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STANDARD ENCYCLOPÆDIA *of* PROCEDURE

EDWARD W. TUTTLE
EDITOR

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RESCUE

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CROSS-REFERENCES:

Indictment and Information; Obstructing Justice; Prisons and Prisoners; Sheriffs, Constables and Marshals.

Rescue of animals, see 1 STANDARD PROC. 982.

For further references and cross-references see the index and the cross-references throughout this article.

I. RESCUE OF PERSON. — A. INDICTMENT AND INFORMATION. The indictment or information must charge all the elements of the offense as defined by the statute,[1] and an indictment that follows the language of the statute is ordinarily sufficient.[2] It is necessary to allege that at the time of the rescue, the person rescued was lawfully under arrest,[3] and that accused knew of that fact.[4] Whether the person from whom the rescue was made was a public officer or a pri-

1. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824; Brunson *v.* State, 97 Ind. 95.

[a] **Wilfulness.**—When the statute defining the offense omits the terms "wilfully" and "force," it is unnecessary to use those terms in the indictment. Loggins *v.* State, 32 Tex. Crim. 358, 24 S. W. 408.

2. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824; Com. *v.* Malloy, 119 Mass. 347. See generally 12 STANDARD PROC. 447. But see Com. *v.* Filburn, 119 Mass. 297.

3. **Ky.**—Com. *v.* Clark, 4 Ky. L. Rep. 622. **Mass.**—Com. *v.* Lee, 107 Mass. 207. **N. J.**—State *v.* Dunn, 25 N. J. L. 214.

[a] **The nature and cause of the imprisonment** of the person alleged to have been rescued, should be stated. State *v.* Hilton, 26 Mo. 199. But see Com. *v.* Lee, 107 Mass. 207.

[b] **The process** on which the prisoner is held in custody need not be alleged. Com. *v* Lee, 107 Mass 207.

4. **Ind.**—State *v.* Sutton, 170 Ind. 473, 84 N. E. 824. **Kan.**—State *v.* Lawrence, 43 Kan. 125, 23 Pac. 157. **Mass.**—Com. *v.* Barrett, 108 Mass. 302.

[a] **If the acts done by accused are unlawful** in their nature, such as an assault upon, or forcible obstruction of the officer, it may not be necessary to allege knowledge of the defendant that the prisoner was in custody. But if they are in their nature innocent, and are only made criminal by a knowledge

vate person, should be stated.[5] The name of the person whose rescue was attempted need not be set out.[6]

B. TRIAL. — Under the statutes it is not necessary to proceed first with the trial of the person rescued,[7] as was the case at common law,[8] except when the person rescued was charged with high treason.[9]

C. VERDICT AND JUDGMENT. — When the indictment or information sets out facts sufficient to charge an assault and battery as well as a rescue, the defendant may be convicted of the assault and battery and acquitted of the rescue.[10] At common law a person convicted of a rescue was guilty of and punished for the same grade of offense as the person rescued.[11] The statutes now usually fix the punishment,[12] and under them a defendant convicted of a rescue may be punished irrespective of whether the guilt of the person in whose escape they aided has been established.[13]

II. RESCUE OF PROPERTY. — A. INDICTMENT AND INFORMATION. A statutory indictment must contain all the necessary facts and circumstances which constitute the offense in the act, so as to bring the defendant precisely within it.[14] It is not sufficient to follow the language of the statute if it does not state the elements of the offense.[15] A common law indictment must allege that the rescue was made knowingly.[16]

B. VERDICT AND JUDGMENT. — Where a defendant is charged with the rescue of property and also an assault and battery, and a general verdict is rendered, the court may pass judgment for the assault, when the allegations as to the rescue are insufficient.[17]

that the prisoner was escaping, such knowledge should be alleged. Com. *v.* Filburn, 119 Mass. 297.

5. State *v.* Hilton, 26 Mo. 199.

6. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748.

7. Fluty *v.* Com., 32 Ky. L. Rep. 89, 105 S. W. 138.

8. State *v.* Cuthbert, 2 Charlt. (Ga.) 13; 1 Hawk. P. C., ch. 21.

9. 1 Hawk. P. C., ch. 12.

10. Rose *v.* State, 33 Ind. 167. See generally 12 STANDARD PROC. 568.

11. 2 Hawk. P. C., ch. 21.

12. See the statutes.

[a] **Arrest Under Civil Process.** When the person rescued was under arrest on civil process, the statute makes the crime a misdemeanor and punishable as such. State *v.* Mazyck, 3 Rich. L. (S. C.) 291; Reg. *v.* Allan, 1 C. & M. (Eng.) 295, 5 Jur. 296, 41 E. C. L. 164.

13. Fluty *v.* Com., 32 Ky. L. Rep. 89, 105 S. W. 138.

14. State *v.* Barrett, 42 N. H. 466. See also 12 STANDARD PROC. 299, et seq.

[a] **Where the property is taken from a private person,** it must be alleged that it was taken knowingly and wilfully without lawful authority, when the statute makes that an element of the offense. Com. *v.* Israel, 4 Leigh (31 Va.) 675.

[b] **An indictment charging ownership in the sheriff,** is sufficient where he is a bailee in possession. State *v.* Clapper, 59 Iowa 279, 13 N. W. 294.

15. United States *v.* Ford, 34 Fed. 26, "forcibly attempt to rescue."

16. Com. *v.* Israel, 4 Leigh (31 Va.) 675.

17. State *v.* Morrison, 24 N. C. 9.

RESIDENCE. — See **Jurisdiction; Notice; Service of Process and Papers; Venue.**

RESISTANCE TO OFFICERS. — See **Obstructing Justice.**

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CROSS-REFERENCES:

Jeopardy; Jurisdiction;
Judgments; Stare Decisis.

Collateral attack on judgments, see 15 STANDARD PROC. 377, 662.

Foreign and sister state judgments, see 15 STANDARD PROC. 644, 686.

Judgment as merger or bar, see 15 STANDARD PROC. 485.

Law of the case, see 18 STANDARD PROC. 781.

Pleading, see 15 STANDARD PROC. 614.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. SCOPE OF ARTICLE. — Res judicata, which in its broadest sense means a thing definitely settled by a judicial decision,[1] may be urged either in bar of a second action upon the same claim or demand,[2] or else to preclude the litigation, in another suit upon a different cause of action, of some point, question, or matter determined in the former suit. This latter branch of the rule which is sometimes termed estoppel by verdict[3] to distinguish it from the former, known as estoppel by judgment[4] is the subject of the present article and it must be borne in mind, therefore, that the principle does not relate to the finality of a judgment in disposing of a cause of action but to its vitality in preserving for evidential purposes a fact once found.

II. RES JUDICATA DEFINED. — The principle of res judicata as here contemplated may be defined as follows: A fact or question directly in issue in a suit, action or other judicial proceeding before a court of competent jurisdiction and there adjudicated is conclusively settled by the judgment, so far as concerns the parties thereto and persons in privity with them, and cannot thereafter be litigated between them even in a proceeding upon a different cause of action.[5]

1. **Mass.**—Sly *v.* Hunt, 159 Mass. 151, 34 N. E. 187, 38 Am. St. Rep. 403, 21 L. R. A. 680. **Mo.**—State *v.* Wear, 145 Mo. 162, 46 S. W. 1099. **N. Y.**—*In re* Mesa's Estate, 172 App. Div. 467, 159 N. Y. Supp. 59.

2. **For a treatment of this phase of estoppel** see 15 STANDARD PROC. 485.

3. **Ill.**—Silurian Oil Co. *v.* Neal, 277 Ill. 45, 115 N. E. 114; Chicago Title & Trust Co. *v.* National Storage Co., 260 Ill. 485, 103 N. E. 227; State Bank of Chicago *v.* Wheeler, 146 Ill. App. 568. **Ia.**—Citizens' State Bank *v.* Snyder, 162 N. W. 6. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; James *v.* Pettis, 134 Minn. 438, 159 N. W. 953; State *ex rel.* City of St. Paul *v.* Great Northern R. Co., 134 Minn. 249, 158 N. W. 972.

4. See 15 STANDARD PROC. 485.

5. **U. S.**—Vicksburg *v.* Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209; Southern Pac. Ry. Co. *v.* United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; Pennsylvania Canal Co. *v.*

III. NATURE AND CONSTRUCTION OF DOCTRINE. — Whether invoked in bar of the action itself or as an estoppel upon a question

Brown, 235 Fed. 669, 149 C. C. A. 89; Linton *v.* National Life Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Harrison *v.* Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Elk Garden Co. *v.* Thayer Co., 206 Fed. 212. **Ala.**—Dishman *v.* Griffis, 73 So. 966; Huntsville *v.* Goodenrath, 13 Ala. App. 579, 68 So. 676; Fox *v.* Sampey, 9 Ala. App. 561, 63 So. 769. **Ariz.**—Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116. **Ark.**—Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67; Massey *v.* Doke, 123 Ark. 211, 185 S. W. 271; Doss *v.* Long Prairie Levee Dist., 96 Ark. 451, 132 S. W. 443. **Cal.** Horowitz *v.* Speese, 169 Pac. 371; Curtis *v.* Upton, 175 Cal. 322, 165 Pac. 935; People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036. **Conn.**—O'Brien *v.* Doolittle, 91 Conn. 354, 99 Atl. 1055; Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903; Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **Fla.**—Connor *v.* Elliott, 74 So. 649; Johnson *v.* State, 60 Fla. 18, 54 So. 91; Prall *v.* Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. **Ga.**—Chatman *v.* Hodnett, 127 Ga. 360, 56 S. E. 439; Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483; Wilson *v.* Williams, 115 Ga. 474, 41 S. E. 629. **Haw.** Pilipo *v.* Scott, 23 Haw. 26. **Idaho.** Waldron *v.* Jenkins, 18 Idaho 616, 111 Pac. 745; Schuler *v.* Ford, 10 Idaho 739, 80 Pac. 219, 109 Am. St. Rep. 233. **Ill.**—Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705; People *v.* Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Karr *v.* Barstow, 24 Ill. 580; Stanley *v.* Leahy, 87 Ill. App. 465. **Ind.**—Clarksville *v.* Ohio F. Hydraulic Mfg. Co., 56 Ind. App. 198, 105 N. E. 67; Armstrong *v.* Hufty, 156 Ind. 606, 55 N. E. 443; Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027; Lee *v.* Independent School Dist., 149 Iowa 345, 128 N. W. 533, 37 L. R. A. (N. S.) 383; Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344. **Kan.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A. 1917F, 1006; Union Pac. R. Co. *v.* Wyandotte, 69 Kan. 572, 77 Pac. 274; Atchison, T. & S. F. Ry. Co. *v.* Cross, 63 Kan. 564, 66 Pac. 620. **Ky.**—Brock *v.* Conkwright, 179 Ky. 555, 200 S. W. 962; Smith *v.* Smith, 179 Ky. 365, 200 S. W. 643; Stone *v.* Winn, 165 Ky. 9, 176 S. W. 933. **La.**—Wall *v.* Rabito, 138 La. 609, 70 So. 531; Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555; Askew *v.* Parker, 131 La. 753, 60 So. 233. **Me.**—Rollins *v.* Blackden, 112 Me. 459, 92 Atl. 521, Ann Cas. 1917A, 875; Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Mitchell *v.* Libbey, 33 Me. 74. **Md.**—Mister *v.* Thomas, 122 Md. 445, 89 Atl. 844; Emmert *v.* Middlekauff, 118 Md. 399, 84 Atl. 540; Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429. **Mass.** Conners Bros. Co. *v.* Sullivan, 220 Mass. 600, 108 N. E. 503; Jennings *v.* Wall, 217 Mass. 278, 104 N. E. 738; Corbett *v.* Craven, 196 Mass. 319, 82 N. E. 37; Luce *v.* Dexter, 135 Mass. 23. **Mich.**—Sayers *v.* Auditor General, 124 Mich. 259, 82 N. W. 1045; Blackman *v.* Simpson, 120 Mich. 377, 79 N. W. 573, 58 L. R. A. 410; Grimes *v.* Williams, 113 Mich. 450, 71 N. W. 835. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; Orr *v.* Bennett, 135 Minn. 443, 161 N. W. 165; James *v.* Pettis, 134 Minn. 438, 159 N. W. 953. **Miss.**—Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466; Hardy *v.* O'Pry, 102 Miss. 197, 59 So. 73; Terry *v.* Hagerman, 102 Miss. 224, 59 So. 75. **Mo.** Edmonston *v.* Carter, 180 Mo. 515, 79 S. W. 459; Watts *v.* Meyer (Mo. App.), 189 S. W. 29; Hill *v.* Dillon (Mo. App.), 183 S. W. 1088; Garner *v.* Henzig, 15 Mo. App. 591. **Neb.**—Herpolsheimer *v.* Acme Harvester Co., 83 Neb. 53, 119 N. W. 30; Hamilton Nat. Bank *v.* American L. & T. Co., 72 Neb. 81, 100 N. W. 202; Agnew *v.* Omaha Nat. Bank, 69 Neb. 654, 96 N. W. 189; State *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. **Nev.**—McIntosh *v.* Knox, 40 Nev. 403, 165 Pac. 337; Gulling *v.* Washoe County Bank, 24 Nev. 477, 56 Pac. 580; McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124. **N. H.** Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620; Kidd *v.* New York Security & Trust Co., 75 N. H. 154, 71 Atl. 878; Gregg *v.* Page Belting Co., 69 N. H. 247, 46 Atl. 26. **N. J.**—Lake *v.* Lake (N. J. Eq.), 89 Atl. 534;

of fact, res judicata is something more than a mere matter of practice and procedure;[6] it is a rule of fundamental and substantial justice[7]

Gyarfas *v.* Karpf, 83 N. J. L. 387, 84 Atl. 1045; Hawkshurst *v.* Asbury Park, 65 N. J. Eq. 496, 56 Atl. 697. **N. Y.** Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499; Epstein *v.* Soskin, 86 Misc. 194, 148 N. Y. Supp. 323; Westerfield *v.* Rogers, 174 N. Y. 230, 66 N. E. 813; Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465, 32 N. E. 1058. **N. C.**—Propst *v.* Caldwell, 172 N. C. 594, 90 S. E. 757; Bear *v.* Brunswick County Comrs., 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Ladd *v.* Byrd, 113 N. C. 466, 18 S. E. 666. **Ohio.** Hixson *v.* Ogg, 53 Ohio St. 361, 42 N. E. 32; Hellebush *v.* Richter, 37 Ohio St. 222; Bell *v.* McColloch's Exrs., 31 Ohio St. 397. **Okla.**—Henthorn *v.* Tidd, 164 Pac. 783; Deming Inv. Co. *v.* Shannon, 162 Pac. 471; McDuffie *v.* Geiser Mfg. Co., 41 Okla. 488, 138 Pac. 1029. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936; Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174; Seaward *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232. **Pa.**—Shaffer *v.* Wilmore Coal Co., 246 Pa. 550, 92 Atl. 701; Bowers' Estate, 240 Pa. 388, 87 Atl. 711; Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519. **R. I.**—Perkins *v.* Kirby, 39 R. I. 343, 97 Atl. 884; Rhode Island Warehouse Co. *v.* Holt Mfg. Co., 36 R. I. 192, 89 Atl. 706; Curry *v.* Swett, 13 R. I. 476. **S. C.** Meares *v.* Finlayson, 63 S. C. 537, 41 S. E. 779; Wylie *v.* Commercial & F. Bank, 63 S. C. 406, 41 S. E. 504; Allen *v.* Cooley, 60 S. C. 353, 38 S. E. 622. **S. D.**—Louder *v.* Hunter, 39 S. D. 206, 163 N. W. 686; Child *v.* McClosky, 14 S. D. 181, 84 N. W. 769; Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803, 26 L. R. A. 498. **Tenn.**—Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004; Borches *v.* Arbuckle, 111 Tenn. 498, 78 S. W. 266; Latimer *v.* Rogers, 3 Head 692. **Tex.**—Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193; Watson *v.* Hopkins, 27 Tex. 637; Foster *v.* Wells, 4 Tex. 101. **Utah.**—Jeremy Fuel & Grain Co. *v.* Mellen, 165 Pac. 791; Rio Grande W. Ry. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995. **Vt.**—Tudor *v.* Kennett, 87 Vt. 99, 88 Atl. 520; Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184; Bacon *v.* Hunt, 72 Vt. 98, 47 Atl. 394. **Va.**—Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; Currie *v.* Chowning, 21 S. E. 809; Johnsons' Exr. *v.* Jennings' Admr., 10 Gratt. (51 Va.) 1, 60 Am. Dec. 323. **Wash.**—Seattle *v.* Erickson, 99 Wash. 543, 169 Pac. 985; Kessler *v.* Seattle, 93 Wash. 192, 160 Pac. 423; Loeper *v.* Loeper, 81 Wash. 454, 142 Pac. 1138; Bond *v.* Chapman, 34 Wash. 606, 76 Pac. 97. **W. Va.**—State *v.* Irwin, 51 W. Va. 192, 41 S. E. 124; Ohio River R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809. **Wis.** Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831; Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589; Baker *v.* Baker, 57 Wis. 382, 15 N. W. 425. **Eng.**—Butler *v.* Butler, 69 L. T. N. S. 545; Strutt *v.* Bovingdon, 5 Esp. 58, 8 R. R. 834. **Can.**—Renwick *v.* Berryman, 3 Manitoba 387; Russell *v.* Rowe, 7 U. C. Q. B. 484; Rider *v.* Snow, 20 Can. Sup. Ct. 12.

[a] **The Duchess of Kingston's Case,** 3 Smith's Lead. Cas. 2028, wherein the doctrine of res judicata was first formulated, states the rule as follows: The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court.

[b] **Where more than one action** involving the same facts has been tried between the same parties, the last judgment rendered in point of time by a court having jurisdiction to render it prevails over any rendered prior thereto, on all points properly adjudicated. Borden *v.* McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841.

6. Hart Steel Co. *v.* Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. ed. 1148; Kessler *v.* Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. ed. 1065; *In re* Walsh's Est., 80 N. J. Eq. 565, 74 Atl. 563.

7. Hart Steel Co. *v.* Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. ed. 1148; Kessler *v.* Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. ed. 1065. See Vicksburg *v.* **Henson,**

recognized in the judicial systems of all civilized countries, dictated by public policy,[8] and demanded by the very object for which civil courts have been established, namely, to secure the peace and repose of society by the settlement of matters capable of judicial determination.[9] But the rule is somewhat strictly construed,[10] and confined within the limits where those considerations are operative.[11] Therefore, a party asserting an estoppel must prove with certainty that the matter has already been adjudicated,[12] for to hold, upon any unsubstantial ground, that a controversy has been concluded, is to do an injustice to litigants and defeat the very purpose for which the rule exists.[13]

IV. DISTINCTIONS. — A. JUDGMENT AS BAR DISTINGUISHED. There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand,[14] and its effect as an estoppel in another action between the same parties or their privies upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, must be pleaded,[15] and constitutes an absolute bar to a subsequent action.[16] It concludes the parties not only as to every matter which was offered and received to sustain or defeat the suit, but also as to any other matter which might have been offered for that purpose.[17] But where the second action between the same parties is upon a different claim or demand the judgment may be offered in

231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209.

8. **Cal.**—*In re* Bell's Estate, 153 Cal. 331, 95 Pac. 372. **La.**—Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555. **N. J.**—*In re* Walsh's Estate, 80 N. J. Eq. 565, 74 Atl. 563. **N. Y.** Fulton County Gas & Electric Co. *v.* Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052. **Ohio.**—Koelsch *v.* Mixer, 52 Ohio St. 207, 39 N. E. 417. **Okla.** Johnson *v.* Gillett, 168 Pac. 1031. **Pa.** Bowers' Estate, 240 Pa. 388, 87 Atl. 711.

9. **U. S.**—Southern Pac. Ry. Co. *v.* United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355. **Ala.**—Hall & Farley *v.* Alabama Terminal & Imp. Co., 173 Ala. 398, 56 So. 235. **Conn.** Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **Ill.**—Chicago *v.* Partridge, 248 Ill. 442, 94 N. E. 115. **N. J.**—*In re* Walsh's Est., 80 N. J. Eq. 565, 74 Atl. 563.

[a] **In equity and good conscience** the fact adjudicated ought to be conclusive. Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

10. Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555.

11. **U. S.**—Vicksburg *v.* Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209. **Ala.**—Crausby *v.* Crausby, 164 Ala. 471, 51 So. 529. **Conn.**—Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **Miss.**—Scottish American Mortgage Co. *v.* Bunckley, 88 Miss. 641, 41 So. 502, 117 Am. St. Rep. 763.

12. See *infra*, IX.

13. Vicksburg *v.* Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209; Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

[a] "**An extension of these limits** so that the probable consequences will be the opposite, cannot be justified on the considerations of public policy that support the rule." Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

14. **The question of judgment as bar** is treated elsewhere in this work. See 15 STANDARD PROC. 485.

15. See 15 STANDARD PROC. 614.

16. See 15 STANDARD PROC. 588.

17. See *infra*, VI, C.

evidence[18] or pleaded,[19] and operates as an estoppel only as to those matters in issue or controverted, upon the determination of which the finding or verdict was rendered.[20]

B. FORMER JEOPARDY DISTINGUISHED. — Res judicata finds its analogy or counterpart in criminal law in the constitutional safeguard of former jeopardy.[21] In the case of jeopardy, however, there must be an identity of offenses both in law and fact before the bar will operate[22] a rule which is not applicable to the branch of res judicata here treated.[23]

C. COLLATERAL ATTACK DISTINGUISHED. — Res judicata and collateral attack are sometimes confused. The former deals only with final judgments on the merits and, admitting the validity of the prior judgment, is concerned merely with the scope claimed for it as an adjudication. Collateral attack applies to every order made in the proceeding whether upon the merits or not, as well as to the final judgment, and denies any validity whatever to such orders and judgment.[24]

D. LAW OF THE CASE DISTINGUISHED. — The distinction between res judicata and the law of the case is elsewhere treated.[25]

V. MATTERS ESSENTIAL TO THE OPERATION OF THE RULE. — A. IN GENERAL. — It is essential to the operation of the rule of res judicata that a competent tribunal[26] possessing the requisite jurisdiction[27] has, by final judgment[28] between the same parties or their privies[29] adjudicated the identical point or question in issue.[30]

B. COMPETENT TRIBUNAL. — **1. In General.** — The decision, to be entitled to the force and effect of res judicata, must have been rendered by a duly organized tribunal[31] acting in the case in a judicial

18. Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785. See 15 STANDARD PROC. 614.

19. Jeremy Fuel & Grain Co. *v.* Mellen (Utah), 165 Pac. 791. See 15 STANDARD PROC. 614.

20. See *infra*, VI.

[a] **This distinction (1) is drawn with clearness** in the opinion of Justice Field in the leading case of Cromwell *v.* County of Sac, 94 U. S. 351, 24 L. ed. 195. (2) In the former case, the judgment is produced as conclusive evidence that no cause of action exists. Either the cause of action has been satisfied and merged in the judgment, or its non existence has been judicially determined and forever settled by the judgment and the controlling principle depends primarily on the legal effect of a judgment on the cause of action determined. The judgment is not treated merely as an estoppel to the proof of any fact involved in the trial of the cause of action alleged, but is rather held to be conclusive evidence that the cause of action does not now exist, or never had an existence. In the latter case the judgment is produced as evidence of some material fact in the cause of action on trial, the truth of which fact both parties are estopped from denying. In such case the controlling principle depends upon the effect of a judgment giving indefinite life and irrebutable probative force to any fact judicially found to be true.

21. See the title "**Jeopardy.**"

22. See 14 STANDARD PROC. 588.

23. See *infra*, VI, A.

24. **For a treatment of collateral attack,** see 15 STANDARD PROC. 377.

25. See 18 STANDARD PROC. 785.

26. See *infra*, V, B.

27. See *infra*, V, C, 2, b.

28. See *infra*, V, C, 2, d.

29. See *infra*, VII.

30. See *infra*, VI, A.

31. Rose *v.* Himely, 4 Cranch (U. S.) 241, 2 L. ed. 608.

[a] **The mere creation of separate**

capacity,[32] for if acting in a legislative capacity its conclusions are not res judicata.[33]

2. Tribunals Within Rule. — a. *In General.* — The rule applies to the decisions of all kinds of courts or legal tribunals when acting judicially under authority of law[34] irrespective of whether the law subjects the judgment to re-examination by some other court,[35] as for example by appeal.[36]

b. *Nature of Court's Jurisdiction.* — **(I.) Original or Appellate.** The operation of the principle of res judicata is not in any way restricted by the nature of the jurisdiction which the court pronouncing the judgment exercises. Its conclusive force extends alike to decisions of courts of original,[37] and to those of appellate[38] juris-

divisions of the same court does not prevent the judgments of such divisions from possessing the effect of res judicata. New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202.

[b] **De Facto Court.—Conn.**—State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409. **N. C.**—Gilliam *v.* Reddick, 26 N. C. 368. **Ohio.**—State *v.* Alling, 12 Ohio 16.

32. Detroit & M. R. Co. *v.* Michigan R. Com., 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288.

As to boards and commissions, see *infra*, V, B, 2, b, (II), (B), and 15 STANDARD PROC. 556, 557.

33. Detroit & M. R. Co. *v.* Michigan R. Comm., 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288.

[a] **In reviewing orders of the state railroad commission** the supreme court of the state acts in a judiciary capacity and its judgment sustaining a rate established by the commission is res judicata. Detroit & M. R. Co. *v.* Michigan R. Comm., 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288.

34. Huntsville *v.* Goodenrath, 13 Ala. App. 579, 68 So. 676.

35. Johnson Co. *v.* Wharton, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. ed. 429; Elk Garden Co. *v.* T. W. Thayer Co., 206 Fed. 212; State *ex rel.* Topping *v.* Houston, 94 Neb. 445, 143 N. W. 796, 50 L. R. A. (N. S.) 227.

36. Elk Garden Co. *v.* T. W. Thayer Co., 206 Fed. 212.

37. **U. S.**—Elk Garden Co. *v.* T. W. Thayer Co., 206 Fed. 212. **Ky.**—Neely *v.* City Nat. Bank, 150 Ky. 512, 150 S. W. 679. **Mo.**—Williams *v.* Hayti, 184 S. W. 470; Griffith *v.* Griffith (Mo. App.), 180 S. W. 411.

[a] **County Judge's Court.—Gaines** *v.* Russ, 60 Fla. 317, 53 So. 113.

38. **U. S.**—Fitch *v.* Stanton Tp., 190 Fed. 310, 111 C. C. A. 210. **Ala.**—Thomason *v.* Dill, 34 Ala. 175. **Cal.**—Lake *v.* Bonynge, 161 Cal. 120, 118 Pac. 535; Lucas *v.* San Francisco, 28 Cal. 591; Borges *v.* Hillman, 29 Cal. App. 144, 154 Pac. 1075. **Colo.**—Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372. **Ga.**—Ingram *v.* Mercer University, 102 Ga. 226, 29 S. E. 273. **Ill.**—Larkins *v.* Terminal R. Assn., 221 Ill. 428, 77 N. E. 678; Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118; Doyle *v.* Sanford, 26 Ill. App. 156. **Ind.**—Sturgis *v.* Rogers, 26 Ind. 1. **Kan.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A. 1917F, 1006. **Ky.**—Renshaw *v.* Cook, 129 Ky. 347, 111 S. W. 377; Ford *v.* Gregory's Heirs, 10 B. Mon. 175; Jenkins *v.* Headley, 19 Ky. L. Rep. 290, 40 S. W. 460. **La.**—State *v.* McGuire, 40 La. Ann. 378, 4 So. 222; Campbell *v.* Woolfolk, 37 La. Ann. 320; Ruthven *v.* Patten, 1 Rob. 416, 2 Abb. Pr. (N. S.) 121. **Md.**—Mitchell *v.* Mitchell's Lessee, 6 Md. 224. **Mich.**—Miller *v.* Maher, 178 Mich. 571, 146 N. W. 196. **Miss.**—Stewart *v.* Stebbins, 30 Miss. 66. **Mo.**—Stevens *v.* Kansas City, 146 Mo. 460, 48 S. W. 658; Chouteau *v.* Gibson, 76 Mo. 38; Brown *v.* Woody, 22 Mo. App. 253. **Mont.** Priest *v.* Eide, 19 Mont. 53, 47 Pac. 206, 958. **N. Y.**—Maldonado & Co. *v.* Yglesias, 162 App. Div. 1, 147 N. Y. Supp. 2; Genet *v.* Delaware & H. C. Co., 14 App. Div. 177, 43 N. Y. Supp. 589; *In re* Broderick, 25 Misc. 534, 56 N. Y. Supp. 99. **Ore.**—Seaward *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232; Rose *v.* Port of Portland, 82 Ore. 541, 162 Pac. 498. **Pa.**—Bolton *v.* Hey, 168 Pa. 418, 31 Atl. 1097. **Tex.**—Crane *v.* Leon & H. Blum, 56 Tex. 325; Sette-

diction, although the decision on appeal consists of an affirmance made without a review of the action of the lower court.[39] But the affirmance of a judgment on appeal can give it no greater effect as res judicata than it would have had before.[40]

(II.) General, Special and Inferior Jurisdiction. — (A.) GENERAL JURISDICTION. — Respecting the conclusiveness of decisions rendered by courts exercising a general jurisdiction,[41] there can of course be no question. And the rule of res judicata is equally applicable to the decisions of courts exercising a general jurisdiction over particular matters such as courts of probate[42] and surrogate.[43]

(B.) SPECIAL AND INFERIOR JURISDICTION. — The binding effect of a judgment as res judicata attaches with full force to the decisions of tribunals of limited and inferior jurisdiction such as justices of the peace and municipal courts,[44] and to the decisions of special and

gast *v.* Blount (Tex.), 46 S. W. 268. **Va.**—Miller *v.* Turner, 111 Va. 341, 68 S. E. 1007; Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142; Terry *v.* Dickinson, 75 Va. 475; Price *v.* Campbell, 5 Call. (9 Va.) 115. **W. Va.**—McGraw *v.* Roller, 53 W. Va. 75, 44 S. E. 248; Henry *v.* Davis, 13 W. Va. 230.

[a] **Judgment of Supreme Court of State.—U. S.**—Detroit & M. R. Co. *v.* Michigan R. Comm., 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288. **Kan.** Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A. 1917F, 1006. **Ore.**—Seaward *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232.

[b] **Decision Not Followed in Other Cases.**—A judgment on appeal construing a building contract is res judicata on that point although in subsequent cases involving contracts of like tenor and effect, a different rule of construction is applied. Bolton *v.* Hey, 168 Pa. 418, 31 Atl. 1097.

39. Borges *v.* Hillman, 29 Cal. App. 144, 154 Pac. 1075; Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142.

[a] **Decision Resting on Presumption.**—The affirmance on appeal of an order appointing a receiver is res judicata even though the record on appeal was such as to preclude a review of the merits of the action of the court in making it and its decision, therefore, rested on the legal presumption of the due regularity of the proceeding culminating in making the order. Borges *v.* Hillman, 29 Cal. App. 144, 154 Pac. 1075.

[b] **A judgment by a divided court** affirmed on appeal without reviewing the merits is res judicata. Kolb *v.* Swann, 68 Md. 516, 13 Atl. 379; McAlister *v.* Hamilton, 61 S. C. 6, 39 S. E. 182.

40. Staley *v.* Murray, 166 App. Div. 328, 152 N. Y. Supp. 163.

41. **For a definition of such courts,** see 17 STANDARD PROC. 642.

42. See the title "**Probate Courts,**" and 15 STANDARD PROC. 556.

43. Kager *v.* Brenneman, 47 App. Div. 63, 62 N. Y. Supp. 339, 30 Civ. Proc. 168.

44. **Ark.**—Kelley & Lysle Milling Co. *v.* Adams, 72 Ark. 657, 78 S. W. 49; Gates *v.* Bennett, 33 Ark. 475; Shaver *v.* Shell, 24 Ark. 122. **Cal.** Wiese *v.* San Francisco Musical Soc., 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; De Bernal *v.* Lynch, 36 Cal. 135. **Conn.**—Bell *v.* Raymond, 18 Conn. 91. **Ga.**—Brown *v.* Webb, 121 Ga. 281, 48 S. E. 917; La Motte *v.* Harper, 88 Ga. 26, 13 S. E. 804. **Ill.**—Bostwick *v.* Skinner, 80 Ill. 147; Hanna *v.* Yocum, 17 Ill. 387; Borrett *v.* Petry, 148 Ill. App. 622. **Ind.**—Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Pressler *v.* Turner, 57 Ind. 56. **Ia.**—Worrall *v.* Des Moines Retail Grocers' Assn., 157 Iowa 385, 138 N. W. 481; Cory *v.* King, 49 Iowa 365; Gay *v.* Lloyd, 1 G. Gr. 78, 46 Am. Dec. 499. **Kan.** Seckler *v.* Delfs, 25 Kan. 159. **Ky.** Stewart *v.* Thomson, 97 Ky. 575, 31 S. W. 133, 53 Am. St. Rep. 431, 36 L. R. A. 582. **Me.**—Stone *v.* Augusta, 46 Me. 127. **Md.**—Cumberland Coal & Iron Co. *v.* Jeffries, 27 Md. 526. **Mass.** Hendrick *v.* Whittemore, 105 Mass. 23. **Mo.**—Julian *v.* Kansas City Granite & Monument Co. (Mo. App.), 187 S. W. 584; State *v.* Wurdeman, 192 Mo. App.

quasi judicial tribunals when acting in a judicial capacity,[45] such as boards of county or municipal officers,[46] boards of arbitration,[47] United States commissioner,[48] controller of the currency,[49] referees in bankruptcy,[50] collectors of customs,[51] land department,[52] interstate com-

657, 179 S. W. 964; Fischer & Co. *v.* Anslyn, 30 Mo. App. 316. **N. J.**—Amerman *v.* Briggs, 50 N. J. L. 114, 11 Atl. 423; Van Doren *v.* Horton, 25 N. J. L. 205. **N. Y.**—Hallock *v.* Dominy, 69 N. Y. 238; Smith *v.* Hemstreet, 54 N. Y. 644; Gates *v.* Preston, 41 N. Y. 113; Sisson *v.* Todd, 167 N. Y. Supp. 1077. **N. C.**—Springs *v.* Schenck, 106 N. C. 153, 11 S. E. 646; Bailey *v.* Hester, 101 N. C. 538, 8 S. E. 164; Brunhild *v.* Freeman, 80 N. C. 212. **Okla.** Liscum *v.* Henderson-Sturgis Piano Co., 44 Okla. 549, 145 Pac. 773. **Ore.** Thompson *v.* Multnomah, 2 Ore. 34. **Pa.** Billings *v.* Russell, 23 Pa. 189, 62 Am. Dec. 330; Hazelett *v.* Ford, 10 Watts 101. **S. C.**—Williams *v.* Columbia Mills Co., 100 S. C. 363, 85 S. E. 160. **S. D.**—Yankton Nat. Bank *v.* Benson, 33 S. D. 399, 146 N. W. 582, Ann. Cas. 1916B, 1011. **Tex.**—Dickensheets *v.* Hudson (Tex. Civ. App.), 167 S. W. 1097; Glass *v.* Shaphard, 37 Tex. Civ. App. 365, 83 S. W. 880. **Vt.**—Johnson *v.* Williams, 48 Vt. 565; Farr *v.* Ladd, 37 Vt. 156. **W. Va.**—Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

See 15 STANDARD PROC. 555.

[a] **Intruders' Court.**—As to rights in personal property, however, a decision of the intruders' court is not res judicata, since that court has jurisdiction only of suits to eject intruders from Indian allotments. Bristow *v.* Carrigar, 37 Okla. 740, 132 Pac. 1110.

[b] **Police Magistrate.** — People *v.* Parelli, 93 Misc. 692, 158 N. Y. Supp. 644.

45. State *ex rel.* Topping *v.* Houston, 94 Neb. 445, 143 N. W. 796, 50 L. R. A. (N. S.) 227. See 15 STANDARD PROC. 556.

46. Ala.—Huntsville *v.* Goodenrath, 13 Ala. App. 579, 68 So. 676. **Cal.** Placer *v.* Campbell, 70 Cal. xx, 11 Pac. 602; Colusa *v.* De Jarnett, 55 Cal. 373. **Me.**—Thomas *v.* Churchill, 84 Me. 446, 24 Atl. 899; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525. **Miss.** Kelly *v.* Wimberly, 61 Miss. 548; Carroll *v.* Board of Police, 28 Miss. 38. **Neb.**—Sioux County *v.* Jameson, 43 Neb. 265, 61 N. W. 596; State *v.* Buffalo County, 6 Neb. 454. **Eng.**—Reg. *v.* Leigh, 10 Ad. & El. 398, 37 E. C. L. 224, 2 P. & D. 357, 113 Eng. Reprint 152.

See 15 STANDARD PROC. 556.

[a] **Board of Police Commissioners.** Queen *v.* Atlanta, 59 Ga. 318.

[b] **Town Trustees.** — Hibben *v.* Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. ed. 195.

[c] **Common Council.** — Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412.

[d] **If not acting in a judicial capacity** the decision of boards of state, and municipal officers cannot have the force and effect of a judgment binding as res judicata. Board of County Comrs. *v.* Cypert (Okla.), 166 Pac. 195.

As to collateral attack on such adjudications, see 15 STANDARD PROC. 396, 410, 434.

47. Mass.—Homes *v.* Avery, 12 Mass. 134. **Minn.**—Johnston *v.* Paul, 23 Minn. 46. **N. Y.**—Armstrong *v.* Masten, 11 Johns. 189; Prentiss *v.* Farnham, 22 Barb. 519; Sinclair *v.* Tallmadge, 35 Barb. 602.

48. Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing & W. Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Hicks *v.* Swank, 37 Okla. 451, 132 Pac. 654.

49. Casey *v.* Golli, 94 U. S. 673, 24 L. ed. 168, 307.

50. *In re* Davidson, 211 Fed. 687; Coen *v.* James, 164 App. Div. 419, 150 N. Y. Supp. 202.

[a] **With respect to allowing or disallowing claims,** the powers of a referee in bankruptcy are judicial in character and in the exercise thereof his findings are conclusive. **U. S.** Ullman, Stern & Krausse *v.* Coppard, 246 Fed. 124, 158 C. C. A. 350. **Ia.** McMahon *v.* Pithan, 166 Iowa 498, 147 N. W. 920. **Okla.**—De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224.

51. United States *v.* McDowell, 21 Fed. 563.

52. Ariz.—Cameron *v.* Bass, 168

merce commission,[53] railroad commission,[54] and within certain limitations, immigration officers.[55]

c. *Judgments of Foreign and Federal and State Courts.* — A discussion of foreign judgments, their operation and effect will be found elsewhere in this work.[56] A matter determined by a judgment of a federal court constitutes an estoppel in a state court,[57] and conversely a matter adjudicated in a state court cannot again be drawn in question in a federal court.[58] The rule of res judicata is equally operative as between the courts of different states,[59] and within certain limitations, is applicable to judgments of foreign countries.[60]

d. *Equity and Law.* — The rule of estoppel or res adjudicata applies to decrees in equity to the same extent as to judgments at law.[61]

Pac. 645. **N. M.**—Whitehill *v.* Victorio Land & Cattle Co., 18 N. M. 520, 139 Pac. 184. **Wash.**—Great Northern R. Co. *v.* Hower, 69 Wash. 380, 125 Pac. 159.

[a] **Character of Public Lands.**—A determination of the land department as to the character of public lands, is, when proper jurisdiction exists and no fraud appears, binding on the world. Cameron *v.* Bass (Ariz.), 168 Pac. 645.

53. New York Cent. & H. R. R. Co. *v.* General Electric Co., 83 Misc. 529, 146 N. Y. Supp. 322.

[a] **Orders in regard to rates and practices** made by the interstate commerce commission are res judicata of matters determined thereby. New York Cent. & H. R. R. Co. *v.* General Elec. Co., 83 Misc. 529, 146 N. Y. Supp. 322.

54. Barnard *v.* Chicago & N. W. R. Co., 39 S. D. 623, 166 N. W. 148.

55. See the title "**Immigration.**"

56. See 15 STANDARD PROC. 642.

57. **U. S.**—Detroit & M. R. Co. *v.* Michigan R. Comm., 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288; Des Moines Nav. & R. Co. *v.* Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. ed. 202; Cuneo Importing Co. *v.* American Importing & Transp. Co., 241 Fed. 421. **Mo.**—State *ex rel.* Kern *v.* Stone, 269 Mo. 334, 190 S. W. 601. **N. Y.**—Kirke La Shelle Co. *v.* Armstrong, 173 App. Div. 232, 159 N. Y. Supp. 363. **Okla.**—Deming Inv. Co. *v.* Shannon, 162 Pac. 471; McCurry *v.* Sledge, 48 Okla. 27, 149 Pac. 1124; De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224. **Pa.**—Williamson's Case, 26 Pa. 9, 67 Am. Dec. 374. **Tex.** Houston Oil Co. *v.* Stepney (Tex. Civ. App.), 187 S. W. 1078.

See 15 STANDARD PROC. 682.

[a] **Where insurance policy is pronounced invalid** by an adjudication of a United States circuit court, that question cannot be again litigated by the parties in a state court. Deming Inv. Co. *v.* Shannon (Okla.), 162 Pac. 471.

[b] **Decrees in admiralty** (1) are within the rule (**Ia.**—Melhop *v.* Doane & Co., 31 Iowa 397, 7 Am. Rep. 147. **Ky.**—Thoms *v.* Southard, 2 Dana 475, 26 Am. Dec. 467. **Mass.**—Whitney *v.* Walsh, 1 Cush. 29, 48 Am. Dec. 590. **N. Y.**—Ocean Ins. Co. *v.* Francis, 2 Wend. 64, 19 Am. Dec. 549. See also 1 STANDARD PROC. 533) being (2) res judicata in a common law court (Wager *v.* Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. ed. 1013; The Rio Grande *v.* Otis, 23 Wall. 458, 23 L. ed. 158; Cupisino *v.* Perez, 2 Dall. [Pa.] 194, 1 L. ed. 345) and (3) on the other hand a final decision on the merits of a common law tribunal is binding on a court of admiralty. Goodrich *v.* Chicago, 5 Wall. (U. S.) 566, 18 L. ed. 511.

58. Pennsylvania Canal Co. *v.* Brown, 235 Fed. 669, 149 C. C. A. 89; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63. See 16 STANDARD PROC. 677.

59. Bigelow *v.* Old Dominion C. M. & S. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009, Ann. Cas. 1913E, 875. See 15 STANDARD PROC. 644, et seq.

60. See 15 STANDATD PROC. 686.

61. **U. S.**—United States *v.* Baltimore & Ohio R. Co., 229 U. S. 244, 33 Sup. Ct. 850, 57 L. ed. 1169; Matter of Howard, 9 Wall. 175, 19 L. ed. 634; Pennington *v.* Gibson, 16 How. 65, 14 L. ed. 847; Bank of United States *v.* Beverly, 1 How. 134, 148, 11 L. ed.

An issue, moreover, directly passed upon in a court of equity is res judicata in a law court,[62] and a point determined by the judgment in a court of law is conclusive on a court of equity,[63] unless the subject

75. **Ala.**—McDonald *v.* Mobile Life Ins. Co., 65 Ala. 358. **D. C.**—Roller *v.* Clark, 38 App. Cas. 260. **Fla.**—Connor *v.* Elliott, 74 So. 649. **Ill.**—People *v.* Harrison, 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913A, 539; Terre Haute & I. R. Co. *v.* Peoria & P. U. Ry. Co., 81 Ill. App. 435; Meyer *v.* Meyer, 40 Ill. App. 94. **Ia.**—Poole *v.* Seney, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634. **Ky.**—Moore *v.* Lockitt's Heirs, 2 A. K. Marsh. 526. **La.**—Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555. **Mass.**—Coughlin *v.* Rosen, 220 Mass. 220, 107 N. E. 914. **Mich.**—Clark *v.* Wiles, 54 Mich. 323, 20 N. W. 63. **N. J.**—Seeley *v.* Adams (N. J. Eq.), 76 Atl. 462. **Ohio.**—Babcock & Co. *v.* Camp, 12 Ohio St. 11; Taylor's Lessee *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603. **Okla.**—Deming Inv. Co. *v.* Shannon, 162 Pac. 471. **Ore.**—Sanford *v.* Hanan, 80 Ore. 266, 156 Pac. 1040. **Pa.**—Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519; Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717. **Tenn.**—Overton *v.* Searcy, Cooke 36, 5 Am. Dec. 665. **Vt.**—Low *v.* Mussey, 41 Vt. 393.

62. **U. S.**—Parker *v.* Kane, 22 How. 1, 16 L. ed. 286; Washington Bridge Co. *v.* Stewart, 3 How. 413, 11 L. ed. 658. **Ala.**—Perolio *v.* Doe *ex dem.* Woodward Iron Co., 197 Ala. 560, 73 So. 197. **Ark.**—Harris *v.* Townsend, 52 Ark. 411, 13 S. W. 283. **Cal.**—Wolverton *v.* Baker, 86 Cal. 591, 25 Pac. 54. **Fla.**—Huddleston *v.* Graham, 74 So. 414. **Ga.**—Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108. **Ill.**—Stickney *v.* Goudy, 132 Ill. 213, 23 N. E. 1034; Black *v.* Thomson, 120 Ill. App. 424; Terre Haute & I. R. Co. *v.* Peoria & P. U. Ry. Co., 81 Ill. App. 435. **Ia.** Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481. **Ky.**—Morgan's Heirs *v.* Patton, 4 Mon. 453. **Md.**—Trayhern *v.* Colburn, 66 Md. 277, 7 Atl. 459. **Mass.** Saco Brick Co. *v.* J. P. Eustis Mfg. Co., 207 Mass. 312, 93 N. E. 629; Powers *v.* Chelsea Sav. Bk., 129 Mass. 44. **N. H.**—Hall *v.* Dodge, 38 N. H. 346. **N. J.**—Putnam *v.* Clark, 34 N. J. Eq. 532. **Okla.**—Randolph *v.* Hudson, 12 Okla. 516, 74 Pac. 946. **Ore.**—Sanford *v.* Hanan, 80 Ore. 266, 156 Pac. 1040. **Pa.**—Smith *v.* McClure, 257 Pa. 168, 101 Atl. 347; Fidelity Ins. T. & S. D. Co. *v.* Fridenberg, 175 Pa. 500, 34 Atl. 848, 52 Am. St. Rep. 851; Westcott *v.* Edmunds, 68 Pa. 34. **Vt.** Pierson *v.* Catlin, 18 Vt. 77. **Va.** Pleasants *v.* Clements, 2 Leigh (29 Va.) 474. **Wash.**—Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935. **W. Va.**—Carberry *v.* West Virginia & P. R. Co., 44 W. Va. 260, 28 S. E. 694; Western Min. & Mfg. Co. *v.* Virginia C. C. Co., 10 W. Va. 250.

See 15 STANDARD PROC. 557, 558.

[a] **Where the legal and equitable title to land** is adjudicated as between the parties, in an equity cause, the decree will constitute res judicata between the parties and their privies in a subsequent action at law involving title to the land. Huddleston *v.* Graham (Fla.), 74 So. 414.

[b] **Decree in rescission suit** res judicata in subsequent ejectment proceeding. Smith *v.* McClure, 257 Pa. 168, 101 Atl. 347.

63. **U. S.**—Rachal *v.* Smith, 101 Fed. 159, 42 C. C. A. 297. **Ala.**—Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Alabama Warehouse Co. *v.* Jones, 62 Ala. 550. **Ark.**—Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696. **Colo.**—Smith *v.* Cowell, 41 Colo. 178, 92 Pac. 20. **Ga.**—Baldwin *v.* McCrea, 38 Ga. 650. **Ill.**—Silurian Oil Co. *v.* Neal, 277 Ill. 45, 115 N. E. 114; Hofmann *v.* Burris, 210 Ill. 587, 71 N. E. 584. **Ia.**—Cech *v.* Cedar Rapids, 147 Iowa 247, 126 N. W. 166; Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298. **Ky.**—Abbott *v.* Traylor, 11 Bush 335; Triplett *v.* Gill, 7 J. J. Marsh. 432. **Me.**—Cowan *v.* Wheeler, 25 Me. 267, 43 Am. Dec. 283. **Mich.**—Codde *v.* Mahiat, 109 Mich. 186, 66 N. W. 1093. **Miss.** Houston *v.* Royston, 1 Smedes & M. 238. **N. H.**—Hollister *v.* Barkley, 11 N. H. 501. **N. J.**—Phillips *v.* Pullen, 45 N. J. Eq. 830, 18 Atl. 849; Hendrickson *v.* Norcross, 19 N. J. Eq. 417. **N. M.**—Robbins *v.* Collier, 3 N. M. 342, 5 Pac. 538. **N. Y.**—Orcutt *v.* Orms, 3 Paige 459; Southgate *v.* Montgomery, 1 Paige 41. **Ohio.**—Starr *v.* Starr, 1 Ohio 321. **Pa.**—Philadelphia

matter is one of which equity has exclusive cognizance.[64]

e. *Criminal.* — The judgments of criminal courts are discussed in a subsequent section.[65]

C. ADJUDICATION. — **1. Necessity for.** — To create an estoppel there must have been an adjudication[66] upon some question of fact,[67] and without such adjudication the verdict,[68] findings,[69] judge's memo-

v. Terry, 17 Phila. 275. **S. C.**—Forsythe *v.* McCreight, 10 Rich. Eq. 308; Gillett *v.* Powell, Speers Eq. 142. **Tenn.** Greenfield *v.* Frierson, 7 Heisk. 633; Bumpass *v.* Reams, 1 Sneed 595; Overton *v.* Searcy, Cooke 36, 5 Am. Dec. 665. **Va.**—Tilson *v.* Davis' Admr., 32 Gratt. (73 Va.) 92. **W. Va.**—Poole *v.* Dilworth, 26 W. Va. 583.

See 15 STANDARD PROC. 557, 558.

64. **U. S.**—Bryant *v.* Hunter, 3 Wash. C. C. 48, 4 Fed. Cas. No. 2,068. **Ala.** Jenkins *v.* Harrison, 66 Ala. 345; Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611. **Ark.**—Lines *v.* Brandon, 129 Ark. 27, 194 S. W. 867. **Colo.**—Smith *v.* Cowell, 41 Colo. 178, 92 Pac. 20. **Ga.**—Merritt *v.* Gill, 68 Ga. 209; Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732. **N. C.**—Love *v.* Belk, 36 N. C. 163. **Tenn.** — Appleton *v.* Harwell, Cooke 242. **Va.**—Hawkins *v.* Depriest, 4 Munf. (18 Va.) 469.

See 15 STANDARD PROC. 558.

65. See *infra,* V, D, 2.

66. **U. S.**—Cumberland Glass Mfg. Co. *v.* De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. ed. 1042. **Minn.**—State *v.* Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054. **N. H.** Piper *v.* Boston & M. R., 75 N. H. 435, 75 Atl. 1041. **N. Y.**—Rudd *v.* Cornell, 171 N. Y. 114, 63 N. E. 823; Finck *v.* Lamphere, 165 App. Div. 826, 151 N. Y. Supp. 174; Denike *v.* Denike, 44 App. Div. 621, 60 N. Y. Supp. 110. **N. D.**—Prondzinski *v.* Garbutt, 9 N. D. 239, 83 N. W. 23. **S. D.**—Van Abel *v.* Wemmering, 36 S. D. 31, 153 N. W. 911. **Tex.**—Holland *v.* Preston, 41 S. W. 374. **Wash.**—Magee *v.* Risley, 82 Wash. 178, 143 Pac. 1088. **Wis.**—Moehlenpah *v.* Mayhew, 138 Wis. 561, 119 N. W. 826.

[a] **The set-off provision in sec. 68a of the bankruptcy act** is not self-executing but its benefit is to be had upon the action of the district court, only when it is properly invoked. Where, therefore, a creditor accepts a composition which has been affirmed by the bankruptcy court and does not apply to the district court to set off the mutual claims, the composition does not adjudicate a claim which the bankrupt has against the creditor so as to make the matter res judicata. Cumberland Glass Mfg. Co. *v.* De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. ed. 1042.

67. Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63; Mercantile Nat. Bank *v.* Lander, 109 Fed. 21; Davenport *v.* Chicago, R. I. & P. R. Co., 38 Iowa 633. See 15 STANDARD PROC. 489, and *infra,* VI.

[a] **Judgments merely interpreting general statutes** and the obligations of citizens under them cannot operate as estoppels where no finding of fact is involved. Oklahoma Ry. Co. *v.* Severns Paving Co. (Okla.), 170 Pac. 216.

68. **Ky.**—Donaldson *v.* Jude, 2 Bibb. 57. **Mass.**—Hawks *v.* Truesdell, 99 Mass. 557. **Mich.**—Murray *v.* Inner Shoe Tire Co., 163 Mich. 676, 127 N. W. 327. **Minn.**—Schurmeier *v.* Johnson, 10 Minn. 319. **Neb.**—McReady *v.* Rogers, 1 Neb. 124, 93 Am. Dec. 333. **N. H.**—Piper *v.* Boston & M. R., 75 N. H. 435, 75 Atl. 1041. **N. Y.**—Denike *v.* Denike, 44 App. Div. 621, 60 N. Y. Supp. 110. **Pa.**—Middletown Mfg. Co. *v.* Philadelphia & R. R. Co., 145 Pa. 187, 22 Atl. 747, 748. **Tenn.**—Read *v.* Staton, 3 Hayw. 159, 9 Am. Dec. 740.

69. **Cal.**—*In re* Holbert's Estate, 57 Cal. 257. **Conn.**—Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179. **Ind.**—Crum *v.* Rea, 14 Ind. App. 379, 42 N. E. 1033. **Kan.**—Auld *v.* Smith, 23 Kan. 65. **Mass.**—Nash *v.* Hunt, 116 Mass. 237. **Mich.**—Whitney *v.* Bayer, 101 Mich. 151, 59 N. W. 414. **Minn.**—State *v.* Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054; Child *v.* Morgan, 51 Minn. 116, 52 N. W. 1127. **N. H.** Hunter *v.* Carroll, 67 N. H. 262, 29 Atl. 639. **N. Y.**—Cauhope *v.* Parke, 121 N. Y. 152, 24 N. E. 185; Finck *v.* Lamphere, 165 App. Div. 826, 151 N. Y. Supp. 174. **Pa.**—Bennett Water Co. *v.* Millvale, 200 Pa. 613, 50 Atl. 155. **Wash.**—Wilson *v.* Hubbard, 39

randum,[70] or opinion of the court,[71] cannot have that effect.

2. Requisites. — a. *In General.* — Not only is it essential to the rule of res judicata that there be an adjudication,[72] but the same must be final,[73] valid,[74] and subsisting.[75]

b. *Void Judgment.* — The rule of res judicata is not applicable where the judgment is void[76] either because of no jurisdiction[77] of

Wash. 671, 82 Pac. 154. See Magee *v.* Risley, 82 Wash. 178, 143 Pac. 1088. **Wis.**—Moehlenpah *v.* Mayhew, 138 Wis. 561, 119 N. W. 826.

[a] **A finding that articles are fixtures** not conclusive, where the judgment does not pass upon the point. Finck *v.* Lamphere, 165 App. Div. 826, 151 N. Y. Supp. 174.

[b] **For the findings to operate as res judicata** where no judgment is entered thereon, there must be something equivalent to an estoppel in fact operating upon the party seeking to assert the contrary of it, see State *v.* Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054.

70. *In re* Elkind, 175 **Fed.** 64, 99 C. C. A. 86.

71. **U. S.**—Harriman *v.* Northern Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. ed. 739; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63; Landon *v.* Public Utilities Commission, 234 Fed. 152. **Ark.**—Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67. **Cal.**—People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036. **La.**—Penouilh *v.* Abraham, 43 La. Ann. 214, 9 So. 36; Davis *v.* Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517. **Wash.** Magee *v.* Risley, 82 Wash. 178, 143 Pac. 1088. **Wis.**—Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

[a] **A mere verbal announcement of a decision** cannot have the effect of res judicata. Magee *v.* Risley, 82 Wash. 178, 143 Pac. 1088.

[b] **The reason is** that the court might change its conclusions when called upon to make specific findings on the evidence, conclusions upon the findings, and a judgment, decree or final order based upon both. Magee *v.* Risley, 82 Wash. 178, 143 Pac. 1088.

[c] **Particularly where the point is reserved** for future litigation as shown by the decision itself. Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67.

[d] **Expressions in the opinion** which would indicate the view that a note in issue was void, do not conclude the question, when such expressions do not amount to an adjudication, and when the language of the decree indicates that the question was reserved for future litigation. Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67.

72. See *supra*, V, C, 1.

73. See *infra*, V, C, 2, d.

74. See *infra*, V, C, 2, b.

75. See *infra*, V, C, 2, d, (V), (B).

76. **U. S.**—Robertson *v.* Gordon, 226 U. S. 311, 33 Sup. Ct. 105, 57 L. ed. 236. **Ala.**—Dunklin *v.* Wilson, 64 Ala. 162. **Ark.**—Miller *v.* Barkeloo, 8 Ark. 318. **Cal.**—*In re* Smith, 122 Cal. 462, 55 Pac. 249. **Ga.**—Dix *v.* Dix, 132 Ga. 630, 64 S. E. 790; Moore *v.* O'Barr, 87 Ga. 205, 13 S. E. 464; C. A. Jowers & Son *v.* Kirkpatrick Hardware Co., 21 Ga. App. 751, 94 S. E. 1044. **Ill.** Inter Ocean Cabinet Co. *v.* McLaughlin, 169 Ill. App. 559. **Ind.**—Abbott *v.* Union Mut. Life Ins. Co., 127 Ind. 70, 26 N. E. 153. **Ia.**—Landis *v.* Marion, 178 Iowa 1396, 161 N. W. 26. **La.** Quaker Realty Co. *v.* Maierwatt Realty Co., 134 La. 1030, 64 So. 897. **Mich.** Portsmouth Sav. Bank *v.* Gratiot Cir. Judge, 83 Mich. 646, 47 N. W. 595. **Miss.**—Reinecke *v.* Reinecke, 105 Miss. 798, 63 So. 215; Lake *v.* Perry, 95 Miss. 550, 49 So. 569. **Mont.**—Finlen *v.* Heinze, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517. **N. Y.**—Hancock *v.* Flynn, 54 Hun 638, 8 N. Y. Supp. 133, 28 N. Y. St. 354, 5 Silvernail 122; Gage *v.* Hill, 43 Barb. 44. **S. C.**—Agnew *v.* Adams, 26 S. C. 101, 1 S. E. 414. **Utah.** *In re* Christensen's Estate, 17 Utah 412, 53 Pac. 1003, 70 **Am. St. Rep.** 794, 41 L. R. A. 504.

As to what constitutes a void judgment on collateral attack, see 15 STANDARD PROC. 415, et seq.

77. Wooster *v.* Fitzgerald, 61 N. J. L. 687, 40 Atl. 599, 41 Atl. 251. See generally the title **"Jurisdiction."**

Collateral attack for lack of jurisdiction, see 15 STANDARD PROC. 420, et seq., 662, 693.

the subject matter[78] or the parties[79] in the first instance, or because the court exceeded its jurisdiction.[80] Moreover, fraud and collusion may invalidate the judgment, so as to render it ineffective as an estoppel.[81]

c. *Voidable or Erroneous Judgment.* — The fact that the judgment is for any reason erroneous and voidable,[82] and would un-

How jurisdiction determined on collateral attack, see 15 STANDARD PROC. 424, et seq., 662, 694.

78. **U. S.**—Murray *v.* Pocatello, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. ed. 239; Robertson *v.* Gordon, 226 U. S. 311, 33 Sup. Ct. 105, 57 L. ed. 236; Fordham *v.* Hicks, 240 Fed. 751; Parr *v.* United States, 153 Fed. 462. **Ala.** Caperton *v.* Hall, 83 Ala. 171, 3 So. 234. **Ark.**—Lines *v.* Brandon, 129 Ark. 27, 194 S. W. 867. **Cal.**—*In re* Freund, 134 Cal. 333, 66 Pac. 476; Dickey *v.* Gibson, 121 Cal. 276, 53 Pac. 704. **Colo.**—Meldrum *v.* Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65. **Ga.** Ponce *v.* Underwood, 55 Ga. 601. **Ia.** Landis *v.* Marion, 178 Iowa 1396, 161 N. W. 26. **Ky.**—Carpenter *v.* Moorelock, 151 Ky. 506, 152 S. W. 575. **Minn.** Dobberstein *v.* Murphy, 44 Minn. 526, 47 N. W. 171. **Mo.**—Wilson *v.* Lubke, 176 Mo. 210, 75 S. W. 602, 98 Am. St. Rep. 503. **N. J.**—Meyer *v.* National Surety Co., 90 N. J. L. 126, 100 Atl. 164. **N. Y.**—Halstead *v.* Striker, 144 N. Y. 705, 39 N. E. 857; *In re* Connell's Will, 75 Misc. 574, 136 N. Y. Supp. 166. **Pa.**—Morgan's Appeal, 110 Pa. 271, 4 Atl. 506. **S. C.**—McMaster *v.* Arthur, 33 S. C. 512, 12 S. E. 308. **Tex.**—United States Fidelity & Guaranty Co. *v.* Hall (Tex. Civ. App.), 173 S. W. 892; Dickensheets *v.* Hudson (Tex. Civ. App.), 167 S. W. 1097; Ingram *v.* Phillips, 10 Tex. Civ. App. 17, 29 S. W. 915.

As to essentials of jurisdiction, see the title "**Jurisdiction.**"

79. **U. S.**—Robertson *v.* Gordon, 226 U. S. 311, 33 Sup. Ct. 105, 57 L. ed. 236; Guaranty Trust & Safe Deposit Co. *v.* Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116. **Colo.**—Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027. **Ga.** Knox *v.* Bates, 79 Ga. 425, 5 S. E. 61; Central Bank *v.* Gibson, 11 Ga. 453. **Ind.**—Abbott *v.* Union Mut. Life Ins. Co., 127 Ind. 70, 26 N. E. 153. **Ia.**—Mohler *v.* Shank's Est., 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161. **La.**—Quaker Realty Co. *v.* Maierwatt Realty Co., 134 La. 1030, 64 So. 897; Colorado Southern N. O. & P. R. Co. *v.* Crowley, 134 La. 180, 63 So. 868. **Me.**—Tremblay *v.* Aetna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521. **Neb.**—Sackett *v.* Montgomery, 57 Neb. 424, 77 N. W. 1083, 73 Am. St. Rep. 522. **N. Y.** Carswell *v.* Alden, 12 Civ. Proc. 137, 6 N. Y. St. 297. **N. C.**—Springer *v.* Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. **Tenn.**—Rockhold *v.* Blevins, 6 Baxt. 115. **Tex.** Franz Falk Brew. Co. *v.* Hirsch, 78 Tex. 192, 14 S. W. 450.

See the titles "**Jurisdiction;**" "**Service of Process and Papers.**"

80. **Conn.**—*In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800. **Ill.**—Volunteers of America *v.* Peirce, 267 Ill. 406, 108 N. E. 318. **Ia.**—Landis *v.* Marion, 178 Iowa 1396, 161 N. W. 26. **Tex.**—Houston *v.* Musgrove, 35 Tex. 594.

See 15 STANDARD PROC. 422.

[a] **A city council having, without jurisdiction, made an assessment,** the district court in reviewing the same can only declare it void and its judgment reducing the assessment being in excess of its jurisdiction, is to that extent not res judicata. Landis *v.* Marion, 178 Iowa 1396, 161 N. W. 26.

[b] **An adjudication of the rights of parties under a will,** made by a county court in proceedings to have the executor's report approved, is not res judicata, since the county court had no jurisdiction in the matter. Volunteers of America *v.* Peirce, 267 Ill. 406, 108 N. E. 318.

81. Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539; Fordham *v.* Hicks, 240 Fed. 751; Erwin *v.* Henry, 5 Mo. 469.

As grounds of collateral attack, see 15 STANDARD PROC. 463, 668, 696.

82. **U. S.**—Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. ed. 859; Straus *v.* American Publishers' Assn., 201 Fed. 306,

doubtedly have been reversed on appeal,[83] does not affect its conclusiveness as res judicata.

d. *Final Adjudication.* — **(I.) In General.** — To be available as res judicata the adjudication must be a final one,[84] and a decree is not

119 C. C. A. 544. **Ala.**—Central of Georgia R. Co. *v.* Gross, 192 Ala. 354, 68 So. 291. **Cal.**—Curtis *v.* Upton, 175 Cal. 322, 165 Pac. 935; Gillmore *v.* American Cent. Ins. Co., 65 Cal. 63, 2 Pac. 882. **Colo.**—Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027. **Conn.** Dennison *v.* Hyde, 6 Conn. 508. **Fla.** Ponder *v.* Moseley, 2 Fla. 207, 48 Am. Dec. 194. **Ga.**—Crutchfield *v.* State, 24 Ga. 335; Peterman *v.* Watkins, 19 Ga. 153. **Ill.**—Waller *v.* Village of River Forest, 259 Ill. 223, 102 N. E. 290; Chicago, B. & Q. R. Co. *v.* Watson, 113 Ill. 195; Jenkins *v.* International Bank, 111 Ill. 462. **Ind.**—Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Terre Haute & I. R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83. **Ia.**—Hunter *v.* Porter, 141 Iowa 500, 120 N. W. 101; McCrillis *v.* Harrison, 63 Iowa 592, 19 N. W. 679; Hart *v.* Jewett, 11 Iowa 276. **Kan.**—Santa Fe Bank *v.* Haskell County Bank, 51 Kan. 50, 32 Pac. 627. **Ky.**—Stone *v.* Winn, 165 Ky. 9, 176 S. W. 933; Pierce *v.* Marrs, 153 Ky. 748, 156 S. W. 404; Dixon *v.* Harris , 32 Ky. L. Rep. 275, 105 S. W. 451; Thompson *v.* Louisville Banking Co., 21 Ky. L. Rep. 1611, 55 S. W. 1080. **La.**—Lafourche Police Jury *v.* Terrebonne Police Jury, 49 La. Ann. 1331, 22 So. 376. **Md.**—Barrick *v.* Horner, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; State *v.* Ramsburg, 43 Md. 325. **Mass.**—Young *v.* Haviland, 215 Mass. 120, 102 N. E. 338. **Mich.** Carr *v.* Brick, 113 Mich. 664, 71 N. W. 1103; Bigalow *v.* Barre, 30 Mich. 1. **Miss.**—Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466; Moore *v.* Ware, 51 Miss. 206. **Mo.** B. Roth Tool Co. *v.* Champ Spring Co., 146 Mo. App. 1, 123 S. W. 513. **Neb.** State *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. **N. H.**—Claggett *v.* Simes, 31 N. H. 56. **N. J.**—Manley *v.* Mickle, 53 N. J. Eq. 155, 32 Atl. 210; Evans *v.* Adams, 15 N. J. L. 373. **N. Y.**—Livingston *v.* Tucker, 107 N. Y. 549, 14 N. E. 443; Lynch *v.* Rome Gas Light Co., 42 Barb. 591. **N. C.**—Propst *v.* Caldwell, 172 N. C. 594, 90 S. E. 757; Gold *v.* Maxwell, 172 N. C. 149, 90 S. E. 115; Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472. **Okla.**—National Surety Co. *v.* S. H. Hanson Bldg. Supply Co., 165 Pac. 1136; McDuffie *v.* Geiser Mfg. Co., 41 Okla. 488, 138 Pac. 1029. **Pa.**—Northampton *v.* Herman, 119 Pa. 373, 13 Atl. 277; Bailey *v.* Bailey, 44 Pa. 274, 84 Am. Dec. 439. **S. D.**—Calhoun *v.* Bryant, 28 S. D. 266, 133 N. W. 266. **Tenn.**—Wattles *v.* Foster, 126 Tenn. 449, 150 S. W. 419, Ann. Cas. 1913E, 69; Kelley *v.* Mize, 3 Sneed 59. **Tex.**—United States Fidelity & Guaranty Co. *v.* Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, Ann. Cas. 1914B, 667, 37 L. R. A. (N. S.) 409; Willis & Bro. *v.* Ferguson, 46 Tex. 496; Watson *v.* Hopkins, 27 Tex. 637; Hunt *v.* Wright (Tex. Civ. App.), 139 S. W. 1007. **Va.** Howison *v.* Weeden, 77 Va. 704; Lancaster *v.* Wilson, 27 Gratt. (68 Va.) 624. **Wash.**—Union Cent. Life Ins. Co. *v.* Chesterley, 100 Wash. 260, 170 Pac. 558; Holt Mfg. Co. *v.* Coss, 78 Wash. 39, 138 Pac. 322. **W. Va.**—State *v.* Irwin, 51 W. Va. 192, 41 S. E. 124; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809. **Wis.**—State *v.* Helms, 101 Wis. 280, 77 N. W. 194; Walker *v.* Daly, 80 Wis. 222, 49 N. W. 812.

See 15 STANDARD PROC. 467, et seq., 564.

[a] **Rule of Law Erroneous.**—State *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; National Surety Co. *v.* S. H. Hanson Builders' Supply Co. (Okla.), 165 Pac. 1136.

[b] **That the second suit is in equity** whereas the erroneous decision is by a court of law, does not alter the rule. Waller *v.* River Forest, 259 Ill. 223, 102 N. E. 290.

83. **Miss.**—Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466. **Neb.**—Kazebeer *v.* Nunemaker, 82 Neb. 732, 118 N. W. 646. **N. C.**—Gold *v.* Maxwell, 172 N. C. 149, 90 S. E. 115. **Tex.**—Peacock *v.* Coltrane (Tex. Civ. App.), 116 S. W. 389.

And see cases in preceding note.

84. **U. S.**—Merriam Co. *v.* Saalfield, 241 U. S. 22, 36 Sup. Ct. 477, 60 L. ed. 868; Kapiolani's Estate *v.* Atcherley, 238 U. S. 119, 35 Sup. Ct. 832, 59 L. ed. 1229, Ann. Cas. 1916E, 142;

res judicata as against a third party participating in the defense unless it is so far final as to be res judicata against the defendant himself.[85]

(II.) Necessity of Entry. — Entry of judgment is essential to its operation as res judicata,[86] unless the decision is final without such entry.[87]

McGourkey *v.* Toledo & O. C. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079; Brush Electric Co. *v.* Western Electric Co., 76 Fed. 761, 22 C. C. A. 543; Australian Knitting Co. *v.* Gormly, 138 Fed. 92; *In re* Vetterlein, 44 Fed. 57. **Ala.**—Schillinger *v.* Leary, 77 So. 846; Hall & Farley *v.* Alabama Terminal & Imp. Co., 173 Ala. 398, 56 So. 235; Capell *v.* Landano, 34 Ala. 135. **Cal.**—Baker *v.* Eilers Music Co., 175 Cal. 652, 166 Pac. 1006; *In re* Rick's Est., 160 Cal. 467, 117 Pac. 539; Taylor *v.* Darling, 22 Cal. App. 101, 133 Pac. 503. **Conn.**—Brown *v.* Clark, 80 Conn. 419, 68 Atl. 1001. **Ga.**—Sumner *v.* Sumner, 121 Ga. 1, 48 S. E. 727; Collins *v.* Carr, 116 Ga. 39, 42 S. E. 373; Heard *v.* National Bank of Illinois, 114 Ga. 291, 40 S. E. 266. **Ia.** *In re* Ellenberger's Estate, 171 Iowa 225, 153 N. W. 1036; Collins *v.* Jennings, 42 Iowa 447. **Kan.**—Manley *v.* Park, 62 Kan. 553, 64 Pac. 28; First Nat. Bank *v.* Linvill, 62 Pac. 165. **Ky.** Morgan *v.* Goode, 151 Ky. 284, 152 S. W. 584; Mitchell *v.* Chenault, 112 Ky. 267, 65 S. W. 447; Scherer *v.* Christian-Moerlein Brewing Co., 23 Ky. L. Rep. 1613, 65 S. W. 448. **La.**—Succession of Hawkins, 139 La. 228, 71 So. 492; Robertson *v.* Goldsmith, 130 La. 255, 57 So. 908; Kemp *v.* Kemp, 15 La. 517; Hockaday *v.* Skeggs, 18 La. Ann. 681. **Me.**—*In re* Shaw, 81 Me. 207, 16 Atl. 662. **Md.**—Feldmeyer *v.* Werntz, 119 Md. 285, 86 Atl. 986. **Mass.**—Corbett *v.* Craven, 196 Mass. 319, 82 N. E. 37. **Mich.**—Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183. **Minn.**—State *v.* Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054. **Mo.**—State *ex rel.* Poole *v.* Willow Springs, 183 S. W. 589. **Neb.**—Hamilton Nat. Bank *v.* American L. & T. Co., 72 Neb. 81, 100 N. W. 202; Agnew *v.* Omaha Nat. Bank, 69 Neb. 654, 96 N. W. 189. **N. J.**—Schilstra *v.* Van Den Heuvel, 82 N. J. Eq. 155, 90 Atl. 1056. **N. Y.** Stevens *v.* Melcher, 152 N. Y. 551, 46 N. E. 965; Converse *v.* Sickles, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; Webb *v.* Buckelew, 82 N. Y. 555; *In re* Mostofsky, 90 Misc. 549, 154 N. Y. Supp. 927. **N. C.**—Northcott *v.* Northcott, 175 N. C. 148, 95 S. E. 104. **N. D.**—Ottow *v.* Friese, 20 N. D. 86, 126 N. W. 503. **Okla.**—Hutchison *v.* Brown, 167 Pac. 624; Brakefield *v.* Lucas, 10 Okla. 584, 64 Pac. 10. **Pa.** Lewis *v.* Baker, 151 Pa. 529, 25 Atl. 99; *In re* Coleman's Est., 7 Pa. Dist. 731. **S. C.**—Logan *v.* Atlanta & C. A. L. R. Co., 82 S. C. 518, 64 S. E. 515; Pell *v.* Ball's Exrs., 1 Rich. Eq. 361. **Tenn.**—Childs *v.* Dennis, 61 S. W. 1092; Thompson *v.* Thompson, 54 S. W. 145; Clariday *v.* Reed, 53 S. W. 302. **Tex.** Henderson *v.* Moss, 82 Tex. 69, 18 S. W. 555; Ledyard *v.* Brown, 27 Tex. 393. **Utah.** — Schramm-Johnson Drugs *v.* Kleeb, 169 Pac. 161; Vance *v.* Heath, 42 Utah 148, 129 Pac. 365. **Va.**—Yates *v.* Wilson, 86 Va. 625, 10 S. E. 976. **Wash.**—Thompson *v.* Washington Nat. Bank, 68 Wash. 42, 122 Pac. 606, 39 L. R. A. (N. S.) 972; Anderson *v.* Burgoyne, 60 Wash. 511, 111 Pac. 777.

See 15 STANDARD PROC. 595.

[a] **That the decree was interlocutory** at the institution of the second suit does not prevent its operation as res judicata if it subsequently ripened into a final decree. David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

85. Merriam Co. *v.* Saalfield, 241 U. S. 22, 36 Sup. Ct. 477, 60 L. ed. 868.

86. See De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224.

Necessity for entry generally, see 14 STANDARD PROC. 988, 990.

Entry distinguished from rendition, see 14 STANDARD PROC. 972, 988.

87. De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224; Green *v.* Edwards, 31 R. I. 1, 77 Atl. 188, Ann. Cas. 1912B, 41; Mills *v.* Allen, 26 R. I. 177, 58 Atl. 622.

[a] **A referee's adjudication of a claim in bankruptcy,** shown by his certificate on file in the case, need not be formally entered in a book of judg-

(III.) Orders. — (A.) INTERLOCUTORY. — The doctrine of res judicata does not apply to incidental or interlocutory orders made in the progress of a cause.[88]

(B.) FINAL. — Where, however, the order is so far final as to absolutely settle the rights of the parties there is no doubt that it would be available as an estoppel.[89]

ments to be admissible as res judicata. De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224.

[b] **That a decree in equity** is not entered does not prevent it from being res judicata. Green *v.* Edwards, 31 R. I. 1, 77 Atl. 188, Ann. Cas. 1912B, 41.

[c] **Entry Pending Second Suit.** The court may on motion made during the subsequent suit, sign and enter a decree in the first suit and allow it to be put in evidence as res judicata. Barker *v.* Stowe, 20 Blatchf. (U. S.) 185, 11 Fed. 303. This procedure was approved in Green *v.* Edwards, 31 R. I. 1, 77 Atl. 188, Ann. Cas. 1912B, 41.

88. **U. S.**—McGourkey *v.* Toledo & O. C. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079; Mitchell *v.* Porter, 194 Fed. 49, 114 C. C. A. 69; *In re* Vetterlein, 44 Fed. 57. **Ala.**—Capell *v.* Landano, 34 Ala. 135. **Ga.**—Sumner *v.* Sumner, 121 Ga. 1, 48 S. E. 727; Collins *v.* Carr, 116 Ga. 39, 42 S. E. 373. **Ia.**—Ford *v.* Dilley, 174 Iowa 243, 156 N. W. 513; *In re* Ellenberger's Est., 171 Iowa 225, 153 N. W. 1036; Collins *v.* Jennings, 42 Iowa 447. **Kan.** Manley *v.* Park, 62 Kan. 553, 64 Pac. 28; Blair *v.* Anderson, 58 Kan. 97, 48 Pac. 562, 62 Am. St. Rep. 606; First Nat. Bank of Buchanan *v.* Linvill (Kan. App.), 62 Pac. 165. **Ky.**—Morgan *v.* Goode, 151 Ky. 284, 152 S. W. 584; Mitchell *v.* Chenault, 112 Ky. 267, 65 S. W. 447. **La.**—Hockaday *v.* Skeggs, 18 La. Ann. 681; Kemp *v.* Kemp, 15 La. 517. **Me.**—*In re* Shaw, 81 Me. 207. **Neb.**—Hamilton Nat. Bank *v.* American L. & T. Co., 72 Neb. 81, 100 N. W. 202. **N. J.**—Schilstra *v.* Van Den Heuvel, 82 N. J. Eq. 155, 90 Atl. 1056. **N. Y.**—*In re* Mostofsky, 90 Misc. 549, 154 N. Y. Supp. 927; Stevens *v.* Melcher, 152 N. Y. 551, 46 N. E. 965; Webb *v.* Buckelew, 82 N. Y. 555. **Okla.**—Brakefield *v.* Lucas, 10 Okla. 584, 64 Pac. 10. **Pa.**—*In re* Coleman's Est., 7 Pa. Dist. 731. **S. C.**—Pell *v.* Ball's Exrs., 1 Rich. Eq. 361. **S. D.** Rosekrans *v.* Wagner, 29 S. D. 181, 135 N. W. 681. **Tenn.**—Childs *v.* Dennis, 61 S. W. 1092; Thompson *v.* Thompson, 54 S. W. 145; Clariday *v.* Reed, 53 S. W. 302. **Tex.**—Henderson *v.* Moss, 82 Tex. 69, 18 S. W. 555; Darby *v.* White (Tex. Civ. App.), 165 S. W. 481. **Va.**—Yates *v.* Wilson, 86 Va. 625, 10 S. E. 976.

[a] **Validity of Marriage.**—An order made in a divorce suit reversing a prior order for alimony on the ground the marriage was void, is not res judicata of the status of the parties so as to preclude its consideration in a subsequent suit to probate the husband's will. *In re* Mostofsky, 90 Misc. 549, 154 N. Y. Supp. 927.

[b] **Though interlocutory when suit instituted,** the order or decree may become final pending the proceeding so as to operate as res judicata therein. David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

89. **U. S.**—Detroit & M. R. Co. *v.* Michigan R. Comm., 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288. **Ala.**—Griffin *v.* Doe *ex dem.* Stoddard, 12 Ala. 783. **Ga.**—McLendon *v.* McGlaun, 60 Ga. 244. **Md.**—Norris *v.* Baumgardner, 97 Md. 534, 55 Atl. 619; Groome *v.* Lewis, 23 Md. 137, 87 Am. Dec. 563. **N. J.**—West New York Silk Mill Co. *v.* Laubsch, 53 N. J. Eq. 65, 30 Atl. 814. **N. Y.**—Seasongood *v.* Prager, 70 Misc. 490, 127 N. Y. Supp. 482; Dollard *v.* Koronsky, 113 N. Y. Supp. 793. **Ohio.** Reiff *v.* Mullholland, 65 Ohio St. 178, 62 N. E. 124. **Pa.**—Harris *v.* Shuster, 3 Pa. Super. Ct. 331. **S. C.**—Quick *v.* Campbell, 44 S. C. 386, 22 S. E. 479. **W. Va.**—Burner *v.* Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

[a] **Naturalization.**—The length of residence of an alien within the United States is concluded by an order admitting him to citizenship. The Acorn, 2 Abb. U. S. 434, 1 Fed. Cas. No. 29.

[b] **Order substituting attorneys** res judicata if attorneys misconduct. Seasongood *v.* Prager, 70 Misc. 490, 127 N. Y. Supp. 482.

(IV.) Effect of Motion for New Trial. — The operation of a judgment as res judicata is not affected by a motion for a new trial.[90]

(V.) Effect of Proceedings To Review Judgment. — (A.) IN GENERAL. Where an appeal or other proceeding to review the judgment suspends its operation for all purposes, such judgment does not estop the parties while the proceeding in review is pending,[91] or where the time for taking an appeal has not expired.[92] But usually an appeal or other proceeding in error does not prevent the judgment from having the effect of res judicata,[93] unless a stay or restraining order be se-

90. **U. S.**—Hubbell *v.* United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. ed. 136, 33 Ct. Cl. 513. **Cal.**—Harris *v.* Barnhart, 97 Cal. 546, 32 Pac. 589. **Nev.**—Young *v.* Brehi, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892.

See 15 STANDARD PROC. 597.

91. **U. S.**—Contra Costa Water Co. *v.* Oakland, 165 Fed. 518; Sharon *v.* Hill, 26 Fed. 337. **Cal.**—Bakers *v.* Eilers Music Co., 175 Cal. 652, 166 Pac. 1006; *In re* Rick's Estate, 160 Cal. 467, 117 Pac. 539. **Ia.**—Main *v.* Kick, 180 Iowa 50, 161 N. W. 711. **La.** Byrne, Vance & Co. *v.* Prather, 14 La. Ann. 653. **Mich.**—Day *v.* De Jonge, 66 Mich. 550, 33 N. W. 527. **Nev.**—Sherman *v.* Dilley, 3 Nev. 21. **N. H.** Haynes *v.* Ordway, 52 N. H. 284. **Utah.** Schramm-Johnson Drugs *v.* Kleeb, 169 Pac. 161. **Vt.**—Small *v.* Haskins, 26 Vt. 209.

See 15 STANDARD PROC. 598.

[a] **The judgment of a city court** is not res judicata pending an appeal to the district court where the case is triable de novo. Schramm-Johnson Drugs *v.* Kleeb (Utah), 169 Pac. 161.

[b] **Unless the appeal is perfected** it does not deprive the judgment of its force as res judicata. Slaughter *v.* Cooper (Tex. Civ. App.), 107 S. W. 897.

[c] **Dismissal of Appeal.**—Where an appeal from a decree setting aside the probate of a will, merely suspends the operation of the decree, its dismissal does not leave the will in force, but operates to leave the decree setting aside the probate in full force as res judicata. Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547.

92. **Cal.**—*In re* Rick's Estate, 160 Cal. 467, 117 Pac. 539. **La.**—Robertson *v.* Goldsmith, 130 La. 255, 57 So. 908. **Utah.**—Vance *v.* Heath, 42 Utah 148, 129 Pac. 365.

[a] **The rule results from the statute** providing that "an action is deemed to be pending from the time of its commencement until its final determination upon an appeal or until the time for appeal has passed, unless the judgment is sooner satisfied." Vance *v.* Heath, 42 Utah 148, 129 Pac. 365.

[b] **If an appeal can be taken** from the judgment it is not res judicata. Thus it must appear either that an appeal does not lie, or the time fixed by law for appeal has elapsed, or that the judgment has been affirmed on appeal. Robertson *v.* Goldsmith, 130 La. 255, 57 So. 908.

93. **U. S.**—Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547; Straus *v.* American Publishers' Assn., 201 Fed. 306, 119 C. C. A. 544. **Ala.**—Gee *v.* Nicholson, 2 Stew. 512. **Ark.**—Cloud *v.* Wiley, 29 Ark. 80. **Ga.**—Macon *v.* Shaw, 14 Ga. 162; Allen, Ball & Co. *v.* Savannah, 9 Ga. 286. **Ill.**—Brown *v.* Schintz, 203 Ill. 136, 67 N. E. 767; Moore *v.* Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563. **Ind.** Scheible *v.* Slagle, 89 Ind. 323; Burton *v.* Burton, 28 Ind. 342. **Ia.**—Miller *v.* Kramer, 154 Iowa 523, 134 N. W. 538; Watson *v.* Richardson, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331. **Kan.**—Willard *v.* Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294. **Mass.**—Faber *v.* Hovey, 117 Mass. 107, 19 Am. Rep. 398. **Mo.**—Bobb *v.* Taylor, 193 S. W. 800; Vantine *v.* Butler, 250 Mo. 445, 157 S. W. 588; Rodney *v.* Gibbs, 184 Mo. 1, 82 S. W. 187. **N. Y.** Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384; Sage *v.* Harpending, 49 Barb. 166, 34 How. Pr. 1. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936; Day *v.* Holland, 15 Ore. 464, 15 Pac. 855. **Pa.**—Columbia Nat. Bank *v.* Dunn, 207 Pa. 548, 56 Atl. 1087; Woodward *v.* Garey, 2 Walk. 447. **R. I.**—Paine *v.* Schenectady Ins. Co., 11 R. I. 411. **S. D.**—*In re* Kirby, 10 S. D. 322, 414, 73 N. W. 92, 39

cured,[94] and in some states not even in the latter case.[95]

(B.) REVERSAL. — A judgment to estop the parties must be a subsisting one.[96] Consequently where it has been reversed, and no new judgment has been entered, it can have no force as res judicata,[97] and particularly where in addition to reversing the judgment, the court goes further and directs the entry in the trial court of a judgment dismissing the action.[98] But a reversal of the former judgment subsequent to the trial court's decision on the plea of res judicata can have no effect.[99]

(VI.) Default, Demurrer, Dismissal, etc. — The doctrine of res judicata is not confined to adjudications had after trial and proof, for it is the finality of the decision and not its character which controls. If the judgment in question is a final one, it will estop the parties and their privies as to every matter of fact directly determined by it, regardless of whether the judgment was rendered on demurrer,[1]

L. R. A. 856. **Utah.**—Garland *v.* Bear Lake & R. W. & I. Co., 9 Utah 350, 34 Pac. 368. **Wash.**—Kaufman *v.* Klain, 69 Wash. 113, 124 Pac. 391. **Wis.** Smith *v.* Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869.

See 15 STANDARD PROC. 598.

94. Miller *v.* Kramer, 154 Iowa 523, 134 N. W. 538; Fassler *v.* Streit, 92 Neb. 786, 139 N. W. 628.

As to supersedeas or stay, see the title "**Supersedeas and Stay of Proceedings.**"

95. **U. S.**—Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547. **Ark.** Boynton *v.* Chicago Mill & Lumber Co., 84 Ark. 203, 105 S. W. 77. **Mo.**—Bobb *v.* Taylor, 193 S. W. 800; Rodney *v.* Gibbs, 184 Mo. 1, 82 S. W. 187. But see Ketchum *v.* Thatcher, 12 Mo. App. 185.

96. Van Abel *v.* Wemmering, 36 S. D. 31, 153 N. W. 911.

97. **U. S.**—Butler *v.* Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. ed. 713. **Ala.**—Paulling *v.* Watson, 26 Ala. 205. **Conn.**—Brennan *v.* Berlin Iron Bridge Co., 73 Conn. 412, 47 Atl. 668. **Ky.** McCallister *v.* Bridges, 19 Ky. L. Rep. 107, 40 S. W. 70. **Me.**—Sargent *v.* Hampden, 38 Me. 581. **Md.**—Richardson's Lessee *v.* Parsons, 1 Har. & J. 253. **Mass.**—Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503. **Mo.**—Turner *v.* Anderson, 260 Mo. 1, 168 S. W. 943; Vantine *v.* Butler, 250 Mo. 445, 157 S. W. 588. See Rodney *v.* Gibbs, 184 Mo. 1, 82 S. W. 187. **Mont.**—Mattingly *v.* Lewisohn, 13 Mont. 508, 35 Pac. 111. **N. H.**—Stevens *v.* Sabin, 20 N. H. 529. **N. Y.**—Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834. **N. C.** Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234. **Ohio.**—Zanesville Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60. **Pa.**—Floyd *v.* Kulp Lumber Co., 222 Pa. 257, 71 Atl. 13; Small's Appeal, 1 Monag. 676, 15 Atl. 807. **S. C.**—Agnew *v.* Adams, 26 S. C. 101, 1 S. E. 414. **S. D.**—Van Abel *v.* Wemmering, 36 S. D. 31, 153 N. W. 911. **Tenn.**—Rosenbaum *v.* Davis, 106 Tenn. 51, 60 S. W. 497. **Tex.**—Halbert *v.* Alford (Tex.), 12 S. W. 77; Hermann *v.* Allen (Tex. Civ. App.), 118 S. W. 794. **Va.**—Omohundro's Exr. *v.* Omohundro, 27 Gratt. (68 Va.) 824. **Wis.** Mowry *v.* First Nat. Bank, 66 Wis. 539, 29 N. W. 559.

See 15 STANDARD PROC. 600.

[a] **A reversal pending the second case** may be taken advantage of by a plea of puis darrein continuance. Vantine *v.* Butler, 250 Mo. 445, 157 S. W. 588.

98. Van Abel *v.* Wemmering, 36 S. D. 31, 153 N. W. 911.

99. Bobb *v.* Taylor (Mo.), 193 S. W. 800.

[a] **Prior to Hearing on Appeal.** That a judgment pleaded as res judicata has been reversed after the decision in the second case, cannot be considered on the appeal of that case. Bobb *v.* Taylor (Mo.), 193 S. W. 800.

1. **U. S.**—Northern Pac. R. Co. *v.* Slagt, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. ed. 738; United States *v.* Salen, 244 Fed. 296; Brown *v.* Fletcher, 203 Fed. 70. **Ala.**—Stein *v.* McGrath, 128 Ala. 175, 30 So. 792; McDonald *v.* Mobile Life Ins. Co., 65 Ala. 358. **Ark.** Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051. **Conn.**—Chapin *v.* Curtis,

or whether it was rendered by default,[2] on dismissal on non-

23 Conn. 388. **Ga.**—Moody *v.* Cleveland Woolen Mills, 133 Ga. 741, 66 S. E. 908; Dolvin *v.* American Harrow Co., 125 Ga. 699, 54 S. E. 706, 28 **L. R. A.** (N. S.) 785; Wheeler *v.* Board of Public Education, 12 Ga. App. 152, 76 S. E. 1035. **Ill.**—Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705; People *v.* Harrison, 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913A, 539; People *v.* Chicago, B. & Q. R. Co., 247 Ill. 340, 93 N. E. 422. **Ind.**—Porter *v.* Fraleigh, 19 Ind. App. 562, 49 N. E. 863. **Ia.** Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77. **La.**—Irish *v.* Wright, 12 Rob. 571. **Miss.**—Alabama & V. Ry. Co. *v.* McCerren, 75 Miss. 687, 23 So. 423, 876. **Mo.**—Shanklin *v.* Francis, 67 Mo. App. 457. **N. J.**—Van Horn *v.* Van Horn, 53 N. J. L. 514, 21 Atl. 1069. **N. Y.**—Pollak *v.* Dodge Mfg. Co., 81 Misc. 216, 142 N. Y. Supp. 495; Phyfe *v.* Masterson, 13 Jones & S. 338. **Ohio.** St. Aubin *v.* Toledo, 11 Ohio Cir. Ct. (N. S.) 581. **Okla.**—Corrugated Culvert Co. *v.* Simpson Tp., 51 Okla. 178, 151 Pac. 854. **S. C.**—Brewton *v.* Shirley, 93 S. C. 365, 76 S. E. 988. **S. D.** Sioux Falls Sav. Bank *v.* Lien, 14 S. D. 410, 85 N. W. 924. **Tenn.**—Moore *v.* Chattanooga Electric Ry. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. (N. S.) 978; Murdock *v.* Gaskill, 8 Baxt. 22. **Tex.**—Parker *v.* Spencer, 61 Tex. 155. **Vt.**—St. Johnsbury & L. C. R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277. **Va.**—Washington, O. & W. R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433. **Wash.**—State *ex rel.* Schmidt *v.* Superior Court, 62 Wash. 556, 114 Pac. 427. **Wyo.**—Hennessy *v.* Chicago, B. & Q. R. Co., 24 Wyo. 305, 157 Pac. 698.

See 15 STANDARD PROC. 573.

[a] **Employment in Interstate Commerce.**—Judgment on demurrer in a suit brought under the Federal Employers' Liability Act on the ground that the injured party was not engaged in interstate commerce estops the plaintiff from contending in any other suit between the same parties that the person was engaged in interstate commerce when injured. Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705.

2. U. S.—Plaut *v.* Gorham Mfg. Co., 174 Fed. 852. **Ala.**—McCalley *v.* Wilburn & Co., 77 Ala. 549. **Cal.**—Hartson *v.* Shanklin, 57 Cal. 558. **Ill.** Sholl *v.* German Coal Co., 139 Ill. 21, 28 N. E. 748; Dyer *v.* Hopkins, 112 Ill. 168. **Ind.**—Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420. **Ind. Ter.**—Tootle *v.* McClellan, 7 Ind. Ter. 64, 103 S. W. 766. **Kan.**—Garrett Biblical Institute *v.* Minard, 82 Kan. 338, 108 Pac. 80; Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260. **Ky.**—Kimbrough *v.* Harbett, 110 Ky. 94, 60 S. W. 836. **La.**—Dunn *v.* Pipes, 20 La. Ann. 276. **Md.**—Betz *v.* P. Welty & Co., 116 Md. 190, 81 Atl. 382; Watson *v.* McHenry, 107 Md. 245, 68 Atl. 606; Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348; Loney *v.* Bailey, 43 Md. 10. **Mass.** Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750; Briggs *v.* Richmond, 10 Pick. 391, 20 Am. Dec. 526. **Minn.**—Doyle *v.* Hallam, 21 Minn. 515. **Miss.**—Claiborne *v.* Planters' Bank, 2 How. 727. **Neb.**—Kloke *v.* Gardels, 52 Neb. 117, 71 N. W. 955; Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Lincoln Nat. Bank *v.* Virgin, 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 747. **N. J.**—Gifford *v.* Thorn, 9 N. J. Eq. 702. **N. Y.**—Tax Lien Co. *v.* Schultze, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915D, 1115; Simon *v.* Bierbauer, 154 App. Div. 506, 139 N. Y. Supp. 327; Barker *v.* Miller, 32 App. Div. 364, 53 N. Y. Supp. 283; Henriques *v.* Yale University, 28 App. Div. 354, 51 N. Y. Supp. 284. **N. C.**—Stelges *v.* Simmons, 170 N. C. 42, 86 S. E. 801; Turnage *v.* Joyner, 145 N. C. 81, 58 S. E. 757; Parker *v.* House, 66 N. C. 374. **Ohio.**—McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93. **Ore.**—Herrett *v.* Warmsprings Irr. Dist., 86 Ore. 343, 168 Pac. 609. **R. I.**—King *v.* Ross, 21 R. I. 413, 45 Atl. 146. **S. D.**—Phillips *v.* Branch Mint Min. & Mill. Co., 27 S. D. 350, 131 N. W. 308; Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803. **Tenn.** Taylor *v.* Sledge, 110 Tenn. 263, 75 S. W. 1074; Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498. **Tex.**—Ellis *v.* Mills, 28 Tex. 584. **Vt.**—Campbell *v.* Martin, 89 Vt. 214, 95 Atl. 494. **Va.** Burbridge *v.* Higgins, 6 Gratt. (47 Va.) 119. **Wash.**—Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317. **Wis.**—Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Sturtevant *v.*

suit,[3] my confession,[4] or on consent or agreement[5] of the parties.

Milwaukee, W. & B. V. R. Co., 11 Wis. 63.

See also 15 STANDARD PROC. 569.

[a] **All points raised by the pleadings** or which might be predicated upon them are concluded by the default. Stelges *v.* Simmons, 170 N. C. 42, 86 S. E. 801; Campbell *v.* Martin, 89 Vt. 214, 95 Atl. 494.

See 15 STANDARD PROC. 577.

3. **U. S.**—United States *v.* Baltimore & Ohio Ry. Co., 229 U. S. 244, 33 Sup. Ct. 850, 57 L. ed. 1169; Marshall *v.* Bryant Electric Co., 185 Fed. 499, 107 C. C. A. 599. **Ala.**—Warrior River Coal & Land Co. *v.* Alabama State Land Co., 154 Ala. 135, 45 So. 53; Strang *v.* Moog, 72 Ala. 460. **Ark.** Brookfield *v.* Jonesboro Trust Co., 131 Ark. 356, 198 S. W. 697. **Conn.**—Huntley *v.* Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71. **Ill.**—Armstead *v.* Blickman, 51 Ill. App. 470. **Ky.** Burchett *v.* Scott, 176 Ky. 669, 197 S. W. 397; Cromwell's Heirs *v.* Mason's Heirs, 2 Bush 439; Thompson *v.* Thompson, 23 Ky. L. Rep. 1535, 65 S. W. 457. **Md.**—Hitch *v.* Davis, 8 Md. 524. **Mich.**—Farmers' & Mechanics' Bank *v.* Bronson, 14 Mich. 361. **Minn.** Johnson *v.* Vaule, 61 Minn. 401, 63 N. W. 1039. **Miss.**—Chiles *v.* Champenois, 69 Miss. 603, 13 So. 840. **N. J.** Spence *v.* Spence, 74 N. J. Eq. 786, 70 Atl. 990. **N. C.**—Northcott *v.* Northcott, 175 N. C. 148, 95 S. E. 104; Rich *v.* Morisey, 149 N. C. 47, 62 S. E. 762; Davie *v.* Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71; Anderson *v.* Rainey, 100 N. C. 321, 5 S. E. 182. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936. **Pa.**—Smith *v.* McClure, 257 Pa. 168, 101 Atl. 347. **Tenn.** Gainus *v.* Bowman, 10 Heisk. 600. **Wash.**—Allen *v.* Migliavacca Realty Co., 74 Wash. 347, 133 Pac. 580; Hayes *v.* Mercantile Inv. Co., 73 Wash. 586, 132 Pac. 406; Peyton *v.* Peyton, 28 Wash. 278, 68 Pac. 757. **W. Va.**—Horner *v.* Philadelphia Gas Co., 71 W. Va. 345, 76 S. E. 662. **Wis.**—Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871.

[a] **An engineer's claim for fees** in organizing a drainage district is concluded by a judgment dismissing a hearing on the engineer's report, where the order dismissing the cause denies such claim. Brookfield *v.* Jonesboro Trust Co., 131 Ark. 356, 198 S. W. 697.

[b] **Obstructing Navigable Streams.** Where it is sought to enjoin a party from obstructing a navigable stream contrary to Act of March 3, 1899, and the bill is dismissed on the ground that the act does apply, that question is res judicata in a subsequent criminal proceeding against the same party for violating the penal provisions of the act. United States *v.* Balt. & O. R. Co., 229 U. S. 244, 33 Sup. Ct. 850, 57 L. ed. 1169.

[c] **The dismissal of a conversion suit** is res judicata of the fact of conversion. Allen *v.* Migliavacca Realty Co., 74 Wash. 347, 133 Pac. 580.

4. **Ark.**—Jeffries *v.* Morgan, 1 Ark. 169. **Colo.**—Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505. **Del.**—Worknot *v.* Millen's Admr., 1 Harr. 139. **Ga.**—Davant *v.* Carlton, 57 Ga. 489. **Ill.**—Ames *v.* Holmes, 190 Ill. 561, 60 N. E. 858; Frear *v.* Commercial Nat. Bank, 73 Ill. 473. **Ind.**—Kingman *v.* Paulson, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611. **N. J.**—Cook *v.* McCahill, 41 N. J. Eq. 69, 3 Atl. 82. **N. Y.**—Rusk *v.* Soutter, 67 Barb. 371. **Ore.**—Crow *v.* Crow, 70 Ore. 534, 139 Pac. 854. **Pa.**—Powell *v.* Forcey, 241 Pa. 152, 88 Atl. 426; Stayton *v.* Graham, 139 Pa. 1, 21 Atl. 2. **S. C.**—Fowler *v.* Henry, 2 Bailey 54. **Tenn.**—Atkins *v.* Baily, 9 Yerg. 111. **Tex.**—Wootters *v.* Hall, 67 Tex. 513, 3 S. W. 725. **Vt.**—Barney *v.* Goff, 1 D. Chip. 304. **Va.**—Syme *v.* Johnston, 3 Call (7 Va.) 558.

See 15 STANDARD PROC. 568.

5. **Ala.**—Cowley *v.* Farrow, 193 Ala. 381, 69 So. 114; Adler *v.* Van Kirk Land & C. Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133. **Cal.**—Partridge *v.* Shepard, 71 Cal. 470, 12 Pac. 480. **Ga.**—Goolsby *v.* Goolsby, 146 Ga. 763, 92 S. E. 521. **Ill.**—Healy *v.* Deering, 231 Ill. 423, 83 N. E. 226, 121 Am. St. Rep. 331; Reardon *v.* Youngquist, 189 Ill. App. 3; Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350. **Ind.**—Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058. **Ky.**—Howard *v.* Howard, 133 Ky. 568, 118 S. W. 367. **La.** Greenwood *v.* New Orleans, 12 La. Ann. 426. **Mass.**—Coyle *v.* Taunton Safe Deposit & Trust Co., 216 Mass. 156, 103 N. E. 288. **Miss.**—Gattman *v.* Gunn, 7 So. 285. **Mo.**—Glasner *v.* Weisberg,

D. NATURE OF THE PROCEEDING. — **1. In General.** — The rule of res judicata is of general operation applying to judgments and decrees in all kinds of actions,[6] and in special[7] and summary[8] proceedings, irrespective of whether such actions or proceedings be legal or equitable,[9] civil or criminal,[10] in contract,[11] or in tort,[12] or whether

43 Mo. App. 214. **N. H.**—Hillsborough *v.* Nichols, 46 N. H. 379. **N. Y.**—Culross *v.* Gibbons, 130 N. Y. 447, 29 N. E. 839. **N. C.**—Union Bank *v.* Oxford, 116 N. C. 339, 21 S. E. 410; Harper *v.* McCombs, 109 N. C. 714, 14 S. E. 41. **Ore.**—Johnstone *v.* Chapman Timber Co., 79 Ore. 674, 156 Pac. 286. **Pa.**—West Philadelphia P. Ry. Co. *v.* Philadelphia & W. T. R. Co., 186 Pa. 459, 40 Atl. 787. **Tenn.**—Fry *v.* Taylor, 1 Head 594. **Tex.**—Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541; Castleberry *v.* Bussey (Tex. Civ. App.), 166 S. W. 14; Robbins *v.* Hubbard (Tex. Civ. App.), 108 S. W. 773. **Vt.**—*In re* Harris' Estate, 82 Vt. 199, 72 Atl. 912. See 15 STANDARD PROC. 571.

[a] **As to the authority of officials to consent** to a judgment against a municipality the judgment by consent is not res judicata. State *ex rel.* Bradway *v.* De Mattos, 88 Wash. 35, 152 Pac. 721.

6. See Huntsville *v.* Goodenrath, 194 Ala. 568, 69 So. 629, and 15 STANDARD PROC. 399, 557.

[a] **Friendly Litigation.**—The fact that the particular decree was rendered in a friendly litigation where no real contest took place, is of no importance. For the conclusiveness of the adjudication depends upon the source from which it came and the issue it determined and not upon the violence of the controversy. Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193.

7. Brown *v.* Max Malter Co., 184 Ill. App. 621; State *ex rel.* Topping *v.* Houston, 94 Neb. 445, 143 N. W. 796, 50 L. R. A. (N. S.) 227. See 15 STANDARD PROC. 559.

[a] **A decision in a statutory proceeding to record ownership** brought before the judge of the court of first instance, or municipal court, under article 395 of the Mortgage Law (Comp. Stat. P. R., p. 1108) is not res judicata. De Elzaburu *v.* Chaves, 239 U. S. 283, 36 Sup. Ct. 47, 60 L. ed. 290.

8. **U. S.**—Plaut *v.* Gorham Mfg. Co., 174 Fed. 852. **N. Y.**—Mouquin *v.* Hergenhan, 138 App. Div. 54, 122 N. Y. Supp. 858; Gross *v.* Salzman, 61 Misc. 630, 114 N. Y. Supp. 411; Mutual Reserve Fund Life Assn. *v.* Cordero, 33 Misc. 387, 67 N. Y. Supp. 464; Sisson *v.* Todd, 167 N. Y. Supp. 1077; Sullivan *v.* Quinn, 132 N. Y. Supp. 745. **Wash.** Dawson *v.* Carstens, 98 Wash. 96, 167 Pac. 86. See 15 STANDARD PROC. 559.

[a] **That the relation of landlord and tenant** existed is adjudicated by a decision that a warrant for dispossession issue. Sullivan *v.* Quinn, 132 N. Y. Supp. 745.

[b] **Proceedings under the "Bawdy House Act"** prosecuted in the municipal court. Sisson *v.* Todd, 167 N. Y. Supp. 1077.

9. See *supra*, V, B, 2, d.

10. See *infra*, V, D, 2.

11. **Ill.**—Silurian Oil Co. *v.* Neal, 277 Ill. 45, 115 N. E. 114. **N. J.** Gyarfas *v.* Karpf, 83 N. J. L. 387, 84 Atl. 1045. **N. Y.**—Bonney *v.* Von Novelly, 164 N. Y. Supp. 42; Israel *v.* Luke A. Burke & Sons Co., 161 N. Y. Supp. 312. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936; Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174. **Pa.**—Speier *v.* Locust Laundry, 63 Pa. Super. Ct. 99.

[a] **Action for Second Instalment.** Where in a suit by an employe against his employer for an instalment of wages, it is adjudicated that the employe was unlawfully discharged, that fact is res judicata in a subsequent suit for another instalment. Speier *v.* Locust Laundry, 63 Pa. Super. Ct. 99.

12. **Ill.**—Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705. **Mo.**—Kinloch Tel. Co. *v.* St. Louis, 268 Mo. 485, 188 S. W. 182; Hill *v.* Dillon (Mo. App.), 183 S. W. 1088. **N. Y.**—Fulton County Gas & Electric Co. *v.* Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052. **Wash.**—Seattle *v.* Erickson, 99 Wash. 543, 169 Pac. 985.

[a] **Proceeding under the Federal Employers' Liability Act** for damages

they be in personam or in rem.[13]

2. Criminal and Civil. — a. *Judgments in Criminal Cases Res Judicata.* — The doctrine and principles of res judicata are applicable to criminal as well as to civil judgments,[14] and a final judgment on the merits in a criminal case operates as res judicata in another criminal case between the same parties.[15]

b. *Criminal Judgments in Civil Cases and Vice Versa.* **(I.) General Rule.** — There are certain considerations, hereinafter stated,[16] which generally prevent a judgment in a criminal case from being pleaded or offered in evidence in a purely civil case,[17] or a

for causing death. Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705.

[b] **Evidence of Negligence.**—In an action for personal injury from an automobile, the judgment in a proceeding between the same parties to recover for damages to plaintiff's motorcycle from the same accident, is admissible on the question of defendant's negligence. Fleischer *v.* Detroit Cadillac Motor Car Co., 165 N. Y. Supp. 245.

13. Gratiot County State Bank *v.* Johnson, 39 Sup. Ct. 263.

See *infra,* V, D, 3.

14. **Ala.**—Jay *v.* State (Ala. App.), 73 So. 137. **N. Y.**—People *v.* Parelli, 93 Misc. 692, 158 N. Y. Supp. 644. **Pa.** *In re* Gottesfeld, 245 Pa. 314, 91 Atl. 494. **Tex.**—State *ex rel.* McNamara *v.* Clark, 79 Tex. Cr. 559, 187 S. W. 760; Busby *v.* State, 51 Tex. Cr. 289, 103 S. W. 638.

And see the title "**Jeopardy.**"

Collateral attack, see 15 STANDARD PROC. 393.

15. Jay *v.* State (Ala. App.), 73 So. 137.

[a] **An acquittal of seduction** held not to be res judicata upon the question of sexual intercourse in a subsequent prosecution for perjury against the same defendant; the reason being that the question of sexual intercourse was not a necessary and material matter in issue to sustain the acquittal. Jay *v.* State (Ala. App.), 73 So. 137.

16. See *infra,* V, D, 2, b, (II).

17. **U. S.**—Lewis *v.* Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. ed. 967; Stone *v.* United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127; American Malting Co. *v.* Keitel, 209 Fed. 351, 126 C. C. A. 277; Williams *v.* United States, 186 Fed. 479, 108 C. C. A. 457; Chamberlain *v.* Pierson, 87 Fed. 420, 31 C. C. A. 157; Sanden *v.* Morgan, 225 Fed. 266. **Ala.**—Carlisle *v.* Killebrew, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617; Jay *v.* State (Ala. App.), 73 So. 137; Mobile Light & R. Co. *v.* Burch, 12 Ala. App. 421, 68 So. 509. **Ark.**—Halliday *v.* Smith, 67 Ark. 310, 54 S. W. 970. **Ga.**—Curtis *v.* Macon Ry. & Light Co., 18 Ga. App. 145, 88 S. E. 997; Beckworth *v.* Phillips, 6 Ga. App. 859, 65 S. E. 1075. **Ill.** Watson *v.* Kammeier, 203 Ill. App. 31; Kitterman *v.* People, 181 Ill. App. 682. **Ky.**—Woodmen of the World *v.* Purdom, 147 Ky. 177, 143 S. W. 1021. **Me.**—Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673. **Mass.**—Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451. **Mich.**—Micks *v.* Mason, 145 Mich. 212, 108 N. W. 707, 11 L. R. A. (N. S.) 653. **Mo.** Summers *v.* Rutherford (Mo. App.), 195 S. W. 511; Myers *v.* Maryland Casualty Co., 123 Mo. App. 682, 101 S. W. 124. **N. Y.**—Sims *v.* Sims, 75 N. Y. 466; Green *v.* Altenkirch, 176 App. Div. 320, 162 N. Y. Supp. 447; Vadney *v.* Albany Ry., 47 App. Div. 207, 62 N. Y. Supp. 140. See Westerburg *v.* Wachenheim, 164 N. Y. Supp. 677. **Ore.**—Spain *v.* Oregon-Washington R. & Nav. Co., 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104; Woodburn *v.* Aplin, 64 Ore. 610, 131 Pac. 516. **Pa.**—Wingrove *v.* Central Pennsylvania Traction Co., 237 Pa. 549, 85 Atl. 850. **S. C.**—Fonville *v.* Atlanta & C. A. L. R. Co., 93 S. C. 287, 75 S. E. 172. **Tex.**—Stewart *v.* Profit (Tex. Civ. App.), 146 S. W. 563. **W. Va.**—Shires *v.* Boggess, 72 W. Va. 109, 77 S. E. 542. **Eng.**—Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 19 W. R. 1, 23 L. T. N. S. 48.

[a] "**The confusion** which is sometimes perceptible in the cases on this subject, results from losing sight of the distinction between the purposes

judgment or decree in a civil case from being successfully invoked as res judicata in a subsequent criminal proceeding,[18] and it matters

for which such judgments are offered, whether as evidence of the fact of conviction and judgment, or of the fact of the guilt of the party. Such a judgment is conclusive for the purpose of establishing the fact that it has been rendered and all the legal consequences which flow from it.'' Sims *v.* Sims, 75 N. Y. 466, 472.

[b] **Where the government sues in conversion** for the cutting of timber, the defendant cannot rely upon the fact that he was indicted by the government for cutting the timber and acquitted. Stone *v.* United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127.

[c] **Acquittal of a motorman** when prosecuted at the instance of plaintiff for criminal negligence, not res judicata in plaintiff's suit against the company for the injury. Mobile Light & R. Co. *v.* Burch, 12 Ala. App. 421, 68 So. 509.

[d] **In proceedings to deport an alien** on the ground that he attempted to bring in a woman for immoral purposes, an acquittal of the same alien upon indictment for the same offense is not res judicata. Lewis *v.* Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. ed. 967.

[e] **Judgment of acquittal in homicide** on the ground that the killing was in self defense, not admissible in an action to recover insurance on deceased's life, to show that deceased was the aggressor. Woodmen of the World *v.* Purdon, 147 Ky. 177, 143 S. W. 1021.

[f] **Acquittal in prosecution for assault** not admissible in civil action of assault and battery against same defendant. **Ga.**—Beckworth *v.* Phillips, 6 Ga. App. 859, 65 S. E. 1075. **Ill.** Kitterman *v.* People, 181 Ill. App. 682. **W. Va.**—Shires *v.* Boggess, 72 W. Va. 109, 77 S. E. 542.

[g] **In an action under the dramshop act** for the death of plaintiff's intestate at the hands of an alleged intoxicated person, the defense, in order to prove that such person was not intoxicated but insane, cannot rely on a prior judgment convicting such person of the murder of another person at the time of killing plaintiff's intestate. Watson *v.* Kammeier, 203 Ill. App. 31.

[h] **Judgment convicting white woman for marrying negro** not competent in civil suit involving issue as to whether the woman was a negress. Stewart *v.* Profit (Tex. Civ. App.), 146 S. W. 563.

[i] **To prove that defendant was drunk** at the time of the injury sued for, plaintiff cannot introduce a judgment of conviction for such drunkenness. Curtis *v.* Macon Ry. & Light Co., 18 Ga. App. 145, 88 S. E. 997.

[j] **A conviction of plaintiff of conspiracy** to fabricate evidence not admissible on part of defendant when sued by plaintiff for damages. Wingrove *v.* Central Penn. Traction Co., 237 Pa. 549, 85 Atl. 850.

[k] **Record of a thief's conviction** not admissible in an action of conversion against the thief. Summers *v.* Rutherford (Mo. App.), 195 S. W. 511.

[l] **A judgment of conviction for forging** a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 19 W. R. 1, 23 L. T. N. S. 48.

18. **Ala.**—Britton *v.* State, 77 Ala. 202. **Conn.**—State *v.* Bradneck, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620. **Ga.**—Wilcox *v.* State, 8 Ga. App. 536, 69 S. E. 1086. **Pa.**—Com. *v.* Shoener, 25 Pa. Super. 526. **S. C.**—State *v.* Weil, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461. **Tex.**—Busby *v.* State, 51 Tex. Cr. 289, 103 S. W. 638; Dunnagan *v.* State, 38 Tex. Cr. 614, 44 S. W. 148.

[a] **Judgment against defaulting tax collector** not admissible against him in a subsequent criminal prosecution. Britton *v.* State, 77 Ala. 202.

[b] **In a prosecution for maintaining liquor nuisance,** the state is not entitled to introduce in evidence the decree in an equitable suit enjoining the defendant from maintaining the nuisance. State *v.* Weil, 83 S. C. 478, 65

not that the parties to the two proceedings are the same.[19]

(II.) Reasons for Rule. — The reasons generally advanced for denying judgments in criminal cases the force and effect of res judicata in civil proceedings and vice versa, are that there is no mutuality of parties,[20] and that the course of the proceedings and the rules of evidence and proof in the two cases are different.[21]

S. E. 634, 26 L. R. A. (N. S.) 461.

[c] **An adjudication of insanity** not admissible in a trial of the same person for crime. Johnson *v.* State, 57 Fla. 18, 49 So. 40.

[d] **To prove that accused had been purchasing liquor** the state cannot introduce a judgment in a civil suit by a liquor dealer against accused for the purchase price of liquor. Wilcox *v.* State, 8 Ga. App. 536, 69 S. E. 1086.

[e] **Judgment for defendant in a divorce** suit based on adultery is not admissible in a subsequent prosecution against the former plaintiff for non support. State *v.* Bradneck, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620.

19. See *infra*, this note.

[a] **Judgment in criminal case** not res judicata between same parties in civil case. Stone *v.* United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127; Boyd *v.* United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746; Sanden *v.* Morgan, 225 Fed. 266; Green *v.* Altenkirch, 176 App. Div. 320, 162 N. Y. Supp. 447.

[b] **Judgment in civil case** not res judicata in a criminal cause between same parties. Busby *v.* State, 51 Tex. Cr. 289, 103 S. W. 638.

[c] **But a judgment of conviction for violating the liquor tax law** was held admissible in a suit by the state commissioner of excise against the same defendant to recover the penalty of his liquor tax bond. Farley *v.* Patterson, 166 App. Div. 358, 152 N. Y. Supp. 59. But the court in Green *v.* Altenkirch, 176 App. Div. 320, 162 N. Y. Supp. 447, intimates that Farley *v.* Patterson is against the weight of authority.

20. Britton *v.* State, 77 Ala. 202; Jay *v.* State (Ala. App.), 73 So. 137; Busby *v.* State, 51 Tex. Cr. 289, 103 S. W. 638. See *infra*, VII, C.

[a] **Since upon conviction, the defendant's guilt** is established beyond a reasonable doubt, the judgment, it would seem, ought to be conclusive evidence of such guilt in favor of the state in a subsequent civil action by it against the same defendant. That effect has been accorded it in a New York case, Farley *v.* Patterson, 166 App. Div. 358, 152 N. Y. Supp. 59, a case which also denies such conclusiveness as res judicata to a judgment of acquittal. This case has been criticised as being against the weight of authority and the trouble with it seems to be that it overlooks the requisite of mutuality. As was said in another New York case, People *v.* Rohrs, 49 Hun 150, 1 N. Y. Supp. 672, "The difficulty, however, in holding that the result in the criminal proceeding estopped the people from trying the question of Rohrs' violation of the statute in this action, arises from the fact that if Rohrs had been found guilty in the criminal action, the record in that action would not have been evidence against Rohrs in this action, and, therefore, because of the want of mutuality no estoppel can arise." See also Busby *v.* State, 51 Tex. Cr. 289, 103 S. W. 638.

21. **U. S.**—Stone *v.* United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127; Williams *v.* United States, 186 Fed. 479, 108 C. C. A. 457 (deportation proceeding and previous criminal case); Sanden *v.* Morgan, 225 Fed. 266. **Ala.** Britton *v.* State, 77 Ala. 202; Jay *v.* State (Ala. App.), 73 So. 137. **S. C.** State *v.* Weil, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461. **Tex.** Busby *v.* State, 51 Tex. Cr. 289, 103 S. W. 647.

[a] **But in Coffey *v.* United States,** 106 U. S. 436, the court allowed a criminal judgment to be pleaded in bar of a forfeiture case between the same parties based upon the same facts notwithstanding proof beyond a reasonable doubt was necessary in the one case and only a preponderance of evidence required in the other. See also United States *v.* Salen, 244 Fed. 296.

[b] **The supreme court in attempting to distinguish the Coffey case** from one of a purely civil nature has said:

(III.) Where Civil Case of a Criminal Nature. — The general rule of exclusion above stated[22] should perhaps be confined to situations wherein the civil action involved is purely such; for it seems that a judgment of acquittal is properly pleadable in bar of a subsequent suit between the same parties, civil in form but criminal in its nature, or which, in other words, seeks to recover a penalty, impose a punishment or declare a forfeiture for the same prohibited acts.[23]

(IV.) Judgments in Rem.[24] — That one proceeding is criminal and the other civil does not prevent the judgment being used in evidence

"The rule established in Coffey's case can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show beyond a reasonable doubt the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action, but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully and feloniously cutting and removing timber from lands of the United States it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. . . . But the present action for the conversion of the timber would be supported by proof that it was in fact the property of the United States, whether the defendant knew that fact or not. . . . It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged." Stone *v.* United States, 167 U. S. 178, 188, 17 Sup. Ct. 778, 42 L. ed. 127.

[c] **Rules as to competency of witnesses** different in the two proceedings. Cottingham *v.* Weeks, 54 Ga. 275.

[d] **That the parties be confronted with witnesses** against them not necessary in civil as in criminal cases. State *v.* Weil, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461.

22. See *supra*, V, D, 2, b, (I).

23. Coffey *v.* United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. ed. 684; United States *v.* Salen, 244 Fed. 296. And see United States *v.* Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. ed. 777; State *v.* Intoxicating Liquor, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937.

Compare Stone *v.* United States, 167 U. S. 178, 188, 17 Sup. Ct. 778, 42 L. ed. 127.

[a] **An acquittal** in a criminal prosecution by the United States to enforce a fine and imprisonment for violation of the internal revenue laws, res judicata in a subsequent forfeiture proceeding by the United States against the same defendant. Coffey *v.* United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. ed. 684.

[b] **Judgment of dismissal** in a criminal prosecution for defrauding customs officers, res judicata in a subsequent civil suit by the United States against the same defendant to recover the amount of duty lost through the fraud. United States *v.* Salen, 244 Fed. 296.

[c] **Deportation proceedings** not criminal. Williams *v.* United States, 186 Fed. 479, 108 C. C. A. 457.

[d] **In an action to forfeit the bond** of a liquor dealer the city cannot prove the breach of the bond by a prior conviction for the same violation had on plea of guilty in the recorder's court. Woodburn *v.* Aplin, 64 Ore. 610, 131 Pac. 516.

24. See *infra*, VII, I, 2, b.

in so far as it is operative in rem. To the extent that it establishes the status of a person or thing, the judgment is properly receivable, in any case wherein a question as to such status is presented.[25]

(V.) Conviction Upon Plea of Guilty. — The record of conviction upon a plea of guilty is admissible in civil cases, not as res judicata of anything determined by the judgment, but merely as an admission of the party,[26] and is in such case only prima facie evidence of his guilt.[27]

(VI.) Judgment Evidence of Its Own Rendition.[28] — The general rule above stated[29] must be further limited to the extent that all judg-

25. Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 19 W. R. 1, 23 L. T. N. S. 48.

[a] **A judgment of conviction** has the force of a judgment in rem; it operates upon the status of the defendant and makes him a convicted felon, but it is conclusive only as to defendant's status and is not admissible evidence on any other matter. Green *v.* Altenkirch, 176 App. Div. 320, 162 N. Y. Supp. 447; Castrique *v.* Imrie, L. R. 4 H. L. (Eng.) 414, 39 L. J. C. P. 350, 19 W. R. 1, 23 L. T. N. S. 48. But in Farley *v.* Patterson, 166 App. Div. 358, 152 N. Y. Supp. 59, a judgment of conviction was held to conclusively establish between the defendant and the people in a subsequent civil case that defendant committed the offense.

[b] **As bearing upon a party's qualifications as an elector** where the question arises in a mandamus proceeding a judgment convicting such party of an infamous crime is admissible. Blodgett *v.* Clarke, 177 Iowa 575, 159 N. W. 243.

[c] **Forfeiture of Vessel.**—A sentence of acquittal, accompanied by a denial of a certificate of probable cause in a proceeding by libel against a vessel for an alleged offense is conclusive evidence that no forfeiture was incurred and the same question cannot be re-examined in an action of trespass against the collector and surveyor for seizing the vessel. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381.

[d] **In disbarment proceedings** the record of the attorney's conviction of a felony is conclusive evidence of his unfitness to be a member of the bar. *In re* Sutton, 50 Mont. 88, 145 Pac. 6, Ann. Cas. 1917A, 1223; *In re* Gottesfeld, 245 Pa. 314, 91 Atl. 494, but in State *v.* Cary, 135 La. 579, 65 So. 748, the court lays down the rule that in disbarment proceedings, no judgment which may have been rendered for or against the defendant in any criminal prosecution can be invoked as the basis of res judicata.

26. **Ill.**—Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98; Young *v.* Copple, 52 Ill. App. 547. **Ia.**—Jones *v.* Cooper, 97 Iowa 735, 65 N. W. 1000; Crawford *v.* Bergen, 91 Iowa 675, 60 N. W. 205. **Mo.**—Corwin *v.* Walton, 18 Mo. 71, 59 Am. Dec. 285. **N. Y.**—Markett *v.* Gemke, 154 N. Y. Supp. 780, *quot.* 7 ENCY. OF EV. 851. **Ohio.**—Clark *v.* Irwin, 9 Ohio 131. **Ore.**—Spain *v.* Oregon-Washington R. & Nav. Co., 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104; Woodburn *v.* Aplin, 64 Ore. 610, 131 Pac. 516. **S. C.**—Fonville *v.* Atlanta & C. A. L. R. Co., 93 S. C. 287, 75 S. E. 172.

27. Sims *v.* Sims, 75 N. Y. 466; Markett *v.* Gemke, 154 N. Y. Supp. 780; Spain *v.* Oregon-Washington R. & Nav. Co., 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104; Woodburn *v.* Aplin, 64 Ore. 610, 131 Pac. 516.

[a] **On a plea of guilty to a charge of drunkenness** plaintiff was convicted, held that such conviction is not conclusive as to his drunkenness in his subsequent suit against defendant railroad company for his ejection from its train and subsequent arrest. Spain *v.* Oregon-Washington R. & Nav. Co., 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104.

[b] **Conviction of keeping disorderly house,** had upon plea of guilty, is only prima facie evidence in a proceeding by the landlord to remove tenant for using premises for disorderly purposes. Markett *v.* Gemke, 154 N. Y. Supp. 780.

28. See *infra,* VII, I, 2, a.

29. See *supra,* V, D, 2, b, (I).

ments both civil and criminal are admissible in any proceeding and even between strangers as conclusive evidence of their rendition and the legal consequences resulting from such fact.[30]

3. Proceedings in Rem.[31] — The conclusiveness of a judgment as res judicata attaches to adjudications in rem or quasi in rem.[32] It is commonly stated that such judgments are binding upon all the world and in a limited sense this is true. In so far as they establish the status of persons or things, they are conclusive not only upon parties and privies but upon strangers as well.[33] But except as between the parties and privies a judgment in rem is not res judicata as to any of the essential findings of fact upon which it is based.[34]

30. **Mass.**—Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727. **N. Y.**—Sims *v.* Sims, 75 N. Y. 466; Markett *v.* Gemke, 154 N. Y. Supp. 780. **Vt.**—Quinn *v.* Quinn, 16 Vt. 426. **Eng.**—Purcell *v.* Macnamara, 9 East 361, 103 Eng. Reprint 610.

31. See the title "**Proceedings in Rem.**"

32. **U. S.**—Johannessen *v.* United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; Sheffey *v.* Davis Colliery Co., 219 Fed. 465, 135 C. C. A. 177. **Ala.**—Rucker *v.* Tennessee Coal, Iron & R. Co., 176 Ala. 456, 58 So. 465; Blacksher Co. *v.* Northrup, 176 Ala. 190, 57 So. 743, 42 L. R. A. (N. S.) 454; Brock's Admr. *v.* Frank, 51 Ala. 85. **Ark.**—Crittenden Lumber Co. *v.* McDougal, 101 Ark. 390, 142 S. W. 836. **Cal.**—Del Campo *v.* Camarillo, 154 Cal. 647, 98 Atl. 1049; Tracy *v.* Muir, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117. **Colo.**—*In re* Hayes' Est., 55 Colo. 340, 135 Pac. 449, Ann. Cas. 1914C, 531. **Del.**—Frankel *v.* Satterfield, 9 Houst. 201, 19 Atl. 898. **Ga.**—Barton *v.* Johnson, 137 Ga. 332, 73 S. E. 516; Thornton *v.* Lane, 11 Ga. 459. **Idaho.** — Connolly *v.* Probate Court, 25 Idaho 35, 136 Pac. 205. **Ill.** Wetmore *v.* Henry, 259 Ill. 80, 102 N. E. 189, Ann. Cas. 1914C, 247; Lawrence *v.* Lawrence, 255 Ill. 365, 99 N. E. 675. **La.**—Pasteur *v.* Lewis, 39 La. Ann. 5, 1 So. 307. **N. J.**—Crawford *v.* Lees, 84 N. J. Eq. 324, 93 Atl. 201. **N. Y.**—Wottrich *v.* Freeman, 71 N. Y. 601; Clemens *v.* Clemens, 37 N. Y. 59. **N. C.**—Corpening *v.* Kincaid, 82 N. C. 202. **Ohio.**—Hamilton *v.* Merril, 25 Ohio St. 11. **Pa.**—*In re* Piper's Estate, 208 Pa. 636, 57 Atl. 1118; Shryock *v.* Buchman, 121 Pa. 248, 15 Atl. 480, 1 L. R. A. 533. **Tex.**—Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735; Scott *v.* Scott (**Tex. Civ. App.**), 170 S. W. 273.

See *infra*, V, D, 3.

In admiralty, see 1 STANDARD PROC. 533, 550.

33. **U. S.**—Gratiot County State Bank *v.* Johnson, 39 Sup. Ct. 263; New Lamp Chimney Co. *v.* Ansonia Brass & Copper Co., 91 U. S. 656, 23 L. ed. 336; Michaels *v.* Post, 21 Wall. 398, 22 L. ed. 520. **Ind.**—Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. **La.**—State *v.* Judge, 39 La. Ann. 499, 2 So. 37, 4 Am. St. Rep. 274. **Mass.**—McCarthy *v.* William H. Wood Lumber Co., 219 Mass. 566, 107 N. E. 439; Hood *v.* Hood, 110 Mass. 463; Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381. **N. Y.**—*In re* Union El. R. Co., 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359. **N. C.**—First Nat. Bank *v.* McCaskill, 174 N. C. 362, 93 S. E. 905; Latham *v.* Wiswall, 37 N. C. 294. **Wis.**—State *v.* McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878. **Eng.**—Concha *v.* Concha, 56 L. J. Ch. 257, 11 App. Cas. 541, 35 W. R. 477, 55 L. T. N. S. 522.

[a] **Judgment Quasi in Rem.**—*In re* Piper's Estate, 208 Pa. 636, 57 Atl. 1118.

[b] **Foreign Judgment in Rem.** Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472.

[c] **Probate of Contested Will.**—Sly *v.* Hunt, 159 Mass. 151, 34 N. E. 187, 38 Am. St. Rep. 403, 21 L. R. A. 680.

[d] **Decree of Distribution.**—By orphan's court. *In re* Piper's Estate, 208 Pa. 636, 57 Atl. 1118.

[e] **A decision of the land department** in a patent proceeding, determining the character of public lands. Cameron *v.* Bass (Ariz.), 168 Pac. 645.

34. **U. S.**—Gratiot County State

4. Particular Applications. — In the following pages are collected a number of cases wherein the rule has been invoked in respect to decisions in particular proceedings or pertaining to particular matters such as accounting;[35] arbitration and award;[36] assault and battery;[37] attachment;[38] garnishment;[39] bankruptcy;[40] boundary proceed-

Bank *v.* Johnson, 39 Sup. Ct. 263; Tilt *v.* Kelsey, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. ed. 95. **Colo.**—Wilson *v.* Mitchell, 48 Colo. 454, 111 Pac. 21, 30 L. R. A. (N. S.) 507. **Ga.**—Luke *v.* Hill, 137 Ga. 159, 73 S. E. 345, 38 L. R. A. (N. S.) 559. **Mass.**—Brigham *v.* Fayerweather, 140 Mass. 411, 5 N. E. 265; Burlen *v.* Shannon, 3 Gray 387. **Mich.** Corry *v.* Lackey, 105 Mich. 363, 63 N. W. 418. **Neb.**—Belknap *v.* Stewart, 38 Neb. 304, 56 N. W. 881, 41 Am. St. Rep. 729. **R. I.**—Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

[a] **An adjudication in bankruptcy** establishes as against the world the debtor's status as a bankrupt, but not the fact of his insolvency at certain period, or any other matter of fact embraced in the judgment. Gratiot County State Bank *v.* Johnson, 39 Sup. Ct. 263.

[b] **Judgment that a mulatto woman was born free** not conclusive as between strangers that her children were free. Wood *v.* Davis, 7 Cranch (U. S.) 271, 3 L. ed. 339.

35. Connor *v.* Elliott (Fla.), 74 So. 649; Goolsby *v.* Goolsby, 146 Ga. 763, 92 S. E. 521.

[a] **Partnership Accounting.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A. 1917F, 1006.

36. **N. Y.**—Pizzini *v.* Hutchins. 70 Misc. 94, 127 N. Y. Supp. 1043. **N. C.** Roanoke Rapids Power Co. *v.* Roanoke Navigation & Water Power Co., 159 N. C. 393, 75 S. E. 29. **Pa.**—Nernst Lamp Co. *v.* Hill, 243 Pa. 448, 90 Atl. 137; Pittsburg Const. Co. *v.* West Side Belt R. Co., 232 Pa. 578, 81 Atl. 884. **Tex.**—Bell *v.* Campbell (Tex. Civ. App.), 143 S. W. 953.

37. Chernes *v.* Rosenwasser, 181 App. Div. 837, 169 N. Y. Supp. 38.

38. Bank of Italy *v.* Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863.

[a] **Debt Not Concluded.**—A judgment in rem in attachment, though conclusive for certain purposes, is not conclusive of the debt, in view of the statute which gives the defendant in attachment one year after distribution of the proceeds of sale under the attachment judgment to sue the attachment creditor for money received by him which was not due and owing. Pendleton *v.* Gondolf, 85 N. J. Eq. 308, 96 Atl. 47.

39. Dishman *v.* Griffis (Ala.), 73 So. 966; Hall & Farley *v.* Alabama Terminal & Improvement Co., 173 Ala. 398, 56 So. 235; Allen *v.* Allen, 96 Wash. 689, 165 Pac. 889. See 10 STANDARD PROC. 583.

[a] **Where title is confirmed in garnishee** it cannot be again litigated between the parties. Allen *v.* Allen, 96 Wash. 689, 165 Pac. 889.

40. **U. S.**—Gratiot County State Bank *v.* Johnson, 39 Sup. Ct. 263; Ullman *v.* Coppard, 246 Fed. 124, 158 C. C. A. 350; Sheppard-Strassheim Co. *v.* Black, 211 Fed. 643, 128 C. C. A. 147; Cook *v.* Robinson, 194 Fed. 785, 114 C. C. A. 505; Lazarus *v.* Eagen, 206 Fed. 518. **Ala.**—Cartwright *v.* West, 185 Ala. 41, 64 So. 293. **Ill.** Chicago Title & Trust Co. *v.* National Storage Co., 260 Ill. 485, 103 N. E. 227. **Okla.**—Swaydan *v.* Ellis, 158 Pac. 434; McCurry *v.* Sledge, 48 Okla. 27, 149 Pac. 1124; De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224.

[a] **As against persons not actual parties** to the proceedings an adjudication, being a judgment in rem, is conclusive of the status of the bankrupt but not of the facts on which the adjudication is based. Gratiot County State Bank *v.* Johnson, 39 Sup. Ct. 263. See *supra*, V, D, 3.

[b] **Judgment of referee disallowing claim** against bankrupt's estate, admissible in subsequent suit between the parties or their privies. Ullman *v.* Coppard, 246 Fed. 124, 158 C. C. A. 350; De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224.

[c] **Homestead of Bankrupt.** — An adjudication by a referee in bankruptcy that a tract of land is the homestead of the bankrupt is conclusive as to that question, as against a claimant in bankruptcy who subsequently sued the bankrupt for fore-

ings;[41] burnt record proceedings;[42] certiorari;[43] condemnation proceedings;[44] copyright infringement cases;[45] decedent's estates;[46] divorce;[47] drainage proceedings;[48] ejectment;[49] forcible entry[50] and

closure of a mortgage upon the same land. McCurry *v.* Sledge, 48 Okla. 27, 149 Pac. 1124.

41. See 18 STANDARD PROC. 665.

42. See the article "**Title.**"

43. *In re* Breck, 252 Mo. 302, 158 S. W. 843.

44. **Ill.**—Bell *v.* Mattoon Waterworks & R. Co., 163 Ill. App. 615. **N. Y.** *In re* Van Alst Avenue, 161 App. Div. 944, 146 N. Y. Supp. 827. **Tex.**—Harbinson *v.* Cottle County (Tex. Civ. App.), 147 S. W. 719. **Wash.**—Hubbell *v.* Forsyth, 96 Wash. 613, 165 Pac. 481; Dose *v.* Seattle, 78 Wash. 571, 139 Pac. 594; Casassa *v.* Seattle, 66 Wash. 146, 119 Pac. 13.

45. Kirke La Shelle Co. *v.* Armstrong, 173 App. Div. 232, 159 N. Y. Supp. 363.

46. *In re* McClellan's Est., 31 S. D. 641, 141 N. W. 965. See 15 STANDARD PROC. 401, et seq.

[a] **Appointment of Administrator.** *In re* McClellan's Est., 31 S. D. 641, 141 N. W. 965. See 15 STANDARD PROC. 402.

47. **Conn.**—Scott *v.* Scott, 83 Conn. 634, 78 Atl. 314. **Ky.**—Auxier *v.* Auxier, 155 Ky. 174, 159 S. W. 678. **Mich.**—Fowler *v.* Blount, 191 Mich. 575, 158 N. W. 114. **N. J.**—Lake *v.* Lake (N. J. Eq.), 89 Atl. 534. **N. Y.** Goodwin *v.* Goodwin, 158 App. Div. 171, 142 N. Y. Supp. 1102; Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. Supp. 162. **Tex.**—Shook *v.* Shook (Tex. Civ. App.), 145 S. W. 699.

[a] **An issue of desertion raised** in a divorce suit is concluded by a prior decree allowing the wife weekly alimony for her support and maintenance under an act providing for such relief where the husband without any justifiable cause abandons or separates himself from the wife. Lake *v.* Lake (N. J. Eq.), 89 Atl. 534.

[b] **An order awarding alimony** res judicata as to the reasonableness of the sum allowed for the wife's support. Demuth *v.* Kemp, 159 App. Div. 422, 144 N. Y. Supp. 690.

48. Brookfield *v.* Jonesboro Trust Co., 131 Ark. 356, 198 S. W. 697.

[a] **Sale of Irrigation Bonds.**—A judgment passing upon the regularity and legality of the proceedings of a board of directors of an irrigation district in issuing and selling bonds is res judicata upon all interested persons who have notice of the proceedings. Herrett *v.* Warmsprings Irr. Dist., 86 Ore. 343, 168 Pac. 609.

49. **Ala.**—Richardson *v.* N. N. & T. J. Powell, 74 So. 364; Windham *v.* Atkins, 184 Ala. 103, 63 So. 1022; Carlisle *v.* Killebrew, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617. **Ark.**—Vittitow *v.* Burnett, 112 Ark. 277, 165 S. W. 625; Brasher *v.* Taylor, 109 Ark. 281, 159 S. W. 1120. **Ga.**—Moate *v.* Rives, 146 Ga. 425, 91 S. E. 420. **Ill.**—Rathje *v.* Waterlohn, 270 Ill. 640, 110 N. E. 816. **Mich.**—Loranger *v.* Carpenter, 167 Mich. 370, 132 N. W. 1032. **Mo.** Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403. **N. Y.**—Van Wyck *v.* Seward, 1 Edw. Ch. 327. **Pa.**—Leith *v.* Metzger, 253 Pa. 433, 98 Atl. 616; Central Pennsylvania Lumber Co. *v.* Bristol, 250 Pa. 61, 95 Atl. 383. **R. I.** Perkins *v.* Kirby, 39 R. I. 343, 97 Atl. 884. **Tenn.**—Stockley *v.* Cissna, 119 Tenn. 135, 104 S. W. 792. **Wash.** Pugsley *v.* Glenn, 98 Wash. 570, 168 Pac. 172.

[a] **Title Concluded.**—The principle that one judgment in ejectment is not conclusive as to the title to the property applies only when another action of ejectment is brought, but in other actions between the same parties a judgment in ejectment is as conclusive res judicata as any other judgment. Coleman *v.* Stewart, 170 Ala. 255, 53 So. 1020.

50. Jones *v.* Jones, 281 Ill. 595, 117 N. E. 1013; Citizens' State Bank *v.* Snyder (Iowa), 162 N. W. 6.

[a] **Whether possession was unlawfully held** is adjudicated by former suit. Citizens' State Bank *v.* Snyder (Iowa), 162 N. W. 6.

[b] **Where title cannot be adjudicated** in unlawful detainer, a judgment therein is not res judicata as to title. Williams *v.* Prioleau, 123 Ark. 156, 184 S. W. 847.

detainer; forfeiture proceedings;[51] habeas corpus;[52] injunction;[53] insanity proceedings;[54] mandamus;[55] mechanic's lien foreclosure;[56] mortgage foreclosure;[57] parent and child;[58] partition;[59] patents;[60]

51. Brown *v.* Max Malter Co., 184 Ill. App. 621.

[a] **An issue as to the condition of eggs** is concluded by a decree of a federal court ordering the eggs destroyed as being unfit for human consumption. Brown *v.* Max Malter Co., 184 Ill. App. 621.

52. Tew *v.* Webster, 118 Minn. 375, 136 N. W. 1098. But see 10 STANDARD PROC. 950, et seq.

[a] **But in a civil suit** involving the same rights the judgment in habeas corpus is not res judicata. Bedford *v.* Hamilton, 153 Ky. 429, 155 S. W. 1128.

53. Coughlin *v.* Rosen, 220 Mass. 220, 107 N. E. 914.

54. Cathcart *v.* Matthews, 105 S. C. 329, 89 S. E. 1021. See 13 STANDARD PROC. 481, 511, 543. See also 7 ENCY. OF EV. 477, et seq.

[a] **Conclusive as to condition at the time** but not subsequent condition. Cathcart *v.* Matthews, 105 S. C. 329, 89 S. E. 1021.

55. U. S.—Nalle *v.* Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. ed. 1439. **Mich.**—Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183. **Neb.** Richardson County *ex rel.* Sheehan *v.* Drainage Dist., 96 Neb. 169, 147 N. W. 205.

[a] **Validity of School District Warrants.**—A final judgment in an action of mandamus requiring a school district treasurer to register certain warrants of his district is res judicata as to the validity of the warrants when registered in pursuance thereof. Bank of Chelsea *v.* School Dist. No. 1 (Okla.), 162 Pac. 809.

56. Lee *v.* Pasco Theater Co., 93 Wash. 204, 160 Pac. 435.

57. Ill.—Black *v.* Thomson, 120 Ill. App. 424. **Ind.**—Sinclair *v.* Gunzenhouser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376. **Okla.**—Deming Inv. Co. *v.* Shannon (Okla.), 162 Pac. 471. **Ore.** Seaweard *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232; Crow *v.* Crow, 70 Ore. 534, 139 Pac. 854. **Tex.**—Holt *v.* Abby (Tex. Civ. App.), 141 S. W. 173. **Wash.**—Union Cent. Life Ins. Co. *v.* Chesterley, 100 Wash. 260, 170 Pac. 558.

[a] **Validity of insurance policy determined in foreclosure suit** held res judicata. Deming Inv. Co. *v.* Shannon (Okla.), 162 Pac. 471.

58. Ferrell *v.* Broadway, 126 N. C. 258, 35 S. E. 467, legitimacy. See also *infra*, VII, J, c.

59. U. S.—Hapai *v.* Brown, 239 U. S. 502, 36 Sup. Ct. 201, 60 L. ed. 407; Harrison *v.* Gillespie, 204 Fed. 384, 122 C. C. A. 554; Martin *v.* People's Bank, 115 Fed. 226. **Cal.**—Giuffre *v.* Lauricella, 25 Cal. App. 422, 143 Pac. 1061. **Conn.**—Harris *v.* Weed, 89 Conn. 214, 93 Atl. 232. **Ga.**—Goolsby *v.* Goolsby, 146 Ga. 763, 92 S. E. 521; Chattahoochee Lumber Co. *v.* Yeates, 137 Ga. 64, 72 S. E. 504. **Ill.**—Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801; Doubet *v.* Doubet, 196 Ill. App. 289. **Ind.**—Finley *v.* Cathcart, 149 Ind. 470, 48 N. E. 586, 49 N. E. 381, 63 Am. St. Rep. 292. **Ky.**—Heard *v.* Higginbotham, 168 Ky. 668, 182 S. W. 846. **Miss.**—Vinson *v.* Colonial & United States Mortgage Co., 116 Miss. 59, 76 So. 827; Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466. **Mo.**—Browne *v.* Appleman, 83 Mo. App. 79. **Neb.** Kazebeer *v.* Nunemaker, 82 Neb. 732, 118 N. W. 646. **N. C.**—Propst *v.* Caldwell, 172 N. C. 594, 90 S. E. 757; McKimmon, Currie & Co. *v.* Caulk, 170 N. C. 54, 86 S. E. 809; Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732. **Tex.** Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193; Skaggs *v.* Mudd (Tex. Civ. App.), 162 S. W. 371; Richardson *v.* Trout (Tex. Civ. App.), 135 S. W. 677. **W. Va.**—Custer *v.* Hall, 71 W. Va. 119, 76 S. E. 183; Shaffer *v.* Shaffer, 69 W. Va. 163, 71 S. E. 111.

60. Hart Steel Co. *v.* Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. ed. 1148; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Sutton *v.* Wentworth (C. C. A.), 247 Fed. 493; L. E. Waterman Co. *v.* Kline, 234 Fed. 891, 148 C. C. A. 489; Gilchrist Co. *v.* Erie Specialty Co., 231 Fed. 659, 145 C. C. A. 545; Searchlight Horn Co. *v.* American Graphophone Co., 240 Fed. 745.

Decisions of patent office, see the title "**Patents.**"

[a] **Priority of Invention.**—Gilchrist Co. *v.* Erie Specialty Co., 231 Fed. 659, 145 C. C. A. 545.

prohibition;[61] quieting title;[62] quo warranto;[63] replevin;[64] taxation proceedings;[65] Torrens act proceedings;[66] trespass;[67] trespass to try title;[68] trover;[69] trusts;[70] wills;[71] and vendor's liens.[72]

VI. MATTERS CONCLUDED. — A. IN GENERAL. — As already pointed out,[73] the effect of a former adjudication when considered as a merger or bar, is much broader as to the matters concluded than when considered merely as a res judicata or adjudication of a particular fact in issue. In the former aspect it is conclusive as to all matters of law or fact which either were or might have been urged for or against the cause of action or claim in suit, but is limited in its use to a case in which the cause of action or subject matter of the suit was identical.[74] In the latter aspect it is conclusive in a sub-

61. People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036; Scott *v.* Pilipo, 23 Haw. 625.

62. **Cal.**—Hanson *v.* Goldsmith, 170 Cal. 512, 150 Pac. 364; Knight *v.* All Persons, 32 Cal. App. 381, 162 Pac. 1051; Los Angeles *v.* Moore, 31 Cal. App. 39, 159 Pac. 872; Los Angeles County *v.* Winans, 13 Cal. App. 257, 109 Pac. 650. **Colo.**—Greene *v.* Gibson, 53 Colo. 346, 127 Pac. 239. **Idaho.** Smith *v.* Kessler, 22 Idaho 589, 127 Pac. 172. **Ill.**—McFall *v.* Kirkpatrick, 236 Ill. 281, 86 N. E. 139. **Ind.**—Young *v.* Wiley (Ind. App.), 102 N. E. 54. **Ky.**—Perry *v.* Eagle Coal Co., 170 Ky. 824, 186 S. W. 875. **Mo.**—Emmert *v.* Aldridge, 231 Mo. 124, 132 S. W. 1050. **Okla.**—Baker *v.* Leavitt, 54 Okla. 70, 153 Pac. 1099.

63. Shumate *v.* Fauquier County Suprs., 84 Va. 574, 5 S. E. 570.

64. Bierce *v.* Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. ed. 237.

[a] **Value of property** replevied, res judicata. Bierce *v.* Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. ed. 237.

65. Kentucky Coal Lands Co. *v.* Baker, 155 Ky. 344, 159 S. W. 943.

[a] **Judgment forfeiting lands** for non-payment of taxes. Kentucky Coal Lands Co. *v.* Baker, 155 Ky. 344, 159 S. W. 943.

66. See the title **"Title."**

67. **Ill.**—Marks *v.* Madsen, 261 Ill. 51, 103 N. E. 625; Chicago Terminal Transfer R. Co. *v.* Barrett, 252 Ill. 86, 96 N. E. 794. **Ky.**—Benge *v.* Martin, 159 Ky. 302, 163 S. W. 1003. **N. H.** Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620. **Wis.**—Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871.

68. Provident Nat. Bank *v.* Webb, 60 Tex. Civ. App. 321, 128 S. W. 426.

69. *In re* Petition of R. O. Witzke *v.* Greer, 195 Ill. App. 206.

70. Anderson *v.* Sands, 40 App. Cas. (D. C.) 447.

71. **Md.** — Emmert *v.* Middlekauff, 118 Md. 399, 84 Atl. 540. **Mo.**—Smith *v.* Smith, 194 Mo. App. 309, 188 S. W. 1111. **N. C.**—Propst *v.* Caldwell, 172 N. C. 594, 90 S. E. 757.

See 15 STANDARD PROC. 401.

[a] **Where a will devising lands is declared valid,** it as completely estops the parties as to the question of title as if the testator had executed a deed to the land instead of the will, and the suit had been to test the validity of the deed instead of the will. Wilson *v.* McDaniel (Mo.), 190 S. W. 3.

[b] **A decree declaring a will invalid** and vacating probate thereof is binding on unborn remaindermen who were properly represented in the proceedings. Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547.

[c] **Decree of Distribution.**—South End Warehouse Co. *v.* Lavery, 12 Cal. App. 449, 107 Pac. 1008. See 15 STANDARD PROC. 404.

72. Perolio *v.* Doe *ex dem.* Woodward Iron Co., 197 Ala. 560, 73 So. 197.

[a] **In ejectment** for certain land the decree in a prior suit to foreclose a vendor's lien is inadmissible, where the foreclosure suit, though it included the land in question, had no effect upon the title thereto. Snow *v.* Bray (Ala.), 73 So. 542.

73. See *supra,* II; IV, A.

74. See 15 STANDARD PROC. 485, et seq., 498.

[a] **Prior to the decision** in Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195, wherein the rule or principle by which to test the conclusive-

sequent action between the same parties or their privies, only as to some matter of fact actually in issue and determined by it,[75] but it has this effect although the causes of action and the relief sought in the two actions are different.[76] To ascertain whether the prior

ness of former litigation between parties seems to have been first deduced, the courts sometimes fell into error in applying the rule in the two classes of cases.

75. See *infra*, this section.

76. **U. S.**—New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202; Cromwell *v.* County of Sac, 94 U. S. 351, 24 L. ed. 195; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63; Union Cent. Life Ins. Co. *v.* Drake, 214 Fed. 536, 131 C. C. A. 82; Masters *v.* City of Rainier, 238 Fed. 827. **Ala.**—Hannis Distilling Co. *v.* Lanning, 191 Ala. 280, 68 So. 137; Huntsville *v.* Goodenrath, 13 Ala. App. 579, 68 So. 676. **Alaska.**—Johanson *v.* Sondheim, 4 Alaska 232. **Ariz.** *In re* Scarry's Est., 15 Ariz. 246, 137 Pac. 868; Valley Bank *v.* Brodie, 9 Ariz. 17, 76 Pac. 617. **Ark.**—Fogel *v.* Butler, 96 Ark. 87, 131 S. W. 211; Morgan *v.* Kendrick, 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78. **Cal.** Horowitz *v.* Speese, 169 Pac. 371; Green *v.* Thornton, 130 Cal. 482, 62 Pac. 750; McClellan *v.* Lewis, 35 Cal. App. 64, 169 Pac. 436. **Colo.**—Savage *v.* Central Electric Co., 59 Colo. 66, 148 Pac. 254; Windsor Reservoir & Canal Co. *v.* Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729; Kerr *v.* Burns, 42 Colo. 285, 93 Pac. 1120. **Conn.**—O'Brien *v.* Doolittle, 91 Conn. 354, 99 Atl. 1055; Scott *v.* Scott, 83 Conn. 634, 78 Atl. 314. **D. C.**—Otis Elevator Co. *v.* George A. Fuller Co., 44 App. Cas. 287. **Fla.**—Johnson *v.* State, 60 Fla. 18, 54 So. 91; Prall *v.* Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. **Ga.**—Chatman *v.* Hodnett, 127 Ga. 360, 56 S. E. 439; Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721, 68 L. R. A. 736. **Idaho.**—Keane *v.* Pittsburg Lead Mining Co., 17 Idaho 179, 105 Pac. 60. **Ill.**—Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705; Silurian Oil Co. *v.* Neal, 277 Ill. 45, 115 N. E. 114; Chicago Title & Trust Co. *v.* Moody, 233 Ill. 634, 84 N. E. 656; Rogers *v.* Higgins, 57 Ill. 244. **Ind.**—Greenfield Gas Co. *v.* Trees, 165 Ind. 209, 75 N. E. 2; Marshall *v.* Stewart, 80 Ind. 189; Duncan *v.* Holcomb, 26 Ind. 378. **Ind. Ter.** Barbee *v.* Shannon, 1 Ind. Ter. 199, 40 S. W. 584. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027; Citizens' State Bank *v.* Snyder, 162 N. W. 6; Reynolds *v.* Lyon, 121 Iowa 733, 96 N. W. 1096. **Kan.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A. 1917F, 1006; Stroup *v.* Pepper, 69 Kan. 241, 76 Pac. 825; Security Investment Co. *v.* Richmond Nat. Bank, 58 Kan. 414, 49 Pac. 521. **Ky.**—Smith *v.* Smith, 179 Ky. 365, 200 S. W. 643; Maxwell's Trustee *v.* England, 115 Ky. 783, 74 S. W. 1091; Smith's Guardian *v.* Holtheide, 27 Ky. L. Rep. 51, 84 S. W. 346. **La.**—Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555; Brooks *v.* Magee, 126 La. 388, 52 So. 551; Hays' Succession, 49 La. Ann. 742, 22 So. 248. **Me.**—Rollins *v.* Blackden, 112 Me. 459, 92 Atl. 521, Ann. Cas. 1917A, 875; Corey *v.* Independent Ice Co., 106 Me. 485, 76 Atl. 930; Lynch *v.* Swanton, 53 Me. 100. **Md.** Emmert *v.* Middlekauff, 118 Md. 399, 84 Atl. 540; Blakistone *v.* State, 117 Md. 237, 83 Atl. 151; National Marine Bank *v.* Heller, 94 Md. 213, 50 Atl. 521. **Mass.**—Coughlin *v.* Rosen, 220 Mass. 220, 107 N. E. 914. **Mich.** Rausch *v.* Briefer, 138 Mich. 284, 101 N. W. 523; Blackman *v.* Simpson, 120 Mich. 377, 79 N. W. 573, 58 L. R. A. 410; Grimes *v.* Williams' Estate, 113 Mich. 450, 71 N. W. 835. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; Anderson *v.* Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045; Thompson *v.* Crosby, 62 Minn. 324, 64 N. W. 823. **Miss.**—Vinson *v.* Colonial & United States Mortgage Co., 116 Miss. 59, 76 So. 827; Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466; Scully *v.* Lowenstein & Bro., 56 Miss. 652. **Mo.**—Bierman *v.* Crecelius, 135 Mo. 386, 37 S. W. 121; Spurlock *v.* Missouri Pac. Ry. Co., 76 Mo. 67; Hill *v.* Dillon (Mo. App.), 183 S. W. 1088. **Mont.**—Howell *v.* Bent, 48 Mont. 268, 137 Pac. 49; Toole *v.* Weirick, 39 Mont. 359, 102 Pac. 590, 133 Am. St. Rep. 576. **Neb.**—Sheibley *v.* Fales, 81 Neb. 795, 116 N. W. 1035; Chicago, B. & Q. R. Co. *v.* Cass County,

adjudication operates as a res judicata of the fact in question it is

72 Neb. 489, 101 N. W. 11, 117 Am. St. Rep. 806; Upton *v.* Betts, 59 Neb. 724, 82 N. W. 19; Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444. **Nev.**—Gulling *v.* Washoe County Bank, 29 Nev. 257, 89 Pac. 25. **N. H.**—Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620; Kidd *v.* New York Security & Trust Co., 75 N. H. 154, 71 Atl. 878. **N. J.**—Gyarfas *v.* Karpf, 83 N. J. L. 387, 84 Atl. 1045; Clark Thread Co. *v.* Clark Co., 55 N. J. Eq. 658, 37 Atl. 599; Paterson *v.* Baker, 51 N. J. Eq. 49, 26 Atl. 324. **N. M.** First Nat. Bank *v.* Tome, 167 Pac. 733; Jahren *v.* Butler, 20 N. M. 119, 147 Pac. 280; Sandoval *v.* Albright, 14 N. M. 345, 93 Pac. 717. **N. Y.**—Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499; Rudd *v.* Cornell, 171 N. Y. 114, 63 N. E. 823; Fleischer *v.* Detroit Cadillac Motor Car Co., 165 N. Y. Supp. 245; People *ex rel.* Reilly *v.* Johnson, 37 Barb. 502. **N. C.**—Propst *v.* Caldwell, 172 N. C. 594, 90 S. E. 757; Southerland *v.* Atlantic Coast Line R. Co., 148 N. C. 442, 62 S. E. 517. **N. D.**—McHenry County *v.* Brady, 37 N. D. 59, 163 N. W. 540; Donovan *v.* Block, 17 N. D. 406, 117 N. W. 527. **Ohio.**—Grant *v.* Ramsey, 7 Ohio St. 157; Cleveland L. & W. Ry. Co. *v.* Reid, 6 Ohio Dec. 273, 4 Ohio N. P. 127; Baker *v.* Connor, 29 Ohio Cir. Ct. 711, *affirming* 74 Ohio 430, 78 N. E. 1116. **Okla.**—Bank of Chelsea *v.* School Dist. No. 1, 162 Pac. 809; Deming Inv. Co. *v.* Shannon, 162 Pac. 471; Woodworth *v.* Hennessey, 32 Okla. 267, 122 Pac. 224. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936; Cook *v.* Nolan, 87 Ore. 228, 170 Pac. 306; Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174. **Pa.**—*In re* Neafie's Est., 245 Pa. 576, 91 Atl. 958; *In re* Bowers' Estate, 240 Pa. 388, 87 Atl. 711; Pittsburg Const. Co. *v.* West Side Belt R. Co., 232 Pa. 578, 81 Atl. 884. **R. I.**—Perkins *v.* Kirby, 39 R. I. 343, 97 Atl. 884; Rhode Island Warehouse Co. *v.* H. W. Holt Mfg. Co., 36 R. I. 192, 89 Atl. 706. **S. C.**—Earle *v.* Greenville, 84 S. C. 193, 65 S. E. 1050; Aultman & Co. *v.* Utsey, 49 S. C. 399, 27 S. E. 405. **S. D.**—Davis *v.* Davis, 24 S. D. 474, 124 N. W. 715; Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416. **Tenn.**—Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498. **Tex.** Hermann *v.* Allen, 103 Tex. 382, 128 S. W. 115; Moore *v.* Snowball, 98 Tex. 16, 81 S. W. 5, 107 Am. St. Rep. 596, 66 L. R. A. 745; Delaney *v.* West (Tex. Civ. App.), 88 S. W. 275. **Utah.** Jeremy Fuel & Grain Co. *v.* Mellen, 165 Pac. 791; Jensen *v.* Montgomery, 29 Utah 89, 80 Pac. 504; Rio Grande W. Ry. Co. *v.* Telluride Power-Transmission Co., 23 Utah 22, 63 Pac. 995. **Vt.** Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184; Morey *v.* King, Fuller & Co., 49 Vt. 304. **Va.**—Hawes & Co. *v.* Wm. R. Trigg Co., 110 Va. 165, 65 S. E. 538; Baker *v.* Watts, 101 Va. 702, 44 S. E. 929; Sheldon *v.* Armstead's Admr., 7 Gratt. (48 Va.) 264. **Wash.**—Seattle *v.* Erickson, 99 Wash. 543, 169 Pac. 985; State *ex rel.* Gladwin *v.* Cheney, 67 Wash. 151, 121 Pac. 48; McGill *v.* W. P. Fuller & Co., 45 Wash. 615, 88 Pac. 1038. **W. Va.**—Koontz *v.* Mylius, 77 W. Va. 499, 87 S. E. 851; Hudson *v.* Iguano Land & Mining Co., 71 W. Va. 402, 76 S. E. 797; Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544. **Wis.**—Lutien *v.* City of Kewaunee, 151 Wis. 607, 139 N. W. 312; Arnold *v.* Randall, 124 Wis. 1, 102 N. W. 340; Wentworth *v.* Racine, 99 Wis. 26, 74 N. W. 551.

[a] "**When some controlling fact** or question material to the determination of both suits was adjudicated in the former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first suit will, if properly presented, be conclusive of the same fact or question in the second suit, irrespective of whether the cause of action is the same in both suits." Tudor *v.* Kennett, 87 Vt. 99, 88 Atl. 520.

[b] **The validity of a lease** from one defendant railroad company to another having been directly adjudicated in a suit in equity against the companies to compel the construction of a siding, cannot again be brought in issue in an action of trespass by the former plaintiff against one of the companies for discrimination in the matter of siding facilities. Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519.

[c] **A decree construing a writing** as a valid contract and not a testamentary devise held res judicata in a subsequent proceeding involving the liability of the property to an in-

necessary to determine whether such fact was actually in issue in the previous proceeding, and if so, whether it was in fact there adjudicated.[77]

B. MATTERS NOT LITIGATED. — The estoppel of the judgment as a res judicata does not extend to any matter which was not actually litigated and passed upon.[78]

heritance tax. Lewis *v.* Brown (Ia.), 166 N. W. 99.

[d] **Title to personal property** adjudicated. Jeremy Fuel & Grain Co. *v.* Mellen (Utah), 165 Pac. 791.

[e] **Construction of Lease.**—Silurian Oil Co. *v.* Neal, 277 Ill. 45, 115 N. E. 114.

77. See *infra*, this section.

78. **U. S.**—Vicksburg *v.* Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209; Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. ed. 1155; Lander *v.* Mercantile Bank, 186 U. S. 458, 22 Sup. Ct. 908, 46 L. ed. 1247; Dennison *v.* United States, 168 U. S. 241, 18 Sup. Ct. 57, 42 L. ed. 453, 33 Ct. Cl. 504; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Sutton *v.* Wentworth (C. C. A.), 247 Fed. 493; Pennsylvania Canal Co. *v.* Brown, 235 Fed. 669, 149 C. C. A. 89; Hanley *v.* Pacific Live Stock Co., 234 Fed. 522, 148 C. C. A. 288; United States & Mexican Trust Co. *v.* Kansas City, M. & O. Ry. Co., 240 Fed. 511. **Ala.**—New *v.* Driver, 180 Ala. 176, 60 So. 798; Saltmarsh *v.* Bower & Co., 34 Ala. 613. **Ark.** Massey *v.* Doke, 123 Ark. 211, 185 S. W. 271; Fogel *v.* Butler, 96 Ark. 87, 131 S. W. 211. **Cal.**—Downing *v.* Rademacher, 62 Pac. 1055. **Colo.**—Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4; La Fitte *v.* Salisbury, 22 Colo. App. 641, 126 Pac. 1104. **Conn.**—House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80. **D. C.**—American Bonding & Tr. Co. *v.* United States, 23 App. Cas. 535. **Fla.**—Croom *v.* Swann, 1 Fla. 211. **Ill.**—Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691; Doubet *v.* Doubet, 196 Ill. App. 289; Hubbard Milling Co. *v.* Roche, 133 Ill. App. 602. **Ind.** Anderson Bldg. L. F. & Sav. Assn. *v.* Hoppes, 90 Ind. 250; Busick *v.* Busick (Ind. App.), 115 N. E. 1025; Baltes Land, Stone & Oil Co. *v.* Sutton, 30 Ind. App. 648, 61 N. E. 1137, 66 N. E. 916. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027; Alt *v.* Young, 162 N. W. 195; Thomas *v.* McDaneld, 88 Iowa 374, 55 N. W. 499. **Kan.**—State *ex rel.* Coleman *v.* Leavenworth, 75 Kan. 787, 90 Pac. 237. **Ky.**—Brock *v.* Conkwright, 179 Ky. 555, 200 S. W. 962; Kelley *v.* Kelley's Exr., 141 Ky. 414, 132 S. W. 1031. **La.**—Darcourt *v.* Brunet, 139 La. 486, 71 So. 776; Wall *v.* Rabito, 138 La. 609, 70 So. 531; Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555; Askew *v.* Parker, 131 La. 753, 60 So. 233. **Me.** Pierce *v.* Rodliff, 95 Me. 346, 50 Atl. 32. **Mass.**—Conners Bros. Co. *v.* Sullivan, 220 Mass. 600, 108 N. E. 503; Bugbee *v.* Davis, 167 Mass. 33, 44 N. E. 1055; Porter *v.* Shaw, 98 Mass. 505. **Mich.**—Port Huron *v.* Wright, 150 Mich. 279, 114 N. W. 76; People *v.* Auditor General, 30 Mich. 12. **Minn.** State *v.* Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054; Orr *v.* Bennett, 135 Minn. 443, 161 N. W. 165; James *v.* Pettis, 134 Minn. 438, 159 N. W. 953. **Miss.**—Alexander *v.* Woods, 115 Miss. 164, 75 So. 772; Terry *v.* Hageman, 102 Miss. 224, 59 So. 75. **Mo.**—State *ex rel.* Blair *v.* Center Creek Mining Co., 262 Mo. 490, 171 S. W. 356; Watts *v.* Meyer (Mo. App.), 189 S. W. 29. **Neb.**—Douglas *v.* Smith, 75 Neb. 169, 106 N. W. 173; Chicago, B. & Q. R. Co. *v.* Cass County, 72 Neb. 489, 101 N. W. 11, 117 Am. St. Rep. 806; Anderson *v.* Kreidler, 56 Neb. 171, 76 N. W. 581. **Nev.**—McIntosh *v.* Knox, 40 Nev. 403, 165 Pac. 337. **N. J.** Ferry-Hallock Co. *v.* Progressive Paper Box Co., 76 N. J. Eq. 1, 73 Atl. 230. **N. Y.**—Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499; Tax Lien Co. *v.* Schultze, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915D, 1115; *In re* Anderson, 211 N. Y. 136, 105 N. E. 79; Yonkers Sav. Bank *v.* Fidelity & Casualty Co., 173 App. Div. 153, 159 N. Y. Supp. 840; First Nat. Bank *v.* Buffalo Brewing Co., 154 N. Y. Supp. 765. **N. C.** McKimmon, Currie & Co. *v.* Caulk, 170 N. C. 54, 86 S. E. 809. **N. D.**—Carter *v.* Carter, 14 N. D. 66, 103 N. W. 425. **Ohio.**—Binder *v.* Finkbone, 25 Ohio St. 103. **Okla.**—Henthorn *v.* Tidd, 164 Pac. 783. **Ore.**—Campbell's Automatic Safety Gas Burner Co. *v.* Hammer, 78

C. MATTERS WHICH MIGHT HAVE BEEN LITIGATED. — Where it is sought to apply the estoppel of a judgment rendered in one cause of action to matters arising in a suit upon a different cause of action the inquiry must always be as to the point actually litigated and determined in the original action,[78] since the adjudication is not operative

Ore. 612. 153 Pac. 475; Heilner *v.* Smith, 49 Ore. 14, 88 Pac. 299. **Pa.** Kicinko *v.* Petruska, 259 Pa. 1, 102 Atl. 286; Trustees of Proprietors of Kingston *v.* Lehigh Valley C. Co., 241 Pa. 469, 88 Atl. 763, 49 L. R. A. (N. S.) 557; *In re* Roney's Estate, 227 Pa. 127, 75 Atl. 1061; Black *v.* Nease, 37 Pa. 433. **R. I.**—Perkins *v.* Kirby, 39 R. I. 343, 97 Atl. 884; Messier *v.* Messier, 34 R. I. 233, 82 Atl. 996; Probate Court of Pawtucket *v.* Williams, 30 R. I. 144, 73 Atl. 382. **S. C.** Virginia-Carolina Chemical Co. *v.* Hunter, 104 S. C. 491, 89 S. E. 393; Kirven *v.* Virginia-Carolina Chemical Co., 77 S. C. 493, 58 S. E. 424; Odom *v.* Beverly, 32 S. C. 107, 10 S. E. 835. **S. D.**—Louder *v.* Hunter, 39 S. D. 206, 163 N. W. 686; Mosteller *v.* Holborn, 21 S. D. 547, 114 N. W. 693. **Tenn.** Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004. **Tex.**—West Texas Bank & Trust Co. *v.* Rice (Tex. Civ. App.), 185 S. W. 1047; Kountze *v.* Bonner, 12 Tex. Civ. App. 131, 34 S. W. 163. **Vt.**—Tudor *v.* Kennett, 87 Vt. 99, 88 Atl. 520; Wells *v.* Boston & M. R. R., 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. **Va.** Taylor *v.* Hedrick, 110 Va. 461, 66 S. E. 65; Tarter *v.* Wilson, 95 Va. 19, 27 S. E. 818. **Wash.**—Kessler *v.* Seattle, 93 Wash. 192, 160 Pac. 423; Hitchcock *v.* Nixon, 16 Wash. 281, 47 Pac. 412. **W. Va.**—State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650. **Wis.**—*In re* Hanlin's Est., 133 Wis. 140, 113 N. W. 411, 126 Am. St. Rep. 938, 17 L. R. A. (N. S.) 1189.

[a] **The confirmation of an executor's account** does not settle a right to accumulations where no question as to the accumulations was raised or passed on. *In re* Freeman's Estate, 227 Pa. 154, 161, 75 Atl. 1063, 1066.

79. **U. S.**—Owensboro *v.* Cumberland Tel. & Tel. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; Troxell *v.* Delaware L. & W. R. Co., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586; Southern Pac. R. Co. *v.* United States, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. ed. 307; Southern Pac. R. Co. *v.* United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202; Mason Lumber Company *v.* Buchtel, 101 U. S. 638, 25 L. ed. 1073; Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204; Sutton *v.* Wentworth (C. C. A.), 247 Fed. 493; Barnes *v.* Cady, 232 Fed. 318, 146 C. C. A. 366; Masters *v.* Rainier, 238 Fed. 827. **Ala.**—Hannis Distilling Co. *v.* Lanning, 191 Ala. 280, 68 So. 137; Hall & Farley *v.* Alabama Terminal & Imp. Co., 173 Ala. 398, 56 So. 235; Huntsville *v.* Goodenrath, 13 Ala. App. 579, 68 So. 676. **Cal.**—Lord *v.* Thomas, 102 Cal. xviii, 36 Pac. 372; People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036; Jacoby *v.* Peck, 23 Cal. App. 363, 138 Pac. 104. **Colo.**—Savage *v.* Central Electric Co., 59 Colo. 66, 148 Pac. 254. **Conn.**—Harris *v.* Weed, 89 Conn. 214, 93 Atl. 232; Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903; Scott *v.* Scott, 83 Conn. 634, 78 Atl. 314. **D. C.**—Otis Elevator Co. *v.* George A. Fuller Co., 44 App. Cas. 287; Carmody *v.* Simpson-Sullivan Co., 44 App. Cas. 39. **Fla.**—Prall *v.* Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. **Ill.**—Rogers *v.* Higgins, 57 Ill. 244. **Ind.**—Duncan *v.* Holcomb, 26 Ind. 378. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027. **Kan.**—Stroup *v.* Pepper, 69 Kan. 241, 76 Pac. 825. **La.**—Wall *v.* Rabito, 138 La. 609, 70 So. 531. **Md.**—Davidson Chemical Co. *v.* Andrew Miller Co., 122 Md. 134, 89 Atl. 401. **Miss.**—Terry *v.* Hageman, 102 Miss. 224, 59 So. 75; Hardy *v.* O'Pry, 102 Miss. 197, 59 So. 73; Scully *v.* Lowenstein & Bro., 56 Miss. 652. **Mo.**—Richardson *v.* Dell, 191 S. W. 63; Spurlock *v.* Missouri Pac. Ry. Co., 76 Mo. 67; Hill *v.* Dillon (Mo. App.), 183 S. W. 1088. **Neb.** Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444. **N. H.** Chesley *v.* Dunklee, 77 N. H. 263, 90 Atl. 965. **N. J.**—Lake *v.* Lake (N. J. Eq.), 89 Atl. 534; Schilstra *v.* Van Den Heuvel, 82 N. J. Eq. 155, 612, 90 Atl. 1056; *In re* Walsh's Est., 80 N. J. Eq. 565, 74 Atl. 563. **N. Y.**—Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E.

as to matters which might have been but were not put in issue and adjudicated.[80]

499; Tax Lien Co. *v.* Schultze, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915D, 1115; *In re* Anderson, 211 N. Y. 136, 105 N. E. 79; Finck *v.* Lamphere, 165 App. Div. 826, 151 N. Y. Supp. 174; Hazel *v.* Golden Eagle Assn., 96 Misc. 703, 161 N. Y. Supp. 91; Bonney *v.* Von Novelly, 164 N. Y. Supp. 42. **N. C.** McKimmon, Currie & Co. *v.* Caulk, 170 N. C. 54, 86 S. E. 809; Whitaker *v.* Garren, 167 N. C. 658, 83 S. E. 759. **Ohio.**—Cleveland L. & W. Ry. Co. *v.* Reid, 6 Ohio Dec. 273, 4 Ohio N. P. 127. **Okla.**—Bank of Chelsea *v.* School Dist. No. 1, 162 Pac. 809; Deming Inv. Co. *v.* Shannon, 162 Pac. 471; McDuffie *v.* Geiser Mfg. Co., 41 Okla. 488, 138 Pac. 1029. **Ore.**—Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174; Campbell's Automatic Safety Gas Burner Co. *v.* Hammer, 78 Ore. 612, 153 Pac. 475. **Pa.**—Kicinko *v.* Petruska, 259 Pa. 1, 102 Atl. 286; Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519. **R. I.** Perkins *v.* Kirby, 39 R. I. 343, 97 Atl. 884. **S. C.**—Cannon *v.* Cox, 98 S. C. 185, 82 S. E. 399. **Tenn.**—Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004. **Tex.** Wylie *v.* Langhorne, 45 Tex. Civ. App. 618, 101 S. W. 527. **Vt.**—Campbell *v.* Martin, 89 Vt. 214, 95 Atl. 494; Tudor *v.* Kennett, 87 Vt. 99, 88 Atl. 520; Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184. **W. Va.**—Pomeroy Nat. Bank *v.* Huntington Nat. Bank, 72 W. Va. 534, 79 S. E. 662; Hudson *v.* Iguano Land & Mining Co., 71 W. Va. 402, 76 S. E. 797. **Wis.**—Wentworth *v.* Racine, 99 Wis. 26, 74 N. W. 551. **Eng.**—Outram *v.* Morewood, 3 East 346, 102 Eng. Reprint 630.

[a] **A change in the controlling facts** since the former trial may defeat the estoppel. State *ex rel.* St. Paul *v.* Great Northern R. Co., 134 Minn. 249, 158 N. W. 972. And see: **Ind.**—Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417. **Ky.**—Newport *v.* Masonic Temple Assn., 103 Ky. 592, 45 S. W. 881, 46 S. W. 697. **Pa.**—Connery *v.* Brooke, 73 Pa. 80.

[a] **Tax Exemptions.**—"The mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed." New Orleans *v.* Citizens' Bank, 167 U. S. 371, 398, 17 Sup. Ct. 905, 42 L. ed. 202.

80. U. S.—Southern Pac. R. Co. *v.* United States, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. ed. 307; Dennison *v.* United States, 168 U. S. 241, 18 Sup. Ct. 57, 42 L. ed. 453, 33 Ct. Cl. 504; Cromwell *v.* County of Sac, 94 U. S. 351, 24 L. ed. 195; Sutton *v.* Wentworth (C. C. A.), 247 Fed. 493; Pennsylvania Canal Co. *v.* Brown, 235 Fed. 669, 149 C. C. A. 89. **Cal.**—Lord *v.* Thomas, 102 Cal. xviii, 36 Pac. 372. **Colo.**—Grand Valley Irr. Co. *v.* Fruita Imp. Co., 37 Colo. 483, 86 Pac. 324. **Fla.**—Prall *v.* Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. **Ill.** Baldwin *v.* Haneey, 204 Ill. 281, 68 N. E. 560; Rogers *v.* Higgins, 57 Ill. 244. **Ia.**—Everling *v.* Holcomb, 74 Iowa 722, 39 N. W. 117. **Kan.**—Stroup *v.* Pepper, 69 Kan. 241, 76 Pac. 825. **Mass.**—Foye *v.* Patch, 132 Mass. 105. **Miss.**—Hardy *v.* O'Pry, 102 Miss. 197, 59 So. 73; Scully *v.* Lowenstein & Bro., 56 Miss. 652. **Mo.**—Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188; Spurlock *v.* Missouri Pac. Ry. Co., 76 Mo. 67. **Neb.**—Gering *v.* School Dist. No. 28, 76 Neb. 219, 107 N. W. 250; Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444. **N. J.** Schilstra *v.* Van Den Heuvel, 82 N. J. Eq. 155, 612, 90 Atl. 1056; Clark Thread Co. *v.* Clark Co., 55 N. J. Eq. 658, 37 Atl. 599; Paterson *v.* Baker, 51 N. J. Eq. 49, 26 Atl. 324. **N. D.** Carter *v.* Carter, 14 N. D. 66, 103 N. W. 425. **Ohio.**—Cleveland L. & W. Ry. Co. *v.* Reid, 6 Ohio Dec. 273, 4 Ohio N. P. 127. **Ore.**—Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174. **Tenn.** Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004. **Vt.**—Campbell *v.* Martin, 89 Vt. 214, 95 Atl. 494; Tudor *v.* Kennett, 87 Vt. 99, 88 Atl. 520. **W. Va.**—Pomeroy Nat. Bank *v.* Huntington Nat. Bank, 72 W. Va. 534, 79 S. E. 662; Biern *v.* Ray, 49 W. Va. 129, 38 S. E. 530. **Wis.**—Wentworth *v.* Racine, 99 Wis. 26, 74 N. W. 551. **Eng.**—Howlett *v.* Tarte, 10 C. B. N. S. 813, 100

D. Matters in Issue. — 1. In General. — As may be seen from the rules above stated,[81] the conclusiveness of the judgment as res judicata is confined to matters in issue,[82] and an adjudication upon a matter not put in issue by the pleadings or otherwise cannot create an estoppel to litigate such matter in a subsequent action.[83]

E. C. L. 812, 31 L. J. C. P. 146, 9 W. R. 868, 142 Eng. Reprint 673.

See cases in preceding note, and *supra*, VI, A.

[a] **The reason for the rule** has been thus stated by the United States supreme court: "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction." Cromwell *v.* County of Sac, 94 U. S. 351, 356, 24 L. ed. 195.

[b] **A purchaser of bonds** is not estopped from showing that he acquired them for value before maturity, by a prior judgment in another action between the parties concerning bonds of the same series, wherein it was held that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value. Cromwell *v.* County of Sac, 94 U. S. 351, 24 L. ed. 195.

81. See *supra*, VI, B and C.

82. U. S.—Barnes *v.* Cady, 232 Fed. 318, 146 C. C. A. 366. **Cal.**—People *v.* Los Angeles Ry. Corporation, 168 Cal. 406, 143 Pac. 739; Wardlow *v.* Middleton, 156 Cal. 585, 105 Pac. 738; Ahlers *v.* Smiley, 11 Cal. App. 343, 104 Pac. 997. **Colo.**—Campbell *v.* Milliken, 20 Colo. App. 299, 78 Pac. 620. **Conn.**—*In re* Nichols, 78 Conn. 429, 62 Atl. 610; Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **D. C.**—Carmody *v.* Simpson-Sullivan Co., 44 App. Cas. 39. **Ill.**—Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691; Stone *v.* Salisbury, 209 Ill. 56, 70 N. E. 605; Robinson & Co. *v.* Marr, 181 Ill. App. 605. **Ia.**—J. J. Smith Lumber Co. *v.* Sisters of Charity, 146 Iowa 454, 125 N. W. 214. **Kan.** State *ex rel.* Coleman *v.* Leavenworth, 75 Kan. 787, 90 Pac. 237. **Ky.**—Campbell *v.* Mims, 161 Ky. 530, 170 S. W. 1176. **La.**—Sharp *v.* Zeller, 114 La. 549, 38 So. 449. **Mass.**—Conners Bros. Co. *v.* Sullivan, 220 Mass. 600, 108 N. E. 503; Harrington *v.* Harrington, 189 Mass. 281, 75 N. E. 632. **Mich.** Reed *v.* Whipple, 140 Mich. 7, 103 N. W. 548; Cockerline *v.* Fisher, 140 Mich. 95, 103 N. W. 522. **Minn.**—Alexander *v.* Thompson, 101 Minn. 5, 111 N. W. 385; Hibbs *v.* Marpe, 84 Minn. 10, 86 N. W. 612. **Miss.**—Brothers *v.* Beck, 75 Miss. 482, 22 So. 944. **Mo.** Hickerson *v.* Mexico, 58 Mo. 61; La Rue *v.* Kempf, 186 Mo. App. 57, 171 S. W. 588; Pierce *v.* Pierce, 139 Mo. App. 416, 122 S. W. 1147. **Mont.** Sloan *v.* Byers, 37 Mont. 503, 97 Pac. 855. **N. H.**—Boston & M. R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688. **N. J.**—*In re* Walsh's Est., 80 N. J. Eq. 565, 74 Atl. 563; Ferry-Hallock Co. *v.* Progressive Paper Box Co., 76 N. J. Eq. 338, 75 Atl. 1100. **N. C.** Tyler *v.* Mahoney, 166 N. C. 509, 82 S. E. 870; Roanoke Rapids Power Co. *v.* Roanoke Navigation & Water Power Co., 152 N. C. 472, 68 S. E. 190. **Ore.** Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174; Adams *v.* Church, 42 Ore. 270, 70 Pac. 1037, 95 Am. St. Rep. 740, 59 L. R. A. 782. **Pa.**—Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519; *In re* Metzger's Est., 222 Pa. 276, 71 Atl. 96. **S. D.**—Mosteller *v.* Holborn, 21 S. D. 547, 114 N. W. 693. **Tenn.** Johnston *v.* Osmont, 59 S. W. 644; Upchurch *v.* Anderson (Tenn. Ch.), 52 S. W. 917. **Tex.**—Hermann *v.* Allen, 103 Tex. 382, 128 S. W. 115; Norris *v.* W. C. Belcher Land Mortg. Co., 98 Tex. 176, 82 S. W. 500, 83 S. W. 799. **Va.**—Taylor *v.* Hedrick, 110 Va. 461, 66 S. E. 65; Tarter *v.* Wilson, 95 Va. 19, 27 S. E. 818. **Wash.**—Chehalis *v.* Robinson, 87 Wash. 690, 152 Pac. 696. **Wis.**—*In re* Ryan's Estate, 157 Wis. 576, 147 N. W. 993, Ann. Cas. 1916D, 840, L. R. A. 1917A, 443.

83. Cal.—Wardlow *v.* Middleton, 156 Cal. 585, 105 Pac. 738. **Ill.**—Robinson

2. Directly in Issue. — The principle is further limited to the extent that the point or question must have been directly in issue,[84] for the judgment is not evidence of any matter which came collaterally or incidentally in question.[85] Although it is sometimes diffi-

& Co. *v.* Marr, 181 Ill. App. 605. **Wash.** O'Brien *v.* Allen, 42 Wash. 393, 85 Pac. 8. See cases in preceding note.

84. **Ala.**—Schillinger *v.* Leary, 77 So. 846. **Cal.**—Ahlers *v.* Smiley, 11 Cal. App. 343, 104 Pac. 997; Lowe *v.* Ozmun, 3 Cal. App. 387, 86 Pac. 729. **Conn.**—Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903. **Ga.**—Bonds *v.* Brown, 133 Ga. 451, 66 S. E. 156. **Minn.**—Neilson *v.* Pennsylvania Coal & Oil Co., 78 Minn. 113, 80 N. W. 859. **N. H.**—Eastman *v.* Barker, 98 Atl. 65. **Pa.**—Kicinko *v.* Petruska, 259 Pa. 1, 102 Atl. 286; Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519; *In re* Metzger's Estate, 222 Pa. 276, 71 Atl. 96. **Tenn.**—Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004. **Tex.**—Wylie *v.* Laughorne, 45 Tex. Civ. App. 618, 101 S. W. 527. **Utah.**—Jeremy Fuel & Grain Co. *v.* Mellen, 165 Pac. 791. **Vt.** Wells *v.* Boston & M. R. R., 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987.

85. **Ala.**—Watts *v.* Rice, 75 Ala. 289; Ford *v.* Ford's Admr., 68 Ala. 141. **Ark.**—Shall *v.* Briscoe, 18 Ark. 142. **Cal.**—Collins *v.* Gray, 154 Cal. 131, 97 Pac. 142; *In re* Freud's Estate, 134 Cal. 333, 66 Pac. 476; Ahlers *v.* Smiley, 11 Cal. App. 343, 104 Pac. 997. **Colo.**—Campbell *v.* Milliken, 20 Colo. App. 299, 78 Pac. 620. **Conn.**—Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903; Dickinson *v.* Hayes, 31 Conn. 417; Kennedy *v.* Scovil, 14 Conn. 61. **Ga.**—Bonds *v.* Brown, 133 Ga. 451, 66 S. E. 156; Brady *v.* Pryor, 69 Ga. 691. **Ill.**—Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691; Smith *v.* Roundtree, 185 Ill. 219, 56 N. E. 1130. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027; Haight *v.* Keokuk, 4 Iowa 199. **Kan.**—State *v.* Hornaday, 62 Kan. 334, 62 Pac. 998. **Me.**—Howard *v.* Kimball, 65 Me. 308. **Md.**—Singery *v.* Attorney General, 2 Har. & J. 487. **Mass.**—Smith *v.* Stoughton, 185 Mass. 329, 70 N. E. 195; Dallinger *v.* Richardson, 176 Mass. 77, 57 N. E. 224; Eastman *v.* Cooper, 15 Pick. 276, 26 Am. Dec. 600. **Mich.**—Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495. **Minn.**—State *v.* Brooks-Scanlon Lumb. Co., 137 Minn. 71, 162 N. W. 1054; Marvin *v.* Dutcher, 26 Minn. 391, 4 N. W. 685. **Miss.** Union & Planters' Bank *v.* Allen, 77 Miss. 442, 27 So. 631. **Mo.**—State *v.* Butler, 164 Mo. 214, 64 S. W. 176. **N. H.**—Metcalf *v.* Gilmore, 63 N. H. 174; Moulton *v.* Libbey, 15 N. H. 480. **N. J.**—Mullaney *v.* Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086. **N. Y.**—*In re* Locust Ave., 185 N. Y. 115, 77 N. E. 1012; Belden *v.* State, 103 N. Y. 1, 8 N. E. 363; Russ *v.* Maxwell, 94 App. Div. 107, 87 N. Y. Supp. 1077. **N. D.** Sobolisk *v.* Jacobson, 6 N. D. 175, 69 N. W. 46. **Ohio.**—Gatch *v.* Simpkins, 25 Ohio St. 89. **Ore.**—La Follett *v.* Mitchell, 42 Ore. 465, 69 Pac. 916, 95 Am. St. Rep. 780. **Pa.**—Kicinko *v.* Petruska, 259 Pa. 1, 102 Atl. 286; Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519; *In re* Metzger's Estate, 222 Pa. 276, 71 Atl. 96; Cavanaugh *v.* Buehler, 120 Pa. 441, 14 Atl. 391. **Tex.** State *v.* O'Connor, 74 S. W. 899; Ellerd *v.* Ellison (Tex. Civ. App.), 165 S. W. 876. **Vt.**—Wells *v.* Boston & M. R. R., 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. **Va.**—Houck's Admr. *v.* Kerfoot's Admr., 99 Va. 658, 39 S. E. 590; Early *v.* Garland's Lessee, 13 Gratt. (54 Va.) 1. **Wash.**—McGee *v.* Wineholt, 23 Wash. 748, 63 Pac. 571. **W. Va.**—Henry *v.* Davis, 13 W. Va. 230.

[a] **A question raised by answer** as to the purpose in transferring notes, is not res judicata where it was apparently not made an issue, had no bearing on the judgment, and was not directly adjudicated. Haines *v.* M. S. Welker & Co. (Ia.), 165 N. W. 1027.

[b] **The court of chancery** has power to decide a question beyond its jurisdiction, when it arises incidentally or collaterally in a suit within its jurisdiction, which decision, however, has no force as res judicata. Platt *v.* Johnson, 87 N. J. Eq. 403, 101 Atl. 1035.

[c] **In distress for rent, title** can only be passed on incidentally or collaterally, and so cannot become res

cult to determine when a particular issue is of sufficient dignity to be covered by the rule of estoppel,[86] it may be said, in general, that the point must be material and traversible,[87] and be of such nature that without the existence, proof or admission thereof the verdict, findings and judgment could not have been rendered.[88] No judgment, in other words, can create an estoppel to relitigate matter which has no bearing upon whether such judgment should be entered,[89] for a fact cannot be directly in issue when the judgment can be correct whether that fact exists or not.[90]

judicata. Fordham *v.* Hicks, 240 Fed. 751.

[d] **Matters of Inducement.**—Where a bill of sale came into the prior suit merely as a matter of inducement, and was not an element of the issue raised by the declaration, nor was any question regarding it presented to the court or found by the jury, but its existence as a writing was shown by its production and its validity assumed, the question of its validity is not precluded by the former adjudication. Tudor *v.* Kennett, 87 Vt. 99, 88 Atl. 520.

[e] **Validity of Antenuptial Contract.**—A bill by executors to obtain an assignment of a homestead to the widow contained an allegation respecting the execution of an antenuptial contract, but no relief in regard to it was prayed for. The answer denied the allegation, but the record contained no further reference to the matter. The reference to the contract in the bill seems to have been made merely for the purpose of showing that the homestead right was exempted from the terms of the agreement. In a subsequent suit by the widow to cancel the contract, the question of its validity was held not res judicata. Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691.

86. Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193.

87. Landon *v.* Clark, 221 Fed. 841, 137 C. C. A. 399; Schillinger *v.* Leary (Ala.), 77 So. 846.

88. **Ia.**—J. J. Smith Lumber Co. *v.* Sisters of Charity, 146 Iowa 454, 125 N. W. 214. **Me.**—Tremblay *v.* Aetna Life Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521. **Mass.**—Waterhouse *v.* Levine, 182 Mass. 407, 65 N. E. 822; Sly *v.* Hunt, 159 Mass. 151, 34 N. E. 187, 38 Am. St. Rep. 403, 21 L. R. A. 680; Leonard *v.* Whitney, 109 Mass. 265. **Minn.**—State *ex rel.* St. Paul *v.* Great Northern R. Co., 134 Minn. 249, 158 N. W. 972; Neilson *v.* Pennsylvania Coal & Oil Co., 78 Minn. 113, 80 N. W. 859. **Mo.**—La Rue *v.* Kempf, 186 Mo. App. 57, 171 S. W. 588. **N. J.**—*In re* Walsh's Estate, 80 N. J. Eq. 565, 74 Atl. 563; Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 Atl. 472; Paterson *v.* Baker, 51 N. J. Eq. 49, 54, 26 Atl. 324. **Ore.**—Stillwell *v.* Hill, 87 Ore. 112, 169 Pac. 1174. **Pa.** Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519. **R. I.**—Perkins *v.* Kirby, 39 R. I. 343, 97 Atl. 884. **S. D.**—Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416. **Tex.**—West Texas Bank & Trust Co. *v.* Rice (Tex. Civ. App.), 185 S. W. 1047; Manning *v.* Green, 56 Tex. Civ. App. 579, 121 S. W. 721. **Vt.** Wells *v.* Boston & M. R. R., 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987; Town *v.* Lamphere, 34 Vt. 365.

[a] **Whatever it was necessary for the jury to find** in order to warrant the verdict, and nothing further, is concluded. Town *v.* Lamphere, 34 Vt. 365.

89. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027. **Minn.**—State *ex rel.* St. Paul *v.* Great Northern R. Co., 134 Minn. 249, 158 N. W. 972. **Tex.**—Word *v.* Colley (Tex. Civ. App.), 173 S. W. 629.

[a] **In an action on a note** the defendant injected into his answer an allegation that the notes had been wrongfully transferred with intent to deprive the maker of the notes of his rights under the exemption laws. Such fact was not directly adjudicated nor could it have any bearing on plaintiff's right to recover on the notes. Haines *v.* M. S. Welker & Co. (Ia.), 165 N. W. 1027.

90. **Cal.**—Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472. **Conn.**—Hotchkiss *v.* Nichols, 3 Day 138. **Minn.** Irish American Bank *v.* Ludlum, 56

3. Determining Matters in Issue. — a. *Technically in Issue by Pleadings.* — A point distinctly raised by the pleadings and passed upon by the court is res judicata,[91] though no evidence was introduced to sustain the point,[92] nor findings made in reference thereto,[93] and although it was not strictly necessary for the court to pass upon the point.[94]

b. *Matters Not Technically in Issue.* — **(I.) In General.** — It is not indispensable to the operation of res judicata that the point or question adjudicated be put technically in issue by the pleadings, for although a particular matter is not necessarily involved in the issue yet if the issue is broad enough to cover it and it actually arose and was determined it may then be connected with the record by evidence aliunde.[95]

Minn. 317, 57 N. W. 927. **Miss.** Lorance *v.* Platt, 67 Miss. 183, 6 So. 772. **N. Y.**—House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595; Stannard *v.* Hubbell, 123 N. Y. 520, 25 N. E. 1084. **Ohio.** — Zanesville Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60. **Pa.**—Cavanaugh *v.* Buehler, 120 Pa. 441, 14 Atl. 391; Tams *v.* Lewis, 42 Pa. 402. **S. C.**—Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304. **W. Va.** Doonan *v.* Glynn, 28 W. Va. 715.

91. **U. S.**—Fayerweather *v.* Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. ed. 193; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63; Masters *v.* Rainier, 238 Fed. 827. **Ala.**—Cowan *v.* Staggs, 178 Ala. 144, 59 So. 153. **Cal.** Lamb *v.* Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; Kline *v.* Mohr, 142 Cal. 673, 76 Pac. 650. **Conn.**—Harris *v.* Weed, 89 Conn. 214, 93 Atl. 232. **Ga.**—Brown *v.* Wilson, 56 Ga. 534; Acree *v.* Bandy, 20 Ga. App. 133, 92 S. E. 765; Fowler *v.* Davis, 1 Ga. App. 549, 57 S. E. 939. **Ill.** Witzke *v.* Greer, 195 Ill. App. 206. **Kan.**—Redden *v.* Metzger, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97. **Mo.** Raymond *v.* Love, 192 Mo. App. 396, 180 S. W. 1054. **Neb.**—State *v.* Broatch, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477. **N. H.**—Kidd *v.* New York Security & Trust Co., 75 N. H. 154, 71 Atl. 878. **Nev.**—McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124. **N. Y.** Roarty *v.* McDermott, 146 N. Y. 296, 41 N. E. 30. **N. C.**—McKinnon, Currie & Co. *v.* Caulk, 170 N. C. 54, 86 S. E. 809. **R. I.**—Rhode Island Warehouse Co. *v.* W. H. Holt Mfg. Co., 36 R. I. 192, 89 Atl. 706. **Tenn.**—Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004. **Tex.** Hermann *v.* Allen, 103 Tex. 382, 128 S. W. 115; American Cotton Co. *v.* Heierman & Bro., 37 Tex. Civ. App. 312, 83 S. W. 845; McGrady *v.* Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

See also *supra*, VI, D, 2.

92. Confectioners' Mach. & Mfg. Co. *v.* Racine E. & M. Co., 163 Fed. 914, *affirming* 170 Fed. 1020; Hermann *v.* Allen, 103 Tex. 382, 128 S. W. 115.

93. Johnson *v.* Gillett (Okla.), 168 Pac. 1031; Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193.

[a] **Where a question of fraud** on the part of defendants is raised and conflicting evidence on the point is introduced, a general decree in favor of the defendants will conclude the issue of fraud, though no special findings thereon are made by the court. Kidd *v.* New York Security & Trust Co., 75 N. H. 154, 71 Atl. 878.

94. Alexander *v.* Worthington, 5 Md. 471; Green *v.* Edwards, 31 R. I. 1, 77 Atl. 188, Ann. Cas. 1912B, 41; Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654.

[a] "**All that is required,** therefore, to establish the authority of any decision is, that the '*very point*' decided was 'actually before' the mind of the court, and was 'investigated with care and considered in its fullest extent.'" When a question is presented by a bill in equity urged and relied upon in the argument, and passed upon by the court in the opinion, it cannot with reason be said that the point was not involved and the opinion of the court on the question is obiter dictum. Alexander *v.* Worthington, 5 Md. 471.

95. **Ala.**—Chamberlain *v.* Gaillard, 26 Ala. 504. See Hall & Farley *v.* Alabama Terminal & Imp. Co., 173 Ala.

(II.) Inference From Judgment. — (A.) NECESSARILY INVOLVED IN JUDGMENT. — It is not necessary to the conclusiveness of the decision that the issue should have been taken in the former action upon the precise point which it is proposed to controvert in the subsequent suit. It is enough if that point was essential to the former judgment,[96] and can be drawn by inevitable inference from such judgment.[97]

398, 56 So. 235; Gilbreath *v.* Jones, 66 Ala. 129. **Cal.**—Ivancovich *v.* Weileman, 144 Cal. 757, 78 Pac. 268. **Ga.** Ashley *v.* Cook, 109 Ga. 653, 35 S. E. 89; Hidell *v.* Funkhouser, 96 Ga. 85, 22 S. E. 708. **Ill.**—Campbell *v.* Wilson, 195 Ill. 284, 63 N. E. 103; Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579. **Ind.**—Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058. **Ia.**—Muecke *v.* Barrett, 104 Iowa 413, 73 N. W. 880. **Kan.** Redden *v.* Metzger, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97. **La.** Logan *v.* Herbert, 30 La. Ann. 727. **Me.**—Young *v.* Pritchard, 75 Me. 513. **Md.**—Trayhern *v.* Colburn, 66 Md. 277, 7 Atl. 459. **Mass.**—Foye *v.* Patch, 132 Mass. 105; Baxter *v.* New England Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125. **Minn.**—Johnson *v.* Johnson, 57 Minn. 100, 58 N. W. 824. **Miss.** Moody *v.* Harper, 38 Miss. 599. **Mo.** Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421. **Neb.**—Upton *v.* Betts, 50 Neb. 724, 82 N. W. 19. **Nev.**—Sherman *v.* Dilley, 3 Nev. 21. **N. J.**—Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563; Breckenridge *v.* Delaware, L. & W. R. Co., 58 N. J. Eq. 581, 43 Atl. 1097. **N. Y.**—Lorillard *v.* Clyde, 102 N. Y. 59, 6 N. E. 104; Pray *v.* Hegeman, 98 N. Y. 351. **N. C.**—Propst *v.* Caldwell, 172 N. C. 594, 90 S. E. 757; Best *v.* British American Mortgage Co., 133 N. C. 20, 45 S. E. 343; Bennett *v.* Holmes, 18 N. C. 486. **Ohio.**—Hazzard *v.* Nottingham, Tapp. 146, 192. **Okla.**—Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976. **Ore.**—White *v.* Ladd, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732. **Pa.**—Wetherald *v.* Van Stavoren, 125 Pa. 535, 17 Atl. 450; Cyphert *v.* McClune, 22 Pa. 195. **S. C.** Edwards *v.* Edwards, 11 Rich. L. 537. **Tex.**—Oldham *v.* McIver, 49 Tex. 556. **Wash.**—Vulcan Iron Works *v.* Kent Lumber Co., 39 Wash. 435, 81 Pac. 913; Lilly *v.* Eklund, 37 Wash. 532, 79 Pac. 1107.

96. U. S.—Owensboro *v.* Cumberland Tel. & Tel. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; Southern Pac. R. Co. *v.* United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355. **Okla.** Johnson *v.* Gillett, 168 Pac. 1031. **Tex.** Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193. **Vt.**—Wells *v.* Boston & M. R. R., 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. **Wis.**—Suprs. of Iowa County *v.* Mineral Point R. Co., 24 Wis. 93.

[a] **Fact of Subrogation.** — Where an assignor pays off a mortgage and his assignee in a suit brought thereafter is allowed to recover the amount so paid, that adjudication necessarily includes a finding that the assignor is not a volunteer and forecloses the question as to whether the assignee is entitled to subrogation to the rights of the mortgagees whose mortgage lien was discharged. Johnson *v.* Gillett (Okla.), 168 Pac. 1031.

[b] **Death Without Issue.**—A decree awarding surviving husband one-half of a child's portion involves a finding that the wife died without issue, and it will be presumed that the court heard evidence on the point, particularly where the pleadings contain an allegation as to the husband's title. Such issue is therefore concluded by the decree and cannot be relitigated by his successors in interest. Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193.

[c] **Presumptions.**—"The judgment of a court is only presumptively conclusive when it appears that the suit and the issues were of such a character that the judgment relied upon to show former adjudication of the questions involved in the issues could not have been rendered without deciding the particular questions again presented by the issues of the case under consideration." Paul *v.* Barnbrook, 58 Ind. App. 607, 106 N. E. 425.

97. U. S.—Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63. **Ala.**—Perry *v.* King, 117 Ala. 533, 23 So. 783; Hutchinson *v.* Dearing, 20 Ala. 798. **Cal.**—Reed *v.* Cross, 116 Cal. 473, 48 Pac. 491; Hayes *v.* Shattuck, 21 Cal. 51; Guiffre *v.* Lauricella, 25

(B.) INFERENCE BY ARGUMENT. — Matters are not concluded, however, which can be inferred only by argument from the judgment,[98] and

Cal. App. 422, 143 Pac. 1061. **Colo.** Ironstone Ditch Co. *v.* Ashenfelter, 57 Colo. 31, 140 Pac. 177. **Conn.**—Harris *v.* Weed, 89 Conn. 214, 93 Atl. 232; Kashman *v.* Parsons, 79 Conn. 295, 39 Atl. 179; Sargent & Co. *v.* New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543. **Ga.**—Maynard *v.* Newton, 116 Ga. 195, 42 S. E. 376; Vaughn *v.* Drewry, 79 Ga. 761, 4 S. E. 879. **Idaho.** Elliott *v.* Porter, 6 Idaho 684, 59 Pac. 360. **Ill.**—Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 164 Ill. 88, 45 N. E. 488; Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Mueller *v.* Henning, 102 Ill. 646. **Ind.**—Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058. **Ia.**—Ostby *v.* Secor, 94 N. W. 571; Keokuk State Nat. Bank *v.* Northwestern Union Packet Co., 35 Iowa 226. **Kan.**—Bleakley *v.* Barclay, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230; Sanford *v.* Oberlin College, 50 Kan. 342, 31 Pac. 1089. **Ky.**—Geo. T. Stagg Co. *v.* E. H. Taylor, Jr. & Sons, 113 Ky. 709, 68 S. W. 862; Lee *v.* Hughes, 25 Ky. L. Rep. 1201, 77 S. W. 386; Sorrell *v.* Samuels, 20 Ky. L. Rep. 1498, 49 S. W. 762. **La.**—Hamlet *v.* Fletcher, Wesenberg & Co., 36 La. Ann. 551; Neidhardt *v.* Hunterheimer, 24 La. Ann. 174. **Md.**—Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218. **Mass.**—Duncan *v.* Bancroft, 110 Mass. 267; Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733. **Mich.**—Gould *v.* Vaughan, 30 Mich. 376. **Mo.**—Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421. **Neb.**—Shelby *v.* Creighton, 65 Neb. 485, 91 N. W. 369, 101 Am. St. Rep. 630. **N. J.**—Manning *v.* Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802; Warren County School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115. **N. Y.**—Thayer *v.* Cable, 165 N. Y. 632, 59 N. E. 1131; Tuska *v.* O'Brien, 68 N. Y. 446; Conant *v.* Jones, 50 App. Div. 336, 64 N. Y. Supp. 189. **N. C.** Windley *v.* Bonner, 99 N. C. 54, 5 S. E. 233. **Ohio.**—Goodman *v.* Hailes, 59 Ohio St. 342, 52 N. E. 829. **Okla.**—Johnson *v.* Gillett, 168 Pac. 1031. **Ore.**—Caseday *v.* Lindstrom, 44 Ore. 309, 75 Pac. 222. **Pa.**—People's Water Co. *v.* Pittston, 241 Pa. 208, 88 Atl. 503; Bell *v.* Allegheny, 184 Pa. 296, 39 Atl. 227, 63 Am. St. Rep. 795; Schenck's Appeal, 94 Pa. 37. **R. I.**—Bradford *v.* Burgess, 20 R. I. 290, 38 Atl. 975. **S. C.**—Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745; Faust *v.* Faust, 31 S. C. 576, 10 S. E. 262. **S. D.**—Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803. **Tenn.**—Daniel *v.* Gum, 45 S. W. 468; Eakin *v.* Riddle, 127 Tenn. 426, 155 S. W. 166. **Tex.** Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; Shook *v.* Shook (Tex. Civ. App.), 145 S. W. 699; Norton *v.* Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025; Hammer *v.* Woods, 6 Tex. Civ. App. 179, 24 S. W. 942. **Vt.**—Perkins *v.* Walker, 19 Vt. 144; St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246. **Va.**—Findlay *v.* Trigg's Admr., 83 Va. 539, 3 S. E. 142. **Wash.** State *v.* Headlee, 18 Wash. 220, 51 Pac. 369. **W. Va.**—Blake *v.* Ohio River Co., 47 W. Va. 520, 35 S. E. 953. **Wis.** McFarland *v.* Rogers, 1 Wis. 452.

And see cases under preceding note.

[a] "**The estoppel is not confined to the judgment, but extends to all facts involved in it** as necessary steps or the ground work upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands 'upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.'" Burlen *v.* Shannon, 99 Mass. 200.

[b] "**But such an inference must be inevitable** or it cannot be drawn." Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

98. **Ala.**—Callan *v.* Anderson, 131 Ala. 228, 31 So. 427; McCravey *v.* Remson, 19 Ala. 430, 54 Am. Dec. 194. **Conn.**—Dickinson *v.* Hayes, 31 Conn. 417; Crandall *v.* Gallup, 12 Conn. 365. **Ga.**—Bonds *v.* Brown, 133 Ga. 451, 66 S. E. 156; Evans *v.* Birge, 11 Ga. 265. **Ill.**—Kitson *v.* Farewell, 132 Ill. 327, 23 N. E. 1024; First Nat. Bank *v.* Burkett, 101 Ill. 391, 40 Am. Rep. 209; Wahle *v.* Wahle, 71 Ill. 510; Weidner *v.* Lund, 105 Ill. App. 454. **Kan.** Hudson *v.* Remington Paper Co., 71 Kan. 300, 80 Pac. 568. **Md.**—Emmert *v.* Stouffer, 64 Md. 543, 3 Atl. 293, 6 Atl. 177. **Mass.**—Watts *v.* Watts,

which might or might not constitute the true ground of recovery,[99] no matter how specifically passed upon by the court.[1]

(III.) Matters Voluntarily Submitted for Determination. — It has been held that a question which by the petition of a party is voluntarily submitted to adjudication and is not technically put in issue by defendant's pleadings is nevertheless, res judicata when determined by the court.[2]

c. *Matters of Evidence.* — Facts which are offered in evidence to establish the issue presented are not themselves in issue and the judgment is no evidence in regard to them.[3]

d. *Matters Withdrawn or Dismissed.* — Matters once in issue but which were subsequently and before judgment withdrawn or withheld[4] or dismissed[5] are not res judicata, particularly where the jury

160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187; Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110; Eastman *v.* Cooper, 15 Pick. 276, 26 Am. Dec. 600. **Miss.**—Adams *v.* Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. **Mo.**—Ridgley *v.* Stillwell, 27 Mo. 128; La Rue *v.* Kempf, 186 Mo. App. 57, 171 S. W. 588. **N. Y.**—People *v.* Hall, 104 N. Y. 170, 10 N. E. 135. **N. C.**—*In re* Thomas, 111 N. C. 409, 16 S. E. 226; Long *v.* Baugas, 24 N. C. 290, 38 Am. Dec. 694. **Pa.**—Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519; Lentz *v.* Wallace, 17 Pa. 412, 55 Am. Dec. 569; Kapp *v.* Shields, 17 Pa. Super. 524. **Tenn.**—Vance *v.* McNabb Coal & Coke Co., 48 S. W. 235. **Tex.** Eans *v.* Sawyer, 27 Tex. 448; Morris *v.* Housley (Tex. Civ. App.), 47 S. W. 846. **Vt.**—Wells *v.* Boston & M. R. R., 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. **Wash.**—Budlong *v.* Budlong, 32 Wash. 672, 73 Pac. 783. **W. Va.** Windon *v.* Stewart, 48 W. Va. 488, 37 S. E. 603. **Wis.**—Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

99. First Nat. Bank *v.* Burkett, 101 Ill. 391, 40 Am. Rep. 209.

1. Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519.

2. Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466.

[a] **Rule Illustrated.**—In a partition suit, the widow of one of the heirs as party complainant, voluntarily submitted for adjudication her rights as against her daughter, adopted in another state. No issue was joined on the question. But the court passed upon it, erroneously holding that the daughter was entitled to inherit a portion of her father's estate. No appeal was taken. In a subsequent proceeding concerning the estate this point was held res judicata. A strong dissenting opinion was rendered. Fisher *v.* Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466.

3. **U. S.**—Smith *v.* Ontario, 4 Fed. 386, 390, 18 Blatchf. 454. **Minn.**—Marvin *v.* Dutcher, 26 Minn. 391, 4 N. W. 685. **N. Y.**—House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595; Belden *v.* State, 103 N. Y. 1, 8 N. E. 363. **Pa.**—Cavanaugh *v.* Buehler, 120 Pa. 441, 14 Atl. 391.

4. **U. S.**—Dettering *v.* Nordstrom, 148 Fed. 81, 78 C. C. A. 157. **Cal.** Southern Pac. Co. *v.* Edmunds, 168 Cal. 415, 143 Pac. 597. **Md.**—Davidson Chemical Co. *v.* Andrew Miller Co., 122 Md. 134, 89 Atl. 401. **S. C.**—Kirven *v.* Virginia-Carolina Chemical Co., 77 S. C. 493, 58 S. E. 424.

[a] **A judgment on an auditor's report** is not conclusive of matters which the plaintiff withheld from the consideration of the auditor. Stratton *v.* Holden & Martin, 91 Vt. 1, 99 Atl. 272.

[b] **Damages in Injunction.**—Where in dismissing a suit, in which an injunction had been awarded, the court does not determine the question of damages, that matter is not res judicata. Alexander *v.* Woods, 115 Miss. 164, 75 So. 772.

[c] **Though subsequently submitted to the jury** the matter is not concluded if not passed upon by the jury. Davidson Chemical Co. *v.* Andrew Miller Co., 122 Md. 134, 89 Atl. 401.

5. Roberts *v.* Dotson, 176 Ky. 278,

is specifically instructed that such points are not in issue.[6]

E. MATTERS ADJUDICATED. — **1. In General.** — The breadth of the judgment is measured by the adjudications therein contained,[7] and its effect as estoppel can extend to no fact or question which it does not actually determine.[8]

2. Matters in Issue But Not Decided. — That the matter was put in issue by the pleadings or otherwise does not constitute it res judicata unless it was in fact litigated and passed upon by the court,[9] but it must be remembered that all matters which are necessarily in-

195 S. W. 495; Alexander *v.* Woods, 115 Miss. 164, 75 So. 772.

6. James *v.* Pettis, 134 Minn. 438, 159 N. W. 953.

7. People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036; Finck *v.* Lamphere, 165 App. Div. 826, 151 N. Y. Supp. 174.

8. U. S.—Friend *v.* Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. ed. 718; Northwestern Port Huron Co. *v.* Babcock, 223 Fed. 479, 139 C. C. A. 27. **Ala.**—Hall & Farley *v.* Alabama Terminal & Imp. Co., 173 Ala. 398, 56 So. 235; Ford *v.* Ford's Admr., 68 Ala. 141. **Cal.**—Collins *v.* Gray, 154 Cal. 131, 97 Pac. 142. **Conn.**—Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903; House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80. **Ill.**—Jones *v.* Jones, 281 Ill. 595, 117 N. E. 1013; Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691. **Ky.**—Thompson *v.* McPherson, 124 S. W. 272; Sharer *v.* Tuck, 172 Ky. 200, 189 S. W. 27. **La.** Soniat *v.* Whitmer, 141 La. 235, 74 So. 916. **Minn.**—James *v.* Pettis, 134 Minn. 438, 159 N. W. 953; Neilson *v.* Pennsylvania Coal & Oil Co., 78 Minn. 113, 80 N. W. 859. **Miss.**—Alexander *v.* Woods, 115 Miss. 164, 75 So. 772. **Mo.**—St. Joseph *v.* Union Ry. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626; Hickerson *v.* Mexico, 58 Mo. 61. **Neb.**—Morgan *v.* Mitchell, 52 Neb. 667, 72 N. W. 1055. **N. Y.**—Reppert *v.* Hunter, 180 App. Div. 680, 167 N. Y. Supp. 857; Finck *v.* Lamphere, 165 App. Div. 826, 151 N. Y. Supp. 174. **Pa.**—Parks *v.* Pennsylvania Clay Co., 60 Pa. Super. 567. **S. D.**—Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416. **Wash.**—Weidlich *v.* Independent Asphalt Pav. Co., 94 Wash. 395, 162 Pac. 541. **W. Va.**—Hudson *v.* Iguano Land & Min. Co., 71 W. Va. 402, 76 S. E. 797.

9. U. S.—Vicksburg *v.* Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209; Central Trust Co. *v.* Clark, 81 Fed. 269, 26 C. C. A. 397. **Cal.**—People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036. **Conn.**—Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903. **Ia.**—Haines *v.* M. S. Welker & Co., 165 N. W. 1027. **Ky.**—Thompson *v.* McPherson, 124 S. W. 272; Roberts *v.* Dotson, 176 Ky. 278, 195 S. W. 493; Kemper *v.* Miller, 10 Ky. L. Rep. 241. **La.**—Succession of Taylor, 24 La. Ann. 326. **Md.**—Davidson Chemical Co. *v.* Andrew Miller Co., 122 Md. 134, 89 Atl. 401. **Minn.**—James *v.* Pettis, 134 Minn. 438, 159 N. W. 953. **Miss.** Alexander *v.* Woods, 115 Miss. 164, 75 So. 772. **N. Y.**—Bender *v.* Palus, 197 N. Y. 369, 90 N. E. 994. **Pa.**—Parks *v.* Pennsylvania Clay Co., 60 Pa. Super. 567. **S. D.**—Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416. **Tex.** Arlington Heights Realty Co. *v.* Citizens' Ry. & Light Co. (Tex. Civ. App.), 160 S. W. 1109. **Wash.**—Weidlich *v.* Independent Asphalt Paving Co., 94 Wash. 395, 162 Pac. 541. **Wis.** *In re* Hanlin's Est., 133 Wis. 140, 113 N. W. 411, 126 Am. St. Rep. 963, 17 L. R. A. (N. S.) 1189.

[a] **The Rule Illustrated.**—In a tort action against an insurance agent for damages for wrongful cancellation of an insurance policy, the agent in his answer raised the points that some months prior to the time when the alleged tort was committed the insured became delinquent in payment of premiums and either owed a balance thereon or else a novation had taken place. The court found generally for the defendant and the grounds of his decision appearing on the record did not include the above points. In another and subsequent suit between the same parties they were held not res judicata. Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903.

ferable from the judgment are conclusively determined thereby.[10]

3. Points Reserved for Future Litigation. — The judgment or decree is not res judicata of any point or question expressly reserved therein for future litigation.[11]

4. Matters Which Could Not Have Been Litigated. — A judgment cannot work an estoppel upon any point which from the form of the action or the nature of the proceeding could not have been adjudicated,[12] though such matter may form a part of the transaction out

10. See *supra*, VI, D, 3, b, (II).

11. **U. S.**—Owensboro *v.* Cumberland Tel. & Tel. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389. **Ark.** Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67. **Ky.**—Adkins *v.* Bently, 177 Ky. 616, 197 S. W. 1086. **La.**—Vicksburg S. & P. R. Co. *v.* Tibbs, 112 La. 51, 36 So. 223; Succession of Taylor, 24 La. Ann. 326. **Neb.**—Ryan *v.* Bullion, 100 Neb. 705, 161 N. W. 167; Wilcox *v.* Saunders, 4 Neb. 569. **N. H.** Bunker *v.* Manchester Real Estate & Mfg. Co., 75 N. H. 131, 71 Atl. 866.

[a] **Fraudulent Deed.**—A creditor of A petitioned for an injunction against A and A's grantee to prevent them from cutting wood on the property granted, alleging that the deed was fraudulent. Upon granting the injunction the court, in its decree, reserved the right of the parties to further litigate the title to the locus. In a subsequent action of trespass between the parties, a plea of res judicata as to the validity of the deed was disallowed. Bunker *v.* Manchester Real Est. & Mfg. Co., 75 N. H. 131, 71 Atl. 866.

12. **U. S.**—San Francisco *v.* Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. ed. 1096. **Ala.**—Bates *v.* Crowell, 122 Ala. 611, 25 So. 217. **Ark.**—Fogel *v.* Butler, 96 Ark. 87, 131 S. W. 211. **Cal.** *In re* Piercy's Est., 168 Cal. 750, 145 Pac. 88; Ramsbottom *v.* Bailey, 124 Cal. 259, 56 Pac. 1036. **Colo.**—Water Supply & Storage Co. *v.* Larimer & Weld Irr. Co., 25 Colo. 87, 53 Pac. 386. **Conn.**—House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80. **Ga.**—Halliday *v.* Bank, 128 Ga. 639, 58 S. E. 169. **Ill.**—McGovern *v.* McGovern, 282 Ill. 97, 118 N. E. 454; Jones *v.* Jones, 281 Ill. 595, 117 N. E. 1013; Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691. **Ind.**—Stringer *v.* Adams, 98 Ind. 539; Doddridge *v.* Doddridge, 24 Ind. App. 60, 56 N. E. 112. **Ia.**—Ross *v.* Dowden Mfg. Co., 147 Iowa 180, 123 N. W. 182; Union Terminal Co. *v.* Wilmar & S. F. R. Co., 116 Iowa 392, 90 N. W. 92. **La.** Meyer *v.* Moss, 110 La. 132, 34 So. 332. **Me.**—Ingraham *v.* Camden & R. Water Co., 82 Me. 335, 19 Atl. 861. **Mass.**—McIntire *v.* Linehan, 178 Mass. 263, 59 N. E. 767. **Minn.**—McKinnon *v.* Red River Lumber Co., 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872. **Miss.**—Terry *v.* Hageman, 102 Miss. 224, 59 So. 75. **Mo.** Baker *v.* Lane, 137 Mo. 682, 39 S. W. 450; Tapley *v.* McPike, 50 Mo. 589; Boyken *v.* Sharp, 193 Mo. App. 607, 187 S. W. 90. **Neb.**—Ryan *v.* Bullion, 100 Neb. 705, 161 N. W. 167. **N. J.** Mershon *v.* Williams, 63 N. J. L. 398, 44 Atl. 211. **N. Y.**—McGillis *v.* McGillis, 154 N. Y. 532, 49 N. E. 145; Fischman *v.* Mayhew, 117 N. Y. Supp. 986; Will *v.* Barnwell, 112 N. Y. Supp. 462. **N. C.**—McCall *v.* Zachary, 131 N. C. 466, 42 S. E. 903. **N. D.**—Teigen *v.* Drake, 13 N. D. 502, 101 N. W. 893. **Pa.**—Martin *v.* Gernandt, 19 Pa. 124. **S. C.**—Horry *v.* Frost, 10 Rich. Eq. 109. **Tex.**—Teal *v.* Terrell, 48 Tex. 491. **Wash.**—Johnson *v.* Carr, 90 Wash. 106, 155 Pac. 778; Harding *v.* Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222. **W. Va.**—State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650.

[a] **A decision of the public service commission** permitting the lease of one railroad to another, is not res judicata of the rights of the stockholders inter se for the commission is constituted to protect the rights of the public, and has no jurisdiction to conclude the stockholders as to their rights inter se. Westchester F. Ins. Co. *v.* Syracuse, B. & N. Y. R. Co., 161 N. Y. Supp. 759.

[b] **Title not adjudicated** by a judgment in unlawful detainer. Williams *v.* Prioleau, 123 Ark. 106, 184 S. W. 847.

of which the former action arose.[13]

5. Facts Confessed or Admitted. — In respect to facts which are essential to the judgment, the adjudication is as conclusive, when such facts are confessed or admitted in the pleadings as it would be if they had been contested and found by the verdict.[14]

F. SHOWING PRIOR ADJUDICATION OF QUESTION. — **1. Necessity for.** — It is essential to the estoppel that it be shown in some manner that the precise fact in question was determined by the former judgment.[15]

2. The Record. — That the point or question was or was not raised and determined in the prior suit may be shown by the record itself.[16]

What Portion of Record. — Whether the matter was adjudicated is usually ascertained from the judgment itself.[17] The inquiry, however, is not confined to the mere formal judgment, but extends to the pleadings,[18] the evidence,[19] the instructions,[20] as well as to the jury's ver-

13. House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80.

14. Harper *v.* Harper, 53 Fed. 35, 3 C. C. A. 415; Masters *v.* Rainier, 238 Fed. 827; McClellan *v.* Lewis, 35 Cal. App. 64, 169 Pac. 436.

[a] **A failure to answer** is taken as an admission of the truth of the facts stated in the complaint and the court may properly base its determination on such admission. Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

Judgments by confession or consent, see *supra*, V, C, 2, d, (VI).

15. **U. S.**—De Sollar *v.* Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. ed. 956; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214. **Conn.**—Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903. **Neb.**—Morgan *v.* Mitchell, 52 Neb. 667, 72 N. W. 1055. **N. Y.** Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499. **Ohio.**—Trout *v.* Marvin, 2 Ohio Cir. Ct. (N. S.) 523. **Pa.**—Hartman *v.* Pittsburg Inclined Plane Co 23 Pa. Super. 360.

16. **U. S.**—Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204; Packet Co. *v.* Sickles, 5 Wall. 580, 18 L. ed. 550; Pennsylvania Canal Co. *v.* Brown, 235 Fed. 669, 149 C. C. A. 89; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63; Cuneo Importing Co. *v.* American Importing & Transp. Co., 241 Fed. 421. **Conn.**—Wilson *v.* Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903. **Ill.**—Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691. **Ind.**—Paul *v.* Barnbrook, 58 Ind. App. 607, 106 N. E. 425. **Mass.** Coughlin *v.* Rosen, 220 Mass. 220, 107 N. E. 914. **Neb.**—Bodie *v.* Bates, 99 Neb. 253, 156 N. W. 8; Morgan *v.* Mitchell, 52 Neb. 667, 72 N. W. 1055. **N. Y.**—Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499; Tax Lien Co. *v.* Schultze, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915D, 1115; Bonney *v.* Von Novelly, 164 N. Y. Supp. 42. **Ore.** Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936.

17. Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63.

18. **U. S.**—Lander *v.* Mercantile Bank, 186 U. S. 458, 22 Sup. Ct. 908, 46 L. ed. 1247; Southern Pac. R. Co. *v.* United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63. **Cal.**—Los Angeles *v.* Moore, 31 Cal. App. 39, 159 Pac. 872. **Ill.**—Landes *v.* Landes, 268 Ill. 11, 108 N. E. 691. **Mass.**—Newell *v.* Carpenter, 118 Mass. 411. **Nev.**—McIntosh *v.* Knox, 40 Nev. 403, 165 Pac. 337. **N. H.**—Metcalf *v.* Gilmore, 63 N. H. 174; Vaughan *v.* Morrison, 55 N. H. 580; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675; Towns *v.* Nims, 5 N. H. 259, 20 Am. Dec. 578. **N. Y.**—Yonkers Sav. Bank *v.* Fidelity & Casualty Co., 173 App. Div. 153, 159 N. Y. Supp. 840. **Okla.**—McDuffie *v.* Geiser Mfg. Co., 41 Okla. 488, 138 Pac. 1029. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936.

19. Yonkers Sav. Bank *v.* Fidelity & Casualty Co., 173 App. Div. 153, 159 N. Y. Supp. 840.

20. Yonkers Sav. Bank *v.* Fidelity

dict,[21] or the findings[22] and conclusions,[23] particularly where the judgment itself refers to such other portions of the record.[24] The opinion of the court may be of assistance in determining what was adjudicated,[25] but the matter cannot be ascertained from the opinion alone,[26] unless, perhaps, the judgment makes the opinion a part of the record.[27]

3. Extrinsic Evidence. — Though some cases seem to confine the inquiry to the record alone,[28] the better view perhaps is that where there is uncertainty in the record as to what was in fact adjudicated, the question may be determined in the light of the facts shown by the record, supplemented by facts shown by any extrinsic evidence,[29] consistent with the record.[30]

What Testimony Admissible. — The testimony should be confined to tangible facts,[31] showing the points in controversy on the former trial,[32] and the questions submitted to the jury for their consideration.[33] The jurors may not testify as to the particular grounds upon which they found their verdict,[34] nor the trial judge as to the matters he considered and disposed of.[35]

& Casualty Co., 173 App. Div. 153, 159 N. Y. Supp. 840; Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184.

21. McDuffie *v.* Geiser Mfg. Co., 41 Okla. 488, 138 Pac. 1029.

22. **U. S.**—Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63. **Cal.**—Los Angeles *v.* Moore, 31 Cal. App. 39, 159 Pac. 872; People *v.* Bailey, 30 Cal. App. 581, 158 Pac. 1036. **N. Y.**—Gugel *v.* Hiscox, 216 N. Y. 145, 110 N. E. 499. **Okla.**—McDuffie *v.* Geiser Mfg. Co., 41 Okla. 488, 138 Pac. 1029. **Ore.**—Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936.

23. Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63.

24. Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936.

[a] **Where a decree dismissing a suit** does not show what matters were determined but recites that the court "filed certain findings of fact and conclusions of law whereby and whereupon it appears that defendant is entitled to a decree dismissing the suit," the findings and conclusions may be examined to ascertain what points were adjudicated. Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936.

25. **U. S.**—Cuneo Importing Co. *v.* American Importing & Transp. Co., 241 Fed. 421. **Ill.**—Jackson *v.* Industrial Board, 280 Ill. 526, 117 N. E. 705. **Pa.**—Moser *v.* Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362, 40 L. R. A. (N. S.) 519; Larkins *v.* Lindsay, 205 Pa. 534, 55 Atl. 184.

26. Vicksburg *v.* Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. ed. 209; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63; Cuneo Importing Co. *v.* American Importing & Transp. Co., 241 Fed. 421; Landon *v.* Public Utilities Commission, 234 Fed. 152.

27. Owensboro *v.* Cumberland Tel. & Tel. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389.

28. The Vincennes, 3 Ware 171, 28 Fed. Cas. No. 16,945.

29. **U. S.**—Fayerweather *v.* Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. ed. 193; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204; Packet Co. *v.* Sickles, 5 Wall. 580, 18 L. ed. 550; Doyle *v.* Hamilton Fish Corp., 234 Fed. 47, 148 C. C. A. 63. **Ala.**—Hall & Farley *v.* Alabama Terminal & Imp. Co., 173 Ala. 398, 56 So. 235. **Ga.** Harris *v.* Neil, 144 Ga. 519, 87 S. E. 661. **Ind.**—Nickless *v.* Pearson, 126 Ind. 477, 26 N. E. 478; Paul *v.* Barnbrook, 58 Ind. App. 607, 106 N. E. 425. **Mo.**—Hickerson *v.* Mexico, 58 Mo. 61. **Neb.**—Bodie *v.* Bates, 99 Neb. 253, 156 N. W. 8.

30. Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214.

31. Fayerweather *v.* Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. ed. 193.

32. Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 592, 18 L. ed. 550.

33. Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 18 L. ed. 550.

34. Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 18 L. ed. 550.

35. Fayerweather *v.* Ritch, 195 U.

VII. PERSONS CONCLUDED. — A. IN GENERAL. — The doctrine of res judicata whether invoked as a complete bar to a second action,[36] or to preclude the relitigation in another action upon a different claim of some fact or question determined by the former judgment, operates to conclude the parties[37] acting in the same

S. 276, 25 Sup. Ct. 58, 49 L. ed. 193. See Viall *v.* Lionel Mfg. Co. (Conn.), 102 Atl. 709.

36. See 15 STANDARD PROC. 511.

37. **U. S.**—Brown *v.* Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202; Cuneo Importing Co. *v.* American Importing & T. Co. (C. C. A.), 247 Fed. 413; G. & C. Merriam Co. *v.* Saalfield, 190 Fed. 927, 111 C. C. A. 517; Fowler *v.* Stebbens, 136 Fed. 365, 69 C. C. A. 209; Day *v.* Combination Rubber Co., 2 Fed. 570. **Ala.**—Dishman *v.* Griffis, 73 So. 966; Norwood *v.* Goldsmith, 168 Ala. 224, 53 So. 84; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159. **Ariz.**—Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116. **Ark.** Doss *v.* Long Prairie Levee Dist., 96 Ark. 451, 132 S. W. 443. **Cal.**—Horowitz *v.* Speese, 169 Pac. 371; *In re* Piercy's Estate, 168 Cal. 750, 145 Pac. 88; Estate of Harrington, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118. **Conn.**—Waterbury *v.* Clark, 91 Conn. 254, 99 Atl. 578; *In re* Appeal of Clarke, 70 Conn. 195, 39 Atl. 155; Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **Fla.**—Connor *v.* Elliott, 74 So. 649; Little *v.* Barlow, 37 Fla. 232, 20 So. 240, 53 Am. St. Rep. 249. **Ga.** Chatman *v.* Hodnett, 127 Ga. 360, 56 S. E. 439; Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483; White *v.* Bleckley, 114 Ga. 155, 39 S. E. 946. **Idaho.**—Waldron *v.* Jenkins, 18 Idaho 616, 111 Pac. 745; Schuler *v.* Ford, 10 Idaho 739, 80 Pac. 219, 109 Am. St. Rep. 233. **Ill.**—People *v.* Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Teel *v.* Dunnihoo, 230 Ill. 476, 82 N. E. 844, 120 Am. St. Rep. 319; Mullally *v.* Lott, 162 Ill. App. 533; International Forwarding Co. *v.* F. Rosati & Co., 156 Ill. App. 339; Rohn *v.* Rohn, 117 Ill. App. 512; Heffron *v.* Knickerbocker, 51 Ill. App. 291. **Ind.**—Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Clarksville *v.* Ohio Hydraulic Mfg. Co., 56 Ind. App. 198, 105 N. E. 67. **Ia.**—Lee *v.* Independent School Dist., 149 Iowa 345, 128 N. W. 533, 37 L. R. A. (N. S.) 383; State *v.* Eads, 15 Iowa 114, 83 Am. Dec. 399. **Kan.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294; Black *v.* Elliott, 63 Kan. 211, 65 Pac. 215, 88 Am. St. Rep. 239; Ellis *v.* Crowl, 46 Kan. 100, 26 Pac. 454. **Ky.**—Smith *v.* Smith, 179 Ky. 365, 200 S. W. 643; Martin *v.* Hall, 152 Ky. 677, 153 S. W. 997, L. R. A. 1918A, 1041; Duncan *v.* Louisville, 13 Bush 378, 26 Am. Rep. 201; Central Pass. R. Co. *v.* Wahle, 13 Ky. L. Rep. 463. **La.**—Smith *v.* Nelson, 121 La. 170, 46 So. 200. **Me.** Morrison *v.* Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395. **Md.**—Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626. **Mass.**—McCarthy *v.* William H. Wood Lumb. Co., 219 Mass. 566, 107 N. E. 439; Timberlake *v.* Supreme Commandery, 208 Mass. 411, 94 N. E. 685, 36 L. R. A. (N. S.) 597; *In re* Buttrick, 185 Mass. 107, 69 N. E. 1044. **Mich.** Hatt *v.* Green, 180 Mich. 383, 147 N. W. 593; Going *v.* Oakland County, 117 Mich. 230, 75 N. W. 462; Besancon *v.* Brownson, 39 Mich. 388. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; Dohs *v.* Holbert, 103 Minn. 283, 114 N. W. 961, 123 Am. St. Rep. 329; Bamka *v.* Chicago, St. P. M. & O. Ry. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618. **Miss.**—Vinson *v.* Colonial & United States Mortgage Co., 116 Miss. 59, 76 So. 827; Lipscomb *v.* Pastell, 38 Miss. 476, 77 Am. Dec. 651. **Mo.**—Blair *v.* Blair, 247 Mo. 61, 152 S. W. 1; State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533; Browne *v.* Appleman, 83 Mo. App. 79; Bonnell *v.* Pack, 79 Mo. App. 496. **Mont.**—Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653. **Neb.**—Van Etten *v.* Test, 64 Neb. 407, 89 N. W. 1052; Fuller *v.* Brownell, 48 Neb. 145, 67 N. W. 6. **Nev.**—Ahlers *v.* Thomas, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820. **N. H.** Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620; Hollister *v.* Abbott, 31 N. H. 442, 64 Am. Dec. 342. **N. J.** Sbarbero *v.* Miller, 72 N. J. Eq. 248,

capacity,[38] and those in privity with them[39] without regard to their being plaintiffs or defendants.[40] But, with certain exceptions, to be hereinafter noticed,[41] strangers to the former adjudication are in no sense bound.[42]

Though the nominal parties be different, yet if the real parties in interest be the same the estoppel operates.[43]

65 Atl. 472; Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 41 Atl. 846, 42 L. R. A. 852; Wooster *v.* Fitzgerald, 61 N. J. L. 687, 40 Atl. 599, 41 Atl. 251. **N. M.**—State *v.* Mills, 169 Pac. 1171. **N. Y.**—Fulton County Gas & Electric Co. *v.* Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052; Kager *v.* Brenneman, 47 App. Div. 63, 62 N. Y. Supp. 339, 30 Civ. Proc. 168; Ainslie *v.* New York, 1 Barb. 168. **N. C.**—Pinnell *v.* Burroughs, 168 N. C. 315, 84 S. E. 364; Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732; Bear *v.* Brunswick, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711. **N. D.** Beyer *v.* North American Coal & Mining Co., 32 N. D. 542, 156 N. W. 204. **Ohio.**—Colston *v.* Bishop, 1 Ohio Cir. Dec. 257, 1 Ohio C. C. 460. **Okla.** Johnson *v.* Gillett, 168 Pac. 1031. **Ore.** Toy *v.* Gong, 87 Ore. 454, 170 Pac. 936; Cook *v.* Nolan, 87 Ore. 228, 170 Pac. 306; Herrett *v.* Warmsprings Irr. Dist., 86 Ore. 343, 168 Pac. 609; Seaward *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232. **Pa.**—*In re* Lightner's Est., 187 Pa. 237, 41 Atl. 46; Weigley *v.* Coffman, 144 Pa. 489, 22 Atl. 919, 27 Am. St. Rep. 667; Masser *v.* Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668. **S. C.**—Smith *v.* Moore, 7 S. C. 209, 24 Am. Rep. 479; Gregg *v.* Bigham, 1 Hill 299, 26 Am. Dec. 181. **S. D.**—Goldberg *v.* Sisseton Loan & T. Co., 24 S. D. 49, 123 N. W. 266; Sonnenberg *v.* Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885. **Tenn.**—Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449. **Tex.**—Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193; Missouri, K. & T. Ry. Co. *v.* Murray (Tex. Civ. App.), 150 S. W. 217; Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272; Connor *v.* Werk (Tex. Civ. App.), 116 S. W. 650; Bowman *v.* Saigling (Tex. Civ. App.), 111 S. W. 1082. **Vt.** Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94; Parks *v.* Moore, 13 Vt. 183, 37 Am. Dec. 589. **Wash.**—Hubbell *v.* Forsyth, 96 Wash. 613, 165 Pac. 481; Loeper *v.* Loeper, 81 Wash. 454, 142 Pac. 1138. **W. Va.**—White *v.* White, 66 W. Va. 79, 66 S. E. 2, 135 Am. St. Rep. 1013; Mann *v.* Peck, 45 W. Va. 18, 30 S. E. 206; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809. **Wis.** Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1; State *v.* McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878; Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

[a] **Persons within rule as to collateral attack,** see 15 STANDARD PROC. 411.

38. See *infra,* VII, B.

39. See *infra,* VII, H.

40. Connor *v.* Elliott (Fla.), 74 So. 649; Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732.

[a] **A partition** decree acts as an estoppel as to all parties to the suit irrespective of whether they are plaintiffs or defendants. Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732.

41. See *infra,* VII, I, 2.

42. See *infra,* VII, I, 1.

43. **U. S.**—Dunscomb *v.* Chicago, B. & Q. R. Co., 246 Fed. 394, 158 C. C. A. 458. **Ill.**—Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Cheney *v.* Cross, 80 Ill. App. 640. **Ind.**—Bass Foundry & Mach. Wks. *v.* Parke, 141 Ind. 68, 32 N. E. 1125; Foust *v.* Huntington, 113 Ind. 139, 15 N. E. 337. **Ky.**—Lowry *v.* McMurtry, Sneed 251. **Me.**—Rogers *v.* Haines, 3 Greenl. 362. **Mich.**—Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887. **Miss.** Manly *v.* Kidd, 33 Miss. 141. **Mo.** Harrison *v.* Jackson County, 187 S. W. 1183. **N. Y.**—Verplanck *v.* Van Buren, 76 N. Y. 247; Castle *v.* Noyes, 14 N. Y. 329; Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. Supp. 162. **Pa.** Follansbee *v.* Walker, 74 Pa. 306. **Tex.** Jackson *v.* West, 22 Tex. Civ. App. 483, 54 S. W. 297; McCleskey *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518. **Eng.**—Wright *v.* Doe *ex dem.* Tatham, 1 Ad. & El. 3, 28 E. C. L. 28, 110 Eng. Reprint 1108.

[a] **County Represented by Officials.** A judgment in an action against the members of a county court wherein

B. As Affected by Capacity in Which Party Appears. — **1. In General.** — Generally there is no privity between persons litigating in two different personalities or capacities,[44] and though the same individual be a party in both actions, if he sues or is sued in a different right or in a different capacity then he is in law not the same person and cannot in the one take advantage of nor be bound by a previous decision in the other.[45] However, a party is bound in every

they were sued in their official capacity and defended in right of the county and as custodians of its funds, is res judicata in a subsequent action against the county, notwithstanding the nominal parties defendant are different. Harrison *v.* Jackson County (Mo.), 187 S. W. 1183.

44. **Ga.**—Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213. **Ind.**—Johnson *v.* Graves, 129 Ind. 124, 28 N. E. 315. **Mass.**—McCarthy *v.* William H. Wood Lumb. Co., 219 Mass. 566, 107 N. E. 439. **Minn.**—Bamka *v.* Chicago, St. P. M. & O. Ry. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618. **Mo.** Dibert *v.* D'Arcy, 248 Mo. 617, 154 S. W. 1116; State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533. **N. J.**—Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 Atl. 472, *affirming* 74 N. J. Eq. 453, 77 Atl. 1088. **N. Y.**—Kager *v.* Brenneman, 47 App. Div. 63, 62 N. Y. Supp. 339, 30 Civ. Proc. 168. **Ohio.**—Mahoning Valley R. Co. *v.* Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893. **Pa.**—Brown *v.* Marmaduke, 248 Pa. 247, 93 Atl. 1023. **S. D.**—Sonnenberg *v.* Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885.

See *infra*, VII, J, 11, b.

45. **U. S.**—Carey *v.* Roosevelt, 102 Fed. 569, 43 C. C. A. 320. **Ariz.**—Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116. **Cal.**—*In re* Piercy's Estate, 168 Cal. 750, 145 Pac. 88; Stoops *v.* Woods, 45 Cal. 439. **Colo.**—Held *v.* Houser, 53 Colo. 363, 127 Pac. 139; Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. **Conn.**—Appeal of Clark's, 70 Conn. 195, 39 Atl. 155; Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **Ga.** Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213; Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861; Davis *v.* Davis, 30 Ga. 296; Brooking *v.* Dearmond's Lessee, 27 Ga. 58. **Ill.**—Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801; Mansfield *v.* Hoagland, 46 Ill. 359. **Ind.**—Johnson *v.* Graves, 129 Ind. 124, 28 N. E. 315; Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417; Hutchinson *v.* Wood, 59 Ind. App. 537, 109 N. E. 794. **La.**—Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740. **Me.**—Morrison *v.* Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395; Lander *v.* Arno, 65 Me. 26. **Mass.** McCarthy *v.* William H. Wood Lumber Co., 219 Mass. 566, 107 N. E. 439; Frost *v.* Thompson, 219 Mass. 360, 106 N. E. 1009. **Minn.**—Bamka *v.* Chicago, St. P. M. & O. Ry. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618. **Mo.**—Dibert *v.* D'Arcy, 248 Mo. 617, 154 S. W. 1116; State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533; Meyer *v.* Nischwitz, 198 Mo. App. 101, 199 S. W. 744. **N. J.**—Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 Atl. 472, *affirming* 74 N. J. Eq. 453, 77 Atl. 1088; Wooster *v.* Fitzgerald, 61 N. J. L. 687, 40 Atl. 599, 41 Atl. 251. **N. Y.**—Collins *v.* Hydorn, 135 N. Y. 320, 32 N. E. 69; Rathbone *v.* Hooney, 58 N. Y. 463; Kager *v.* Brenneman, 47 App. Div. 63, 62 N. Y. Supp. 339, 30 Civ. Proc. 168; Lauby *v.* Gill, 42 Misc. 334, 86 N. Y. Supp. 718; Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Supp. 43; Fisher *v.* Johnson, 152 N. Y. Supp. 944. **N. D.** Murphy *v.* Wilson, 37 N. D. 300, 163 N. W. 820, Ann. Cas. 1918E, 1101; Beyer *v.* North American C. & Min. Co., 32 N. D. 542, 156 N. W. 204. **Ore.**—Nickum *v.* Burckhardt, 30 Ore. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822. **Pa.**—Brown *v.* Marmaduke, 248 Pa. 247, 93 Atl. 1023. **S. D.** Sonnenberg *v.* Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885. **Tenn.**—Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449. **Wash.**—Flessher *v.* Carstens Packing Co., 96 Wash. 505, 165 Pac. 397. **Eng.**—Leggott *v.* Great Northern Ry., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. N. S. 334, 24 W. R. 784; Fenwick *v.* Thornton, 1 Mood. & M. 51, 22 E. C. L. 470; Daly *v.* Dublin, Wicklow & Wexford Ry., 30 L. R. Ireland 514.

[a] **The reason is that when a party**

capacity in which his rights are affected by the previous adjudication,[46] and if every interest which the party represents in his several capacities was before the court and litigated, he is bound in all characters or personalities.[47] If a person appearing as an individual voluntarily pleads in that suit his rights in his representative capacity the judgment binds him in both capacities as an individual and as a representative,[48] even though no order is taken making him a party in his representative capacity.[49]

2. Application of Rule. — a. *Different Representative Capacities.* A judgment or decree for or against a person in one representative

sues or is sued in another capacity, he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment. Rathbone *v.* Hooney, 58 N. Y. 463; Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449.

[b] **A party representing minority stockholders** is not estopped by a former adjudication affecting him in his individual capacity. Beyer *v.* North American Coal & Mining Co., 32 N. D. 542, 156 N. W. 204.

[c] **Actions by Administrator.**—An administrator in prosecuting an action begun by intestate for injuries sustained by her, sues for the benefit of those interested in the estate and a judgment therein is not res judicata in a subsequent suit by such administrator to recover damages for her death from such injuries. "The rights asserted by the plaintiff in his different capacities are diverse in their origin, distinct in the classes of persons entitled to share in their benefits, and susceptible of prosecution in not infrequent instances by persons different in fact. They are as far from being privies as are administrators or executors of the same estate appointed in different jurisdictions." McCarthy *v.* William H. Wood Lumb. Co., 219 Mass. 566, 107 N. E. 439.

46. Ga.—La Pierre *v.* Webb, 113 Ga. 820, 39 S. E. 344. **Ia.**—*In re* Park's Estate, 166 Iowa 403, 147 N. W. 850. **Kan.**—Harris *v.* Morrison, 100 Kan. 157, 163 Pac. 1062. **N. J.**—Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 Atl. 472. **Tenn.**—Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449.

47. Cal.—Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, devisee and executrix. **Ga.**—La Pierre *v.* Webb, 113 Ga. 820, 39 S. E. 344; Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861. **Kan.**—Heyl *v.* Donifelser, 59 Kan. 779, 54 Pac. 1059. **Mass.** Flint *v.* Bodge, 10 Allen 128. **Mo.** Fitzgerald *v.* De Soto Special Road Dist., 195 S. W. 695. **S. C.**—Manigault *v.* Holmes, Bailey Eq. 283. **Tenn.** Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449.

[a] **Though a trustee,** as such, was not a party to the former proceeding, but he himself and the parties actually owning the interests he represented as trustee, were brought before the court, the judgment therein concludes the trustee in his representative capacity. Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449.

[b] **One who sued as trustee** is estopped by the judgment from relitigating the matter in his individual capacity, where it appears he owns the subject matter of the trust. Corcoran *v.* Chesapeake & O. Canal Co., 94 U. S. 741, 24 L. ed. 190.

[c] **A judgment against the sole beneficiary** of an intestate is res judicata in a subsequent suit against such beneficiary as administratrix. *In re* Park's Estate, 166 Iowa 403, 147 N. W. 850.

48. Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861.

[a] **Administrator.**—Where in the defense to an action brought against one as an individual, he files an answer which practically, though not in express terms, makes him in his character as administrator of a deceased person, a defendant to the action, and defends in the right of his intestate's estate, the estate is concluded by the judgment rendered in that action. Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861.

49. Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861.

capacity is not ordinarily res judicata in a subsequent suit to which he is a party in another and different representative capacity, because he represents a different right or interest.[50]

b. *Representative and Individual Capacity.* — So also, for the same reason, one who was a party to the former proceeding in his individual capacity is not bound by the judgment in a representative capacity, such as guardian,[51] executor or administrator,[52] assignee,[53] trustee,[54] or official.[55] And conversely one who participates in the proceeding in

50. **Ga.**—Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213. **Ind.**—Kitts *v.* Willson, 140 Ind. 604, 39 N. E. 313; Johnson *v.* Graves, 129 Ind. 124, 28 N. E. 315. **Mo.**—State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533. **N. J.**—Wooster *v.* Fitzgerald, 61 N. J. L. 687, 40 Atl. 599, 41 Atl. 251. **Ohio.**—Mahoning Valley R. Co. *v.* Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893; Henry *v.* Pittsburgh, C. C. & St. L. Ry. Co., 2 Ohio N. P. 118. **Tenn.**—Melton *v.* Pace, 103 Tenn. 484, 53 S. W. 939. **Tex.**—Downing *v.* Diaz, 80 Tex. 436, 16 S. W. 49; Caruth *v.* Grigsby, 57 Tex. 259. **W. Va.** McNutt *v.* Trogden, 29 W. Va. 469, 2 S. E. 328.

See *supra,* VII, B, 1, and *infra,* VII, J, 11.

[a] **Trustee and Guardian.**—A determination that one sued as trustee, held funds as such trustee is not res judicata in an action against him as guardian. State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533.

[b] **As deacon of a church** and trustee of the church. Allison *v.* Little, 93 Ala. 150, 9 So. 388.

51. **Cal.**—Karr *v.* Parks, 44 Cal. 46. **Ind.**—McBurnie *v.* Seaton, 111 Ind. 56, 12 N. E. 101. **La.**—Duhe's Succession, 41 La. Ann. 209, 6 So. 502. **Mich.** Baker *v.* Flint & P. M. R. Co., 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154. **Neb.** Myers *v.* McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627. **Tenn.** Buchanan *v.* Kimes, 2 Baxt. 275.

52. **Ga.**—Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213. **Ill.**—Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801. **Mo.**—Meyer *v.* Nischwitz, 198 Mo. App. 101, 199 S. W. 744.

[a] **Application for Letters.** — An adjudication that a given applicant for letters of administration upon the estate of a deceased person is not entitled to such letters, constitutes no estoppel against the same person in his capacity as an administrator of an heir at law of the decedent upon whose estate he sought to administer. Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213.

53. **Conn.** — Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84. **N. Y.**—Landon *v.* Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712; Bonney *v.* Von Novelly, 164 N. Y. Supp. 42. **Tex.** — Schneider-Davis Co. *v.* Brown (Tex. Civ. App.), 46 S. W. 108.

[a] **Rule Illustrated.**—When A and B have, in their individual right and capacity, litigated a fact in issue in the trial of an action arising from the breach by B of a non negotiable contract between them, such fact is res judicata in a later trial of a different cause of action, arising from the breach by B of a different contract between him and C brought by A in his capacity as an assignee of C subsequent to such breach. Fuller *v.* Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

54. **Colo.**—Held *v.* Houser, 53 Colo. 363, 127 Pac. 139. **Ind.**—Hutchinson *v.* Wood, 59 Ind. App. 537, 109 N. E. 794. **S. D.**—Sonnenberg *v.* Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885. **Tenn.**—Chandler *v.* White Oak Creek Lumber Co., 131 Tenn. 47, 173 S. W. 449.

[a] **A trustee may litigate a claim to property** though his claim to the property in his individual capacity was denied by a prior judgment. Sonnenberg *v.* Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885.

55. **Ariz.**—Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116. **N. Y.**—Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Supp. 43. **N. D.** Murphy *v.* Wilson, 37 N. D. 300, 163 N. W. 820, Ann. Cas. 1918E, 1101.

[a] **Individual and Sheriff.** — A judgment against a person for the

a representative capacity such as executor or administrator,[56] heir,[57] guardian or next friend,[58] or trustee[59] is not concluded in his individual capacity.

In either class of cases, however, when the cause of action or interest represented by the person in both actions is the same, the prior adjudication is binding in the subsequent proceeding.[60]

C. MUTUALITY. — The doctrine of res judicata requires mutuality[61]

conversion of property, is not res judicata in a suit against him as sheriff for conversion of the same property. Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116.

[b] **Assignee in bankruptcy** not concluded by a judgment affecting him in his individual capacity. Landon *v.* Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712.

56. **Conn.**—Appeal of Clark's, 70 Conn. 195, 39 Atl. 155. **Ill.**—Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801. **N. Y.** Richards *v.* Gill, 138 App. Div. 75, 122 N. Y. Supp. 620; Lauby *v.* Gill, 42 Misc. 334, 86 N. Y. Supp. 718; Hall *v.* Richardson, 22 Hun 444. **Ore.**—Crow *v.* Abraham, 86 Ore. 99, 167 Pac. 590. **Tenn.**—Gibson *v.* Willis, 36 S. W. 154.

[a] **Judgment in ejectment** in favor of an administrator. Loftis *v.* Marshall, 134 Cal. 394, 66 Pac. 571.

57. Barrett *v.* Choen, 119 Ind. 58, 20 N. E. 145, 21 N. E. 322.

58. McBurnie *v.* Seaton, 111 Ind. 56, 12 N. E. 101; Gerstein *v.* Fisher, 12 Misc. 211, 33 N. Y. Supp. 1120, 67 N. Y. St. 824; Furlong *v.* Banta, 80 Hun 248, 29 N. Y. Supp. 985, 61 N. Y. St. 253.

59. Amsterdam First Nat. Bank *v.* Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601; Fisher *v.* Johnson, 152 N. Y. Supp. 944.

60. See *supra*, VII, B, 1, and *infra*, this section.

61. **U. S.**—Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009, Ann. Cas. 1913E, 875; Wood *v.* Davis, 7 Cranch 271, 3 L. ed. 339; G. & C. Merriam Co. *v.* Saalfield, 190 Fed. 927, 111 C. C. A. 517; Merchants' Coal Co. *v.* Fairmont Coal Co., 160 Fed. 769, 88 C. C. A. 23; Jefferson Electric Light, Heat & Power Co. *v.* Westinghouse Electric & Mfg. Co., 139 Fed. 385, 71 C. C. A. 481; Hanks Dental Assn. *v.* International Tooth Crown Co., 122 Fed. 74, 58 C. C. A. 180; Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528; Andrews *v.* National Foundry & Pipe Works, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139. **Ala.**—Louisville & N. R. Co. *v.* Brinckerhoff, 119 Ala. 606, 24 So. 892; Gwynn *v.* Hamilton's Admr., 29 Ala. 233; Phillips *v.* Thompson, 3 Stew. & P. 369. **Ark.**—Bell *v.* Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370. **Cal.** Valentine *v.* Mahoney, 37 Cal. 389; Purcell *v.* Victor Power & Mining Co., 29 Cal. App. 504, 156 Pac. 1009. **Ga.** Bradley *v.* Johnson, 49 Ga. 412. **Ill.** MacDonald *v.* Dexter, 234 Ill. 517, 85 N. E. 209; Robinson & Co. *v.* Marr, 181 Ill. App. 605; Mullally *v.* Lott, 162 Ill. App. 533. **Ind.**—Smith *v.* King, 81 Ind. 217. **Ia.**—Woodward *v.* Jackson, 85 Iowa 432, 52 N. W. 358; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226. **Kan.**—Atchison, T. & S. F. Ry. Co. *v.* Jefferson, 12 Kan. 127. **Ky.** Sim *v.* Bishop, 177 Ky. 279, 197 S. W. 625; Bridges *v.* McAlister, 106 Ky. 791, 51 S. W. 603, 90 Am. St. Rep. 267, 45 L. R. A. 800. **Me.**—Biddle & Smart Co. *v.* Burnham, 91 Me. 578, 40 Atl. 669. **Md.**—Groshon *v.* Thomas, 20 Md. 234. **Mass.**—Cheshire Nat. Bank *v.* Jaynes, 224 Mass. 14, 112 N. E. 500; McCarthy *v.* William H. Wood Lumber Co., 219 Mass. 566, 107 N. E. 439. **Minn.**—Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263; Nowack *v.* Knight, 44 Minn. 241, 46 N. W. 348. **Mo.**—State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533; Bell *v.* Hoagland, 15 Mo. 360. **Neb.**—Sickler *v.* Mannix, 68 Neb. 21, 93 N. W. 1018; Densmore *v.* Tomer, 14 Neb. 392, 15 N. W. 734. **N. H.**—Guay *v.* Eastman, 77 N. H. 422, 92 Atl. 840; Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620; Parker *v.* Moore, 59 N. H. 454. **N. J.**—Coney *v.* Harney, 53 N. J. L. 53, 20 Atl. 736. **N. Y.**—Van Camp *v.* Fowler, 133 N. Y. 600, 30 N. E. 1147; Chapman *v.* L. E. Waterman Co., 176 App. Div. 697, 163 N. Y. Supp. 1059; Murphy *v.* John Hofman Co., 157 App. Div. 88, 141 N. Y. Supp. 900; Hardy *v.* Eagle, 25 Misc. 471, 54 N. Y. Supp. 1045. **N. C.**—Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R.

of estoppel for a person who is not bound by a judgment cannot set it up against another as an estoppel.[62]

D. ADVERSARY PARTIES. — The estoppel of a judgment is available only as between adversary parties.[63] By this it is not meant that they must have stood upon the record as plaintiff and defendant, but merely that this was in fact their real attitude upon the issues tried and determined.[64]

Coparties, whether co-plaintiffs or co-defendants, are as a rule not adversaries and the judgment is ordinarily not conclusive as between them.[65]

A. 924; Redmond *v.* Coffin, 17 N. C. 437. **Ore.**—Cooley *v.* Snake River District Imp. Co., 78 Ore. 384, 152 Pac. 1190. **Pa.**—Chandler's Appeal, 100 Pa. 262. **S. C.**—Crews *v.* McKinnie, 2 Nott. & McC. 52. **Tenn.**—Simpson *v.* Jones, 2 Sneed 36. **Tex.**—Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785; Galveston Chamber of Commerce *v.* Railroad Commission (Tex. Civ. App.), 137 S. W. 737; Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272. **Va.**—Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491; Payne *v.* Coles, 1 Munf. (15 Va.) 373. **W. Va.**—Buford *v.* Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854. **Eng.**—Wenman *v.* Mackenzie, 5 El. & Bl. 447, 85 E. C. L. 445, 25 L. J. Q. B. 44, 1 Jur. N. S. 1015, 1049 (n), 119 Eng. Reprint 547.

[a] **Where a non-resident defendant appears specially** merely for the purpose of protecting his interest in attached property, the estoppel of whatever judgment may be rendered extends no further against the plaintiff than it does against the defendant. Cheshire Nat. Bank *v.* Jaynes, 224 Mass. 14, 112 N. E. 500.

62. **Ala.**—Tallapoosa County Bank *v.* Salmon, 12 Ala. App. 589, 68 So. 542. **Minn.**—Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263. **N. Y.**—Chapman *v.* L. E. Waterman Co., 176 App. Div. 697, 163 N. Y. Supp. 1059. **Tex.** Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785. **Va.** Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491.

[a] **One not a party** to a former proceeding cannot plead the adjudication therein as an estoppel against a party to such former suit. Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263.

63. **Ala.**—Leinkauff *v.* Munter, 76 Ala. 194; Buffington *v.* Cook, 35 Ala. 312, 73 Am. Dec. 491. **Conn.**—Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247. **Ill.**—Gouwens *v.* Gouwens, 222 Ill. 223, 78 N. E. 597, 113 Am. St. Rep. 395. **Ind.**—Whitesell *v.* Strickler, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524; Duncan *v.* Holcomb, 26 Ind. 378. **Ky.**—Martin *v.* Hall, 152 Ky. 677, 153 S. W. 997, L. R. A. 1918A, 1041. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; Pioneer Sav. & L. Co. *v.* Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511. **Mo.**—Kinloch Telephone Co. *v.* St. Louis, 268 Mo. 485, 188 S. W. 182; Peters *v.* St. Louis, 226 Mo. 62, 125 S. W. 1134; Nevins *v.* Coleman, 198 Mo. App. 252, 200 S. W. 445; Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416. **N. Y.**—Ostrander *v.* Hart, 130 N. Y. 406, 29 N. E. 744; Beveridge *v.* New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Post *v.* Thomas, 180 App. Div. 627, 168 N. Y. Supp. 226; Savage *v.* Buffalo, 49 App. Div. 577, 63 N. Y. Supp. 477. **N. C.**—Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732. **Ohio.**—Koelsch *v.* Mixer, 52 Ohio St. 207, 39 N. E. 417; McCrory *v.* Parks, 18 Ohio St. 1. **Okla.** Henthorn *v.* Tidd, 164 Pac. 783. **W. Va.** Central Bkg. & Security Co. *v.* United States Fidelity & G. Co., 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (N. S.) 797. **Wis.**—Rice *v.* Cutler, 17 Wis. 351, 84 Am. Dec. 747.

[a] **Where separate relief as between persons** to a suit could not have been asked or granted the judgment is not res judicata between them. Nevins *v.* Coleman, 198 Mo. App. 252, 200 S. W. 445.

64. Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416; Koelsch *v.* Mixer, 52 Ohio St. 207, 39 N. E. 417.

[a] **That with respect to the precise issue** involved the parties were adversary parties, is sufficient. Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018.

65. **Ala.**—Buffington *v.* Cook, 35

E. Effect of Presence of Other Parties. — The rule of res judicata does not demand an identity of parties to the two proceedings in the sense that all the parties must be the same.[66] It is sufficient that the parties be substantially the same;[67] the true test being whether the same parties have once contested the same issue.[68] It is no objection to the application of the rule that the parties to the former action include some who are not joined[69] in the subsequent

Ala. 312, 73 Am. Dec. 491. **Conn.** Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247. **Minn.** Pioneer Sav. & L. Co. *v.* Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511. **Mo.**—Kinloch Telephone Co. *v.* St. Louis, 268 Mo. 485, 188 S. W. 182; Charles *v.* White, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674, 21 L. R. A. (N. S.) 481; McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489. **N. Y.**—Post *v.* Thomas, 180 App. Div. 627, 168 N. Y. Supp. 226. **Wis.**—Rice *v.* Cutler, 17 Wis. 351, 84 Am. Dec. 747.

66. **U. S.**—Green *v.* Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. ed. 1061. **Cal.**—Delano *v.* Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201. **Ga.** Carlton *v.* Price, 121 Ga. 12, 48 S. E. 721, 68 L. R. A. 736. **Ill.**—Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608. **Ind.**—Davenport *v.* Barnett, 51 Ind. 329. **Ia.** Larum *v.* Wilmer, 35 Iowa 244. **Kan.** Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091. **Ky.**—Hawkins *v.* Lambert, 18 B. Mon. 99. **Mass.**—Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651; French *v.* Neal, 24 Pick. 55. **Minn.** Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263. **Mo.**—State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533; Young *v.* Byrd, 124 Mo. 590, 28 S. W. 83, 46 Am. St. Rep. 461; Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Glasner *v.* Weisberg, 43 Mo. App. 214; Parker *v.* Straat, 39 Mo. App. 616. **N. Y.**—Fish *v.* Vanderlip, 218 N. Y. 29, 112 N. E. 425, Ann. Cas. 1916E, 150; Castle *v.* Noyes, 14 N. Y. 329; Sisson *v.* Todd, 167 N. Y. Supp. 1077. **N. C.**—Fowler *v.* Osborne, 111 N. C. 404, 16 S. E. 470. **Ore.**—Neppach *v.* Jones, 28 Ore. 286, 39 Pac. 999, 42 Pac. 519. **Tenn.**—Moore *v.* Chattanooga Electric R. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. (N. S.) 978. **Tex.**—Girardin *v.* Dean, 49 Tex. 243. **Wash.**—Leggett *v.* Ross, 14 Wash. 41, 44 Pac. 111. **Wis.**—McMillan *v.* Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94, Ann. Cas. 1914B, 53.

67. **U. S.**—Thompson *v.* Roberts, 24 How. 233, 16 L. ed. 648. **Ill.**—Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228. **Ind.**—Bass Foundry & Machine Works *v.* Board of Comrs., 141 Ind. 68, 32 N. E. 1125. **Ky.**—Lowry *v.* McMurtry, Sneed 251. **Mich.**—Hoppen *v.* Avery, 87 Mich. 551, 49 N. W. 887. **Miss.**—Manly *v.* Kidd, 33 Miss. 141. **N. Y.**—Verplanck *v.* Van Buren, 76 N. Y. 247; Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539. **Pa.**—Follansbee *v.* Walker, 74 Pa. 306. **Tex.**—McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518.

68. **U. S.**—Thompson *v.* Roberts, 24 How. 233, 241, 16 L. ed. 648. **Ill.** Rohn *v.* Rohn, 117 Ill. App. 512. **Ind.** Clarksville *v.* Ohio Falls Hydraulic Mfg. Co., 56 Ind. App. 198, 105 N. E. 67. **Kan.**—Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018. **Mo.**—Young *v.* Byrd, 124 Mo. 590, 28 S. E. 83, 46 Am. St. Rep. 461; Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Jones *v.* Silver, 97 Mo. App. 231, 70 S. W. 1109. **N. H.** Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620. **Vt.**—Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184. **W. Va.**—McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809.

69. **Ga.**—Carlton *v.* Price, 121 Ga. 12, 48 S. E. 721, 68 L. R. A. 736. **Ia.** Larum *v.* Wilmer, 35 Iowa 244. **Kan.** Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018. **Mo.** Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421. **N. Y.**—Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539. **Vt.**—Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184.

[a] "**A contrary doctrine** would sacrifice a wholesome principle of law to a mere technical rule having no

action, nor that there are additional parties in the second action,[70] nor that the same parties in other capacities may also be involved.[71]

F. LITIGANTS AFFECTED BY THE RULE. — **1. In General.** — All litigants are affected by the rule of the thing adjudged; it is equally binding on the sovereign and the citizen,[72] and within the usual limitations the doctrine of res judicata applies with full force and effect to judgments for or against the United States,[73] the state,[74] or the municipality.[75]

foundation in reason; making a distinction where there is no difference.'' Thompson *v.* Roberts, 24 How. (U. S.) 241, 16 L. ed. 648.

70. **U. S.**—Green *v.* Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. ed. 1061; Thompson *v.* Roberts, 24 How. 233, 16 L. ed. 648. **Ill.**—Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228. **Mass.**—French *v.* Neal, 24 Pick. 55. **Mo.**—State *ex rel.* Buchanan County *v.* Patton, 271 Mo. 554, 197 S. W. 353. **Tenn.**—Moore *v.* Chattanooga Electric R. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. (N. S.) 978. **Tex.**—King *v.* Henderson, 29 Tex. Civ. App. 601, 69 S. W. 487. **Vt.** Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184.

71. Rohn *v.* Rohn, 117 Ill. App. 512.

[a] **Addition of Individual Capacity.**—A question of negligence of an executor de son tort determined in a suit brought against him by the administratrix in her official capacity is res judicata in a subsequent suit by such executor against the administratrix in her individual as well as her official capacity. Rohn *v.* Rohn, 117 Ill. App. 512.

72. **U. S.**—United States *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267. **Ill.**—O'Connell *v.* Chicago T. T. R. Co., 184 Ill. 308, 56 N. E. 355. **Neb.**—State *v.* Broatch, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477; State *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557.

73. United States *v.* O'Grady, 22 Wall. (U. S.) 641, 22 L. ed. 772, 10 Ct. Cl. 134; Atlantic Dredging Co. *v.* United States, 35 Ct. Cl. (U. S.) 463; Fendall *v.* United States, 14 Ct. Cl. (U. S.) 247; United States *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267.

74. **U. S.**—Stone *v.* Bank of Kentucky, 174 U. S. 799, 19 Sup. Ct. 881, 43 L. ed. 1187; New Orleans *v.* Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202. **Cal.**—People *v.* Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86; People *v.* Smith, 93 Cal. 445, 29 Pac. 64; People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186. **Ill.** O'Connell *v.* Chicago T. T. R. Co., 184 Ill. 308, 56 N. E. 355. **Ky.**—Com. *v.* Fidelity & Columbia Trust Co., 171 Ky. 519, 188 S. W. 658. **Md.**—Baldwin *v.* State, 89 Md. 587, 43 Atl. 857. **Neb.** State *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; State *v.* Kennedy, 60 Neb. 300, 83 N. W. 87; Holsworth *v.* O'Chander, 49 Neb. 42, 68 N. W. 334. **N. M.**—State *v.* Mills, 169 Pac. 1171.

[a] ''**The state,** in the exercise of its governmental functions, is not obliged to invoke the aid of the courts in any case; but when it does so it assumes the character of an ordinary suitor, and is bound by self-imposed restraints.'' State *ex rel.* Wright *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557.

[b] **A judgment against a municipality** claiming as trustee of the people of the state, is binding on the state. People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186.

[c] **Where the proceeding is at the relation of,** or for the benefit of, some individual the judgment does not bind the state as res judicata. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; State *v.* Stock, 38 Kan. 184, 16 Pac. 799.

75. **Cal.**—Los Angeles *v.* Moore, 31 Cal. App. 39, 159 Pac. 872. **Fla.** Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190. **Ill.**—Illinois Cent. R. Co. *v.* Champaign, 163 Ill. 524, 45 N. E. 120. **Ind.**—Millikan *v.* Lafayette, 118 Ind. 323, 20 N. E. 847. **Ky.**—Henderson *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197. **Mich.**—Detroit *v.* Ellis, 103 Mich. 612, 61 N. W. 886, 27 L. R. A. 241. **Mo.**—Kinloch Tele-

2. Persons Under Disability. — The rule of res judicata applies to judgments, not absolutely void,[76] affecting persons under disabilities, such as married women,[77] infants,[78] and insane persons.[79]

G. WHO ARE PARTIES. — **1. In General.** — The persons who are estopped by a judgment in an action in which they have been named as parties and brought before the court are those who are directly interested in the subject matter in issue, who have a right to make defense and control the proceeding or appeal from the judgment.[80] Strangers are those who do not possess these rights.[81]

2. Parties of Record. — a. *In General.* — The term parties, as defined within the rule of res judicata,[82] includes, of course, those who are named as such in the record,[83] and over whom the court has ob-

phone Co. *v.* St. Louis, 268 Mo. 485, 188 S. W. 182. **N. Y.**—Williamsburgh Sav. Bk. *v.* Solon, 136 N. Y. 465, 32 N. E. 1058; Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619. **N. C.** Bear *v.* Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711. **Ore.**—Rose *v.* Portland, 82 Ore. 541, 162 Pac. 498. **Wash.**—Seattle *v.* Erickson, 99 Wash. 543, 169 Pac. 985. **Wis.**—Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831.

[a] **Drainage District.** — State *ex rel.* Kern *v.* Stone, 269 Mo. 334, 190 S. W. 601.

[b] **A judgment against the officers** authorized to represent the municipality, binds it. Henderson *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197.

76. See *supra,* V, C, 2, b.

77. Ketchum *v.* Christman, 128 Mo. 38, 30 S. W. 313; Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421.

78. Cal.—Joyce *v.* McAvoy, 31 Cal. 273, 89 Am. Dec. 172. **Ill.**—Paskewic *v.* East St. Louis & Sub. Ry. Co., 197 Ill. App. 1. **Neb.** — McCreary *v.* Creighton, 76 Neb. 179, 107 N. W. 240; Manfull *v.* Graham, 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412. **N. J.**—Sites *v.* Eldredge, 45 N. J. Eq. 632, 18 Atl. 214, 14 Am. St. Rep. 769.

See more fully, 12 STANDARD PROC. 771.

79. Cathcart *v.* Matthews, 105 S. C. 329, 89 S. E. 1021.

80. U. S.—Green *v.* Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. ed. 1061; Litchfield *v.* Goodnow's Admr., 123 U. S. 549, 8 Sup. Ct. 210, 31 L. ed. 199. **Ala.**—Powell *v.* Robinson, 76 Ala. 423. **Fla.**—Ottensoser *v.* Scott, 47 Fla. 276, 37 So. 161, 110 Am. St. Rep. 137, 66 L. R. A. 346. **Ga.**—Brown *v.* Chaney, 1 Ga. 410. **Ill.**—Watson *v.* Kammeier, 203 Ill. App. 31. **Md.**—Parsons *v.* Urie, 104 Md. 238, 64 Atl. 927, 8 L. R. A. (N. S.) 559; Courtney *v.* William Knabe Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626. **Miss.**—Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651. **Mo.**—Womach *v.* St. Joseph, 201 Mo. 467, 100 S. W. 443, 10 L. R. A. (N. S.) 140; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; State *v.* Johnson, 25 S. W. 855. **N. J.**—Ludy *v.* Larsen, 78 N. J. Eq. 237, 79 Atl. 687, 37 L. R. A. (N. S.) 957. **N. Y.**—Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619. **Ohio.** Colston *v.* Bishop, 1 Ohio Cir. Ct. 460, 1 Ohio C. D. 257. **Okla.**—*In re* Board of Education of Perry, 35 Okla. 733, 130 Pac. 951. **Pa.**—Walker *v.* Philadelphia, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801; Peterson *v.* Lothrop, 34 Pa. 223; Ehrhart *v.* Bear, 51 Pa. Super. 39. **S. D.**—Goldberg *v.* Sisseton Loan & Title Co., 24 S. D. 49, 123 N. W. 266, 140 Am. St. Rep. 775.

[a] **A necessary party not served** and who made no appearance is not concluded by the judgment merely because he might have been made a party. Butler *v.* Fryer (Okla.), 159 Pac. 367.

81. See *infra,* VII, I, 1.

82. See *supra,* VII, G, 1.

83. Conn.—Waterbury *v.* Clark, 91 Conn. 254, 99 Atl. 578. **Ill.**—Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434. **Kan.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A.

tained jurisdiction by process or otherwise.[84]

Inspection of Record. — To ascertain, therefore, who were the parties to the former proceeding the record may be inspected,[85] and if there is ambiguity therein in respect to parties the identity may be shown by extrinsic evidence,[86] but an unambiguous record cannot be thus aided,[87] particularly when the record was made by the party himself.[88]

b. *Defaulting Parties.* — A party properly served with process but who defaults is concluded by the judgment thereafter rendered in so far as such judgment is final and upon merits.[89]

c. *Consolidation of Actions.* — Where two or more actions are consolidated a party to one of them is required to notice the proceedings and is bound by what is done in each and all of them.[90]

d. *Nominal Party.* — Nominal parties are parties within the rule as to res judicata,[91] except where they are unnecessary parties even formally and have no control over the proceedings in which the adjudication was made,[92] or, perhaps, where as to them no relief is either sought or granted.[93]

e. *Parties Non-suited.* — The estoppel of the judgment does not operate to conclude parties who were non-suited before the issues were determined.[94]

1917F, 1006. **Mo.**—Smith *v.* Smith, 194 Mo. App. 309, 188 S. W. 1111.

84. See *supra*, V, C, 2, b.

[a] **A corporation** is not estopped by the judgment where the entry of service shows only a personal service. Hodges *v.* Stuart Lumber Co., 140 Ga. 569, 79 S. E. 462.

85. Hodges *v.* Stuart Lumber Co., 140 Ga. 569, 79 S. E. 462.

86. Hitt *v.* Carr, 62 Ind. App. 80, 109 N. E. 456.

87. Hitt *v.* Carr, 62 Ind. App. 80, 109 N. E. 456.

88. Owen *v.* Cox, 122 Ark. 78, 182 S. W. 559.

[a] **Dower Claim.**—A widow who was made a party to a partition suit that she might protect her dower rights, did not assert her claim but instead joined in the prayer that the title to the land be vested in one O. The decree having been rendered pursuant to her request, she could not thereafter claim dower as against purchasers holding in faith of the record thus made by her. Owen *v.* Cox, 122 Ark. 78, 182 S. W. 559.

89. **Ill.**—The Equitable Trust Co. *v.* Jennings, 189 Ill. App. 359. **Mich.** Going *v.* Oakland County Agricultural Soc., 117 Mich. 230, 75 N. W. 462. **Neb.**—Cowles *v.* Kyd, 91 Neb. 274, 135 N. W. 1010. **Ore.**—Hough *v.* Porter, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

See *supra*, V, C, 2, d, (VI).

90. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Seiler *v.* Northern Bank, 86 Ky. 128, 5 S. W. 536.

91. United States *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267.

[a] **The United States** concluded. United States *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267.

92. Walker *v.* Philadelphia, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801, husband, when unnecessarily made party to wife's action for damages for her personal injuries, which damages are her separate property. See *infra*, VII, J, 2.

93. See *infra*, this note.

[a] **A prior incumbrancer** technically made a party in a suit to foreclose a mortgage but as to whom no relief is sought or granted, held not concluded by the decree. Dunn *v.* Raley, 58 Mo. 134.

94. Roberts *v.* Dotson, 176 Ky. 278, 195 S. W. 493; Continental Ins. Co. *v.* Seaboard Air Line Ry., 106 S. C. 43, 90 S. E. 318. See *supra*, V, C, 2, (VI).

[a] **An issue as to the cause of a certain fire** determined in a former suit is not conclusive upon insurance companies who were non-suited in the former proceeding prior to the adjudication of the issue. Continental Ins. Co.

f. *Intervenors.* — One who though not a party of record voluntarily intervenes and submits his rights to the jurisdiction of the court is bound by the judgment,[95] but the mere filing of a petition asking to intervene does not render the petitioner a party where the same is denied,[96] especially where the denial resulted from the objections of the party now trying to assert the estoppel.[97]

g. *Persons Interpleaded.* — The judgment or decree is res judicata as to persons interpleaded.[98]

3. Parties Not of Record. — a. *In General.* — There are cases which seem to confine the operation of res judicata to record parties,[99] but undoubtedly persons may be concluded by a judgment who though not parties of record are parties in fact,[1] as for example persons who are represented by parties of record,[2] or, under certain circumstances, interested persons who are notified of the proceedings and fail to appear,[3] and persons participating in the proceedings.[4]

b. *Persons Represented by Parties.*[5] — (I.) **Rule Stated.** — Under certain circumstances, persons who are not parties of record may be bound by the judgment on the ground of their being represented by

v. Seaboard Air Line Ry., 106 S. C. 43, 90 S. E. 318.

95. **U. S.**—Martin *v.* People's Bank, 115 Fed. 226. **Cal.**—Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129. **Ga.** Hidell *v.* Funkhouser, 89 Ga. 532, 16 S. E. 79. **Ill.**—Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813. **Ind.**—Hawkins *v.* Taylor, 128 Ind. 431, 27 N. E. 1117. **La.**—Reinach *v.* New Orleans Imp. Co., 50 La. Ann. 497, 23 So. 455. **Me.** Sevey *v.* Chick, 13 Me. 141. **Md.**—Albert *v.* Hamilton, 76 Md. 304, 25 Atl. 341. **Minn.**—St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189. **N. H.**—Parker *v.* Moore, 59 N. H. 454. **N. Y.**—Smith *v.* Pure Strain Farms Co., 180 App. Div. 703, 167 N. Y. Supp. 877; *In re* Grade Crossing Comrs., 138 App. Div. 349, 122 N. Y. Supp. 922; Conant *v.* Jones, 50 App. Div. 336, 64 N. Y. Supp. 189; Van Koughnet *v.* Dennie, 68 Hun 179, 22 N. Y. Supp. 823, 51 N. Y. St. 877. **Tenn.**—Goss *v.* Singleton, 2 Head 67. **Tex.**—Sandoval *v.* Rosser, 86 Tex. 682, 26 S. W. 933; Bomar *v.* Ft. Worth Bldg. Assn., 20 Tex. Civ. App. 603, 49 S. W. 914.

96. McNeill's Heirs *v.* Thompson, 178 Ky. 90, 198 S. W. 571.

97. McNeill's Heirs *v.* Thompson, 178 Ky. 90, 198 S. W. 571.

98. Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018.

99. **Ind.**—Hitt *v.* Carr, 62 Ind. App. 80, 109 N. E. 456. **Ia.**—Walters *v.* Wood, 61 Iowa 290, 16 N. W. 116. **Ky.** Allin's Heirs *v.* Hall's Heirs, 1 A. K. Marsh. 525. **Mo.**—Titus *v.* North Kansas City Development Co., 264 Mo. 229, 174 S. W. 432. **Pa.**—*In re* Sames' Appeal, 26 Pa. 184. **S. C.**—Samuel *v.* Dinkins, 12 Rich. L. 172, 75 Am. Dec. 729. **Tex.**—Campbell *v.* Upson, 98 Tex. 442, 84 S. W. 817.

1. **U. S.**—Dunscomb *v.* Chicago, B. & Q. R. Co., 246 Fed. 394, 158 C. C. A. 458. **Ill.**—Pontiac Mut. County Fire & Lightning Ins. Co. *v.* Sherbley, 279 Ill. 118, 116 N. E. 644; Champlin *v.* Butler, 124 Ill. App. 41. **Kan.**—Carter *v.* Aetna Life Ins. Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155. **Ky.**—Schmidt *v.* Louisville, C. & L. R. Co., 99 Ky. 143, 35 S. W. 135, 36 S. W. 168. **Minn.**—Hendricks *v.* Dean, 105 Minn. 162, 117 N. W. 426. **Mont.** Pew *v.* Johnson, 35 Mont. 173, 88 Pac. 770, 119 Am. St. Rep. 852. **N. H.** Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620. **N. J.**—Lake *v.* Weaver, 80 N. J. Eq. 395, 86 Atl. 817; Ludy *v.* Larsen, 78 N. J. Eq. 237, 79 Atl. 687, 37 L. R. A. (N. S.) 957. **N. Y.** Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. Supp. 162. **S. D.**—Goldberg *v.* Sisseton Loan & Title Co., 24 S. D. 49, 123 N. W. 266, 140 Am. St. Rep. 775

2. See *infra*, VII, G, 3, b; **VII, H.**
3. See *infra*, VII, G, 3, c.
4. See *infra*, VII, G, 3, d.
5. **Privies,** see *infra*, VII, H.

one or more other plaintiffs holding similar and homogeneous interests.[6] It is only necessary that all the parties be brought before the court that can be brought before it and in such case if the court may act upon the subject matter according to the rights that appear, its decision will conclude the parties so represented by another.[7] The protection of a person thus represented is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement. In the absence of such attack, the decree is final and conclusive as to the status of the property.[8]

(II.) Limitations of Rule. — But this rule of virtual representation is one of necessity rather than of convenience,[9] except, perhaps, in those cases where one person may sue or defend on behalf of all others similarly situated.[10] Consequently all persons in being capable of appearing who are interested must be brought into court for there is no room for the doctrine when actual appearance can be enforced.[11]

6. **Cal.**—Hurlbutt *v.* Butenof, 27 Cal. 50. **Ill.**—Denegre *v.* Walker, 214 Ill. 113, 73 N. E. 409, 105 Am. St. Rep. 98; Gavin *v.* Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776. **Minn.** Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep 558. **N. Y.** Kent *v.* Church of St. Michael, 136 N. Y. 10, 32 N. E. 704, 32 Am. St. Rep. 693, 18 L. R. A. 331; Kerr *v.* Blodgett, 48 N. Y. 62, 16 Abb. Pr. 137, 25 How. Pr. 303; Nodine *v.* Greenfield, 7 Paige 544, 34 Am. Dec. 363. **Ohio.**—Carpenter *v.* Canal Co., 35 Ohio St. 307. **S. C.**—Bernard *v.* Bernard, 79 S. C. 364, 60 S. E. 700, 128 Am. St. Rep. 852; Rutledge *v.* Fishburne, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757. **Tenn.**—Bransford Realty Co. *v.* Andrews, 128 Tenn. 725, 164 S. W. 1175. **Vt.**—Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84. **Va.**—Harrison *v.* Wallton's Exr., 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703.

Suing or defending on behalf of others, see 20 STANDARD PROC. 945, et seq., 952.

7. **U. S.**—Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547. **Cal.**—Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640. **Ky.**—Johnson *v.* De Pauw University, 116 Ky. 671, 76 S. W. 851. **Minn.**—Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558. **N. J.**—Sweet *v.* Parker, 22 N. J. Eq. 453.

8. **U. S.**—Arndt *v.* Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918. **Cal.**—Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640. **Minn.** Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558; Mayall *v.* Mayall, 63 Minn. 511, 65 N. W. 942. **Va.**—Harrison *v.* Wallton's Exr., 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; Faulkner *v.* Davis, 18 Gratt. (59 Va.) 651, 98 Am. Dec. 698; Baylor's Lessee *v.* Dejarnette, 13 Gratt. (54 Va.) 152. **Wis.**—Ruggles *v.* Tyson, 104 Wis. 500, 81 N. W. 367, 48 L. R. A. 809.

9. Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640; Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558.

[a] **In condemnation proceedings** where the property is necessary for a public use and the interests of unborn contingent remaindermen are to be affected, the necessity of relying on the rule is apparent. Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640.

10. See 20 STANDARD PROC. 945, 952.

11. **Cal.**—Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640. **Kan.**—Holderman *v.* Hood, 70 Kan. 267, 78 Pac. 838. **Ohio.**—Wilson *v.* Wilson, 11 Ohio C. C. (N. S.) 450. **Tenn.**—Chambers *v.* Preston, 137 Tenn. 324, 193 S. W. 109, Ann. Cas. 1918B, 428.

[a] **A partition decree** is not res judicata as against contingent remaindermen where there are persons in being to represent such remaindermen and whose actual appearance could have been enforced but was not. Chambers *v.* Preston, 137 Tenn. 324, 193 S. W. 109, Ann. Cas. 1918B, 428.

The rule does not apply unless the interests of the representatives and represented are so far identical that the motive and inducement to protect and preserve may be assumed to be the same in each.[12] For one cannot represent a class when his interest and that of the class are antagonistic.[13]

(III.) Application of Rule. — The rule is applicable to representations of persons living,[14] and to persons not in being such as contingent remaindermen and executory devisees who may be concluded where they are represented by the present holder of the estate.[15]

[b] **Other creditors in like situation** are not concluded by a decree in an equity suit brought against a trustee "on behalf of complainant and all other creditors likewise situated who desire to avail themselves thereof" unless they have notice or knowledge of the pendency of the suit. Holderman *v.* Hood, 70 Kan. 267, 78 Pac. 838.

12. Cal.—Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640. **Ill.**—Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247. **N. Y.** Downey *v.* Seib, 185 N. Y. 427, 78 N. E. 66, 113 Am. St. Rep. 926, 8 L. R. A. (N. S.) 49.

[a] **Fiduciary Relation Not Essential.**—"We do not understand that in cases coming within the principle there is any fiduciary relation between the parties defendant representing the nonparties not in being. The representation is not of the interest of such nonparties, but, the interests being identical the representation is of the questions on which their interests depend." Stewart *v.* Oneal, 237 Fed. 897, 903, 150 C. C. A. 547.

[b] **An identity of interest in upholding a will** exists between unborn remaindermen and the executors, devisees and legatees who were made defendants and who represented such unborn remaindermen. Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547.

13. Downey *v.* Seib, 185 N. Y. 427, 78 N. E. 66, 113 Am. St. Rep. 926, 8 L. R. A. (N. S.) 49; Sartor *v.* Newberry Land & Security Co., 104 S. C. 184, 88 S. E. 467.

[a] **An administrator with interests adverse to creditors** in a proceeding to which the creditors are not parties cannot represent them therein so as to make the judgment conclusive as to them. Sartor *v.* Newberry Land & Security Co., 104 S. C. 184, 88 S. E. 467.

14. Johnson *v.* De Pauw University, 116 Ky. 671, 76 S. W. 851.

[a] **As in case of an association** whose members are numerous. Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

15. U. S.—Stewart *v.* Oneal, 237 Fed. 897, 150 C. C. A. 547. **Cal.**—Los Angeles County *v.* Winans, 13 Cal. App. 234, 109 Pac. 640. **Ill.**—Hopkins *v.* Patton, 257 Ill. 346, 100 N. E. 992. **Minn.**—Mathews *v.* Lightner 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558. **N. Y.**—Downey *v.* Seib, 185 N. Y. 427, 78 N. E. 66, 113 Am. St. Rep. 926, 8 L. R. A. (N. S.) 49. **S. C.** Hunt *v.* Gower, 80 S. C. 80, 61 S. E. 218, 128 Am. St. Rep. 862; Rutledge *v.* Fishburne, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757.

[a] **In such case it is sufficient** to bring before the court the first tenant in tail in being, and, if there be none, the first person entitled to the inheritance and if there be none, then the tenant for life. Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558; Downey *v.* Seib, 185 N. Y. 427, 78 N. E. 66.

[b] **Every defense that after-born children could make** is available to the children who are made defendants and it would be unjust to postpone the determination of title till there should no longer be a possibility a child being born. Hopkins *v.* Patton, 257 Ill. 346, 100 N. E. 992.

[c] **"In suits to enforce a trust,** or with reference to trust property, so limited in remainder, if the holder of the legal title, the life tenant, and the persons in being in whom the remainder would become a vested estate if the life estate then fell in—if all these are parties, a valid decree may be pronounced. Bransford Realty Co. *v.* Andrews, 128 Tenn. 725, 164 S. W. 1175. See also Johnson *v.* De Pauw University, 116 Ky. 671, 76 S. W. 851.

[d] **A decree quieting title in father's favor** is res judicata as to after born children who were represented by

c. *Interested Persons Who Fail To Appear.* — Persons who are directly interested in the suit and who have knowledge of its pendency and are bound to appear but refuse or neglect to do so and avail themselves of their rights are concluded by the proceedings as if they were parties named in the record.[16] The rule applies to persons liable over,[17] as also where such relations exist as master and servant,[18] landlord and tenant,[19] principal and agent,[20] bailor and bailee,[21] and other such relations.[22]

d. *Third Parties Participating in the Litigation.* — **(I.) In General.** One not a party of record, nor in privity with a party, who for his own interest participates in the former litigation may be as much bound by the judgment therein as if he had been a record party,[23]

the living children. Hopkins *v.* Patton, 257 Ill. 346, 100 N. E. 992.

16. Ladany *v.* Assad, 91 Conn. 316, 99 Atl. 762.

[a] "**It is contrary to the policy of the law** to allow the same question to be separately litigated by every person interested in it. These complainants knew of the pendency of the former suit; they ought to have been made parties on their own petition. They by their own neglect or willful refusal lost the right to take part in the control of the proceedings, examine and cross-examine witnesses, and appeal from the decree; they therefore are embraced within the rule." Bernstein, Cohen & Co. *v.* Stansbury, 119 Md. 316, 86 Atl. 349.

17. Konitzky *v.* Meyer, 49 N. Y. 571; American Bonding Co. *v.* Loeb, 47 Wash. 447, 92 Pac. 282. See Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620.

[a] **Where a city or village** has been obliged to pay damages for personal injuries caused by a defective highway, the third party whose negligence caused the defect will be bound by the judgment recovered against the city if he had notice of the action and opportunity to defend. Port Jervis *v.* First Nat. Bank, 96 N. Y. 550.

Indemnity or contribution, see *infra,* VII, J, 14.

18. Castle *v.* Noyes, 14 N. Y. 329.

19. Moate *v.* Rives, 146 Ga. 425, 91 S. E. 420; Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373. See *infra,* VII, J, 1.

20. Warfield *v.* Davis, 14 B. Mon. (Ky.) 40; McKinzie *v.* Baltimore & O. R. Co., 28 Md. 161. See *infra,* VII, J, 5.

21. Ladany *v.* Assad, 91 Conn. 316, 99 Atl. 762.

22. See *infra,* VII, J.

23. **U. S.**—Plumb *v.* Goodnow's Admr., 123 U. S. 560, 8 Sup. Ct. 216, 31 L. ed. 268; Frank *v.* Wedderin, 68 Fed. 818, 16 C. C. A. 1; Bryant Electric Co. *v.* Marshall, 169 Fed. 426; Carey *v.* Roosevelt, 91 Fed. 567; Theller *v.* Hershey, 89 Fed. 575; Eagle Mfg. Co. *v.* David Bradley Mfg. Co., 50 Fed. 193. **Ala.**—Hudson *v.* Wright, 164 Ala. 298, 51 So. 389, 137 Am. St. Rep. 55. **Colo.**—Brown *v.* Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 228; Hurd *v.* McClellan, 1 Colo. App. 327, 29 Pac. 181. **Ill.**—Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283. **Ind.**—Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365; Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260. **Ia.**—Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298. **Ky.**—Henderson *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197; Bridges *v.* McAlister, 106 Ky. 791, 51 S. W. 603, 90 Am. St. Rep. 267, 45 L. R. A. 800. **Md.**—Parsons *v.* Urie, 104 Md. 238, 64 Atl. 927, 8 L. R. A. (N. S.) 559. **Mass.** Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651. **Mich.**—Grant *v.* Reno, 107 Mich. 409, 65 N. W. 376. **Minn.**—Hendricks *v.* Dean, 105 Minn. 162, 117 N. W. 426; Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88. **Mo.**—State *ex rel.* Kern *v.* Stone, 269 Mo. 334, 190 S. W. 601; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. **Mont.** Pew *v.* Johnson, 35 Mont. 173, 88 Pac. 770, 119 Am. St. Rep. 852. **N. H.** Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620. **N. J.**—Ludy *v.* Larsen, 78 N. J. Eq. 237, 79 Atl. 687, 37 L. R. A. (N. S.) 957. **N. Y.**—Fish *v.* Vander-

particularly where he is the real party in interest.[24] If it can be shown that to protect some substantial interest of his own he takes control and management either of the prosecution,[25] or the defense,[26]

lip, 218 N. Y. 29, 112 N. E. 425, Ann. Cas. 1916E, 150; Castle *v.* Noyes, 14 N. Y. 329; Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. Supp. 162. **N. D.** Boyd *v.* Wallace, 10 N. D. 78, 84 N. W. 760. **S. D.**—Goldberg *v.* Sisseton Loan & Title Co., 24 S. D. 49, 123 N. W. 266, 140 Am. St. Rep. 775. **Tex.** Cleveland *v.* Heidenheimer (Tex. Civ. App.), 44 S. W. 551. **Wash.**—Ramsey *v.* Wilson, 52 Wash. 111, 100 Pac. 177; American Bonding Co. *v.* Loeb, 47 Wash. 447, 92 Pac. 282; Shoemake *v.* Finlayson, 22 Wash. 12, 60 Pac. 50. **Wis.**—McMillan *v.* Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94, Ann. Cas. 1914B, 53; Kolpack *v.* Kolpack, 128 Wis. 169, 107 N. W. 457, 116 Am. St. Rep. 29; Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877.

[a] **The rule invoked is for strangers** to the record, not for parties or privies. Ladany *v.* Assad, 91 Conn. 316, 99 Atl. 762.

[b] **In patent infringment cases,** the rule is frequently applied. Gilchrist Co. *v.* Erie Specialty Co., 231 Fed. 659, 145 C. C. A. 545; Bemis Car Box Co. *v.* J. G. Brill Co., 200 Fed. 749, 119 C. C. A. 229; General Electric Co. *v.* Morgan-Gardner E. Co., 168 Fed. 52, 93 C. C. A. 474; Rumford Chemical Works *v.* Hygienic Chemical Co., 154 Fed. 65, 83 C. C. A. 177; Jefferson Electric Light, Heat & Power Co. *v.* Westinghouse Electric & Mfg. Co., 139 Fed. 385, 71 C. C. A. 481; Penfield *v.* C. & A. Potts & Co., 126 Fed. 475, 61 C. C. A. 371; Hanks Dental Assn. *v.* International Tooth Crown Co., 122 Fed. 74, 58 C. C. A. 180; Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528; Searchlight Horn Co. *v.* American Graphophone Co., 240 Fed. 745; Bryant Electric Co. *v.* Marshall, 169 Fed. 426; Australian Knitting Co. *v.* Gormly, 138 Fed. 92; Sacks *v.* Kupferle, 127 Fed. 569; National Folding-Box Co. *v.* Dayton Paper Novelty Co., 95 Fed. 991; Theller *v.* Hershey, 89 Fed. 575.

24. Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651; Rivers *v.* School Dist. (Okla.), 156 Pac. 236.

[a] **A tenant who is substantially interested** in the subject matter of a suit concerning the title, in that his title would be affected by the result, is concluded by the judgment, where he acted as counsel for the plaintiff, paid the costs, had full opportunity to control the proceedings, to examine witnesses, and to take and prosecute an appeal. Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651.

[b] **A person litigating under an assumed name** is estopped from subsequently denying in his real name the conclusive effect of the judgment. Clark Bros. *v.* Wyche, 126 Ga. 24, 54 S. E. 909.

25. **U. S.**—Sanders *v.* Peck, 87 Fed. 61, 30 C. C. A. 530. **Ill.**—Pontiac Mut. County Fire & Lighting Ins. Co. *v.* Sheibley, 279 Ill. 118, 116 N. E. 644. **Mass.**—Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651. **Mo.**—Landis *v.* Hamilton, 77 Mo. 554. **Okla.**—Rivers *v.* School Dist., 156 Pac. 236. **S. D.** Goldberg *v.* Sisseton Loan & Title Co., 24 S. D. 49, 123 N. W. 266, 140 Am. St. Rep. 775. **Tex.**—Finkley *v.* Wakefield (Tex. Civ. App.), 184 S. W. 755; Cleveland *v.* Heidenheimer (Tex. Civ. App.), 44 S. W. 551.

[a] **Where a suit is brought in the name of one party** for the benefit of another who directs and advises the same, the latter though not a formal party to the suit will be concluded by the judgment. **U. S.**—Claflin *v.* Fletcher, 10 Biss. 281, 7 Fed. 851. **Ill.**—Pontiac Mut. County Fire & Lightning Ins. Co. *v.* Sheibley, 279 Ill. 118, 116 N. E. 644; Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283. **Ind.**—Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365. **Okla.**—Rivers *v.* School Dist., 156 Pac. 236. **Tex.** Cleveland *v.* Heidenheimer (Tex. Civ. App.), 44 S. W. 551. **Wis.**—Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877.

26. **U. S.**—Elliott Co. *v.* Roto Co., 242 Fed. 941, 155 C. C. A. 529; Cushman *v.* Warren-Scharf Asphalt Paving Co., 220 Fed. 857, 135 C. C. A. 289; Bemis Car Box Co. *v.* J. G. Brill Co., 200 Fed. 749, 119 C. C. A. 229; Greenwich Ins. Co. *v.* N. & M. Friedman Co., 142 Fed. 944, 74 C. C. A. 114; Searchlight Horn Co. *v.* American Graphophone Co., 240 Fed. 745; Good-

the judgment will conclude him though no personal liability under the judgment ensues.[27]

(II.) Nature of Participation. — Since estoppels must be mutual,[28] a stranger thus participating in the litigation is not concluded and may not avail himself of the judgment as an estoppel unless his conduct in that respect was open and avowed or otherwise known to the opposite party.[29] His assistance in the proceedings must also have

no *v.* Hotchkiss, 237 Fed. 686; Bryant Electric Co. *v.* Marshall, 169 Fed. 426; Theller *v.* Hershey, 89 Fed. 575. **Colo.** Hurd *v.* McClellan, 1 Colo. App. 327, 29 Pac. 181. **Ill.**—Champlin *v.* Butler, 124 Ill. App. 41. **Ind.**—Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260. **Ia.**—Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298. **Md.** Parsons *v.* Urie, 104 Md. 238, 64 Atl. 927, 8 L. R. A. (N. S.) 559. **Mich.** Grant *v.* Reno, 107 Mich. 409, 65 N. W. 376. **Minn.**—Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88. **Mo.**—State *ex rel.* Kern *v.* Stone, 269 Mo. 334, 190 S. W. 601; Titus *v.* North Kansas City Dev. Co., 264 Mo. 229, 174 S. W. 432. **N. J.**—Ludy *v.* Larsen, 78 N. J. Eq. 237, 79 Atl. 687, 37 L. R. A. (N. S.) 957. **N. Y.**—Fish *v.* Vanderlip, 218 N. Y. 29, 112 N. E. 425, Ann. Cas. 1916E, 150; Castle *v.* Noyes, 14 N. Y. 329. **N. D.**—Boyd *v.* Wallace, 10 N. D. 78, 84 N. W. 760. **Wash.**—Ramsey *v.* Wilson, 52 Wash. 111, 100 Pac. 177; Shoemake *v.* Finlayson, 22 Wash. 12, 60 Pac. 50. **Wis.**—McMillan *v.* Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94, Ann. Cas. 1914B, 53.

[a] **One liable over to defendants,** who files a formal statement of defense is concluded. Lamberton *v.* Dinsmore, 75 N. H. 574, 78 Atl. 620.

[b] **Submission of Affidavit.** — A father who has deeded the custody of his children to their grandparents, is bound by a decree rendered in a habeas corpus proceeding brought by the mother for their custody, when he submits an affidavit therein making no claim on his own behalf but insisting on the claim of his father and mother. Tillman *v.* Tillman, 93 S. C. 281, 76 S. E. 559.

[c] **Attorney of Record.**—Where it is manifest from the face of the record that one who defended the cause while apparently as attorney of record for his grantors, was as a matter of fact acting in his own behalf, he is as much estopped by the decree as he would have been had he been joined as defendant in the action. Titus *v.* North Kansas City Development Co., 264 Mo. 229, 174 S. W. 432.

[d] **A manufacturer who undertakes the defense of a suit for infringement** brought against one of its customers is estopped. Bemis Car Box Co. *v.* J. G. Brill Co., 200 Fed. 749, 119 C. C. A. 229; Bryant Electric Co. *v.* Marshall, 169 Fed. 426.

27. Hendricks *v.* Dean, 105 Minn. 162, 117 N. W. 426.

[a] **A grantor of real property** who, though not a party thereto, to protect himself from liability under the covenants of his conveyance defends an action brought by a third person against his grantee to recover the property, though not personally liable to the plaintiff therein for the payment of the judgment, is concluded by the issues decided. Hendricks *v.* Dean, 105 Minn. 162, 117 N. W. 426.

28. See *supra*, VII, C.

29. **U. S.**—Merriam Co. *v.* Saalfield, 241 U. S. 22, 36 Sup. Ct. 477, 60 L. ed. 868; Souffront *v.* La Compagnie Des Sucreries, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. ed. 846; Jefferson Electric Light, Heat & Power Co. *v.* Westinghouse Elec. & Mfg. Co., 139 Fed. 385, 71 C. C. A. 481; Hanks Dental Assn. *v.* International Tooth Crown Co., 122 Fed. 74, 58 C. C. A. 180; Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528; Cramer *v.* Singer Mfg. Co., 93 Fed. 636, 35 C. C. A. 508; Andrews *v.* National Foundry & Pipe Works, 73 Fed. 516, 19 C. C. A. 548. **Cal.**—Loftis *v.* Marshall, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286. **Conn.**—Ladany *v.* Assad, 91 Conn. 316, 99 Atl. 762. **Minn.**—Cannon River Mfgrs. Assn. *v.* Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497. **R. I.**—Central Baptist Church & Society *v.* Manchester, 17 R. I. 492, 23 Atl. 30, 33 Am. St. Rep. 893.

[a] **A mere unfulfilled promise to defend** a patent suit together with the

been for the protection of some substantial interest of his own,[30] and he must have had a legal right to control the litigation and to have the judgment therein reviewed.[31] Unless these conditions are present a person is not concluded by the judgment simply because he contributed toward the costs and expenses of the action,[32] or employed attorneys,[33] or filed briefs,[34] or was summoned as a witness and testified therein.[35] But on the other hand persons not parties of record,

payment of five dollars to defendant's solicitor to obtain copies of the patent do not constitute a participation in the defense, particularly where the plaintiff knew nothing thereof. Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528.

[b] **Contributing to Defense.**—The mere fact that the defendants in both suits are members of an association which has contributed to the defense of each patent suit does not render a judgment against one res judicata as against the other in the absence of knowledge by the plaintiff of the true relations between them. Hanks Dental Assn. *v.* International Tooth Crown Co., 122 Fed. 74, 58 C. C. A. 180.

30. Hauke *v.* Cooper, 108 Fed. 922, 48 C. C. A. 144.

[a] **Mere similarity of interest** as for example an interest in the decision as a judicial precedent is not enough. Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009, Ann. Cas. 1913E, 875; Litchfield *v.* Goodnow's Admr., 123 U. S. 549, 8 Sup. Ct. 210, 31 L. ed. 199; Helm *v.* Zarecor, 213 Fed. 648; Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651.

31. **U. S.**—Litchfield *v.* Goodnow's Admr., 123 U. S. 549, 8 Sup. Ct. 210, 31 L. ed. 199; Australian Knitting Co. *v.* Gormly, 138 Fed. 92. **Mich.** Feldkamp *v.* Ernst, 177 Mich. 550, 143 N. W. 887. **N. Y.**—Fish *v.* Vanderlip, 218 N. Y. 29, 112 N. E. 425, Ann. Cas. 1916E, 150.

See Walker *v.* Philadelphia, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801.

[a] **Suits on Insurance Policy.**—In an action against several underwriters to recover insurance on a vessel, an insurer who was not a party of record, but who was interested in the suit by reason of having given a several contract of insurance on the same vessel, openly participated in the defense and contributed to the expense thereof. He had no legal right, however, to control the course of the litigation, or to appeal from the judgment and for that reason he was not concluded. Fish *v.* Vanderlip, 218 N. Y. 29, 112 N. E. 425, Ann. Cas. 1916E, 150.

32. Litchfield *v.* Goodnow's Admr., 123 U. S. 549, 8 Sup. Ct. 210, 31 L. ed. 199; General Electric Co. *v.* Morgan-Gardner E. Co., 168 Fed. 52, 93 C. C. A. 474; Merchants' Coal Co. *v.* Fairmont Coal Co., 160 Fed. 769, 88 C. C. A. 23; Feldkamp *v.* Ernst, 177 Mich. 550, 143 N. W. 887.

[a] **Actually carrying on the defense** (1) at his own expense, even though the other party may have had reason to suspect the fact, is not sufficient unless it was done openly to the knowledge of the plaintiff. Jefferson Electric Light, Heat & Power Co. *v.* Westinghouse Electric & Mfg. Co., 139 Fed. 385, 71 C. C. A. 481, but (2) the fact that the person paid the attorney who defended the former suit does not of itself make him a party within the rule. General Electric Co. *v.* Morgan-Gardner E. Co., 168 Fed. 52, 93 C. C. A. 474.

33. **U. S.**—Searchlight Horn Co. *v.* American Graphophone Co., 240 Fed. 745. **Ia.**—Coleman *v.* Bosworth, 180 Iowa 975, 164 N. W. 238. **La.**—Behrman *v.* Louisiana Ry. & Nav. Co., 127 La. 775, 54 So. 25. **Mo.**—State *v.* Johnson, 25 S. W. 855. **Neb.**—Cockins *v.* Bank, 84 Neb. 624, 122 N. W. 16, 133 Am. St. Rep. 642. **Okla.**—*In re* Board of Education of Perry, 35 Okla. 733, 130 Pac. 951. **R. I.**—Central Baptist Church & Society *v.* Manchester, 17 R. I. 492, 23 Atl. 30, 33 Am. St. Rep. 893.

34. Behrman *v.* Louisiana Ry. & Nav. Co., 127 La. 775, 54 So. 25.

[a] **The filing of a brief** as amicus curiae does not make a person a party within the rule. Behrman *v.* Louisiana Ry. & Nav. Co., 127 La. 775, 54 So. 25.

35. **Ia.**—Wells *v.* Western Union Tel. Co., 144 Iowa 605, 123 N. W. 371,

who are substantially interested in the result of the proceedings will be estopped by the judgment where they openly and to the knowledge of the adversary participate in the litigation by employing counsel to represent them in the prosecution[36] or defense[37] of the former action.

H. PRIVIES. — **1. In General.** — A judgment or decree, provided it is binding on the parties,[38] concludes those in privity with them,[39] the reason being that the privies are identified in interest with the parties.[40]

24 L. R. A. (N. S.) 1045. **Mich.** Fowler *v.* Blount, 191 Mich. 575, 158 N. W. 114. **Pa.**—Seigfried *v.* Boyd, 237 Pa. 55, 85 Atl. 72; *In re* Miller's Estate, 159 Pa. 562, 28 Atl. 441; Ehrhart *v.* Bear, 51 Pa. Super. 39.

36. **U. S.**—Plumb *v.* Goodnow's Admr., 123 U. S. 560, 8 Sup. Ct. 216, 31 L. ed. 268. **Tex.**—Finkley *v.* Wakefield (Tex. Civ. App.), 184 S. W. 755. **Wis.**—McMillan *v.* Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94, Ann. Cas. 1914B, 53.

See *supra*, this section.

37. Hauke *v.* Cooper, 108 Fed. 922, 48 C. C. A. 144; Searchlight Horn Co. *v.* American Graphophone Co., 240 Fed. 745; Goodno *v.* Hotchkiss, 237 Fed. 686.

38. Hanley *v.* Pacific Live Stock Co., 234 Fed. 522, 148 C. C. A. 288; Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Supp. 43.

39. **U. S.**—Hart Steel Co. *v.* Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. ed. 1148; Souffront *v.* Compagnie Des Sucreries, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. ed. 846; Cuneo Importing Co. *v.* American Importing & T. Co. (C. C. A.), 247 Fed. 413. **Ark.**—Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67. **Conn.**—O'Brien *v.* Doolittle, 91 Conn. 354, 99 Atl. 1055. **Fla.**—Connor *v.* Elliott, 74 So. 649. **Ga.**—White *v.* Bleckley, 114 Ga. 155, 39 S. E. 946; Georgia Realty Co. *v.* Bank, 19 Ga. App. 219, 91 S. E. 267. **Idaho.**—Waldron *v.* Jenkins, 18 Idaho 616, 111 Pac. 745; Schuler *v.* Ford, 10 Idaho 739, 80 Pac. 219, 109 Am. St. Rep. 233. **Ill.**—People *v.* Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Maloney *v.* Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; Cole *v.* Favorite, 69 Ill. 457. **Ind.** Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050. **Ia.**—Adams *v.* Graves, 75 Iowa 642, 36 N. W. 889; Sobey *v.* Beiler, 28 Iowa 323. **Kan.**—Alexander *v.* Clarkson, 100 Kan. 294, 164 Pac. 294, L. R. A. 1917F, 1006. **Ky.**—Shanahan *v.* McIntire, 169 Ky. 160, 183 S. W. 529; Soward *v.* Coppage, 10 Ky. L. Rep. 436, 9 S. W. 389. **La.**—Wall *v.* Rabits, 138 La. 609, 70 So. 531; Kennon *v.* Brooks-Scanlon Co., 132 La. 515, 61 So. 555. **Me.**—Rollins *v.* Blackden, 112 Me. 459, 92 Atl. 521. **Mass.**—Federal Trust Co. *v.* Bristol County St. R. Co., 222 Mass. 35, 109 N. E. 880. **Minn.**—Telford *v.* McGillis, 130 Minn. 397, 153 N. W. 758, Ann. Cas. 1916E, 157. **Mo.**—Stoutimore *v.* Clark, 70 Mo. 471; First Nat. Bank of Bolivar *v.* Burns (Mo. App.), 199 S. W. 282; Julian *v.* Kansas City Granite & Monument Co. (Mo. App.), 187 S. W. 584. **N. Y.**—Beebe *v.* Elliott, 4 Barb. 457; Ludington's Petition, 5 Abb. N. C. 307. **N. C.**—Stelges *v.* Simmons, 170 N. C. 42, 86 S. E. 801; Buchanan *v.* Hedden, 169 N. C. 222, 85 S. E. 417; Moore *v.* Curtis, 169 N. C. 74, 85 S. E. 132. **Okla.**—Butler *v.* Fryer, 159 Pac. 367; Corrugated Culvert Co. *v.* Simpson Tp., 51 Okla. 178, 151 Pac. 854. **Ore.**—Seaweard *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232. **S. C.**—Cathcart *v.* Matthews, 105 S. C. 329, 89 S. E. 1021. **Tenn.**—Daniel *v.* Gum, 45 S. W. 468. **Tex.**—Webster *v.* Mann, 56 Tex. 119, 42 Am. Rep. 688; Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193; Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785; Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272; Sutherland *v.* Elmendorf, 24 Tex. Civ. App. 137, 57 S. W. 890. **Wis.** Grunert *v.* Spalding, 78 N. W. 606; Finney *v.* Boyd, 26 Wis. 366.

Particular applications, see *infra*, VII, J.

40. Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009, Ann. Cas. 1913E, 875; Butler *v.* Fryer (Okla.), 159 Pac. 367.

2. Privity Defined. — As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property,[41] and all persons are privies to a judgment, whose succession to the rights of property thereby adjudicated or affected was derived through or under one of the parties to the action and accrued subsequent to the commencement of that suit.[42]

I. STRANGERS. — 1. In General. — The doctrine of res judicata rests upon the principle that there has been a judicial inquiry into the subject matter in which the person to be affected by the judgment has had an opportunity,[43] either personally or by representation,

41. **U. S.**—Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009, Ann. Cas. 1913E, 875. **Ark.**—Bell *v.* Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370. **Cal.**—Valentine *v.* Mahoney, 37 Cal. 389. **Ga.**—Brown *v.* Chaney, 1 Ga. 410. **Ill.**—Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212. **Ia.**—Woodward *v.* Jackson, 85 Iowa 432, 52 N. W. 358; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226. **Minn.**—Nowack *v.* Knight, 44 Minn. 241, 46 N. W. 348. **Mo.** State *ex rel.* Knisely *v.* Board of Trustees, 268 Mo. 163, 186 S. W. 680. **Neb.**—Densmore *v.* Tomer, 14 Neb. 392, 15 N. W. 734. **Nev.**—Bank of Italy *v.* Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863. **Okla.**—Butler *v.* Fryer, 159 Pac. 367. **Tenn.**—Simpson *v.* Jones, 2 Sneed 36. **Tex.**—Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785; Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272. **Wash.**—Litzell *v.* Hart, 96 Wash. 471, 165 Pac. 393.

[a] **Privies in law** is intended and not privity by contract or deed. California Bridge & Const. Co. *v.* United States, 50 Ct. Cl. 40.

[b] **Privity in estate** implies mutuality of or succession in interest. Butler *v.* Fryer (Okla.), 159 Pac. 367.

[c] **Privity depends** upon the relation of the parties to the subject matter, rather than their activity in a suit relating to it after the event. Old Dominion Copper Min. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314.

[d] **That parties were interested in the same question** or in proving the same facts, does not constitute them privies. Coleman *v.* Bosworth, 180 Iowa 975, 164 N. W. 238.

[e] **A grantee in a champertous deed** might be in privity with his grantor but that does not necessarily mean that the grantor is in privity with such grantee and bound by a judgment in which he alone is the party defendant. Butler *v.* Fryer (Okla.), 159 Pac. 367.

42. **U. S.**—Central Nat. Bank *v.* Hazard, 30 Fed. 484. **Ala.**—White *v.* Hall, 176 Ala. 480, 58 So. 444. **Cal.** Gale *v.* Tuolumne County Water Co., 169 Cal. 46, 145 Pac. 532; Calderwood *v.* Brooks, 28 Cal. 151. **Ill.**—Orthwein *v.* Thomas, 13 N. E. 564. **Ky.**—McNeill's Heirs *v.* Thompson, 178 Ky. 90, 198 S. W. 571; Shanahan *v.* McIntire, 169 Ky. 160, 183 S. W. 529. **Miss.** Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651. **Nev.**—Bank of Italy *v.* Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863. **N. C.**—Sills *v.* Ford, 171 N. C. 733, 88 S. E. 636; Moore *v.* Curtis, 169 N. C. 74, 85 S. E. 132; Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924. **Okla.**—Butler *v.* Fryer, 159 Pac. 367; Blackwell *v.* McCall, 54 Okla. 96, 153 Pac. 815. **Pa.** Hessel *v.* Johnson, 124 Pa. 233, 16 Atl. 855; *In re* Newbold's Estate, 65 Pa. Super. 151. **Tex.**—Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785; Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272; Elliott *v.* Morris, 49 Tex. Civ. App. 527, 121 S. W. 209.

Necessity of lis pendens, see the title "**Lis Pendens.**"

43. **U. S.**—Iroquois Iron Co. *v.* Kruse, 241 Fed. 433, 154 C. C. A. 265; Old Colony Trust Co. *v.* Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. ed. 1410; Northern Pac. R. Co. *v.* Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. ed. 931; Peters *v.* Braward, 222 U. S. 483, 32 Sup. Ct. 122, 56 L. ed. 278. **Ala.**—White *v.* Hill, 176 Ala. 480, 58 So. 444; Miller *v.* Vaughan, 73 Ala. 312. **Ga.**—Jackson *v.* Butt, 147 Ga. 415, 94 S. E. 235; Georgia Realty Co. *v.* Bank of Covington, 19 Ga. App.

to be heard. Within certain limitations,[44] therefore, it may be stated that persons who were neither parties nor privies to the former proceeding are not estopped by the judgment therein,[45] unless they volun-

219, 91 S. E. 267; Floyd *v.* Boyd, 16 Ga. App. 43, 84 S. E. 494. **Ill.**—Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256. **Ind.** Hutchinson *v.* Wood, 59 Ind. App. 537, 109 N. E. 794. **Ia.**—Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293. **Kan.** Chapek *v.* Jurgensen, 99 Kan. 658, 162 Pac. 1165. **Ky.**—Brock *v.* Conkwright, 179 Ky. 555, 200 S. W. 962; McNeill's Heirs *v.* Thompson, 178 Ky. 90, 198 S. W. 571; France *v.* Chesapeake & O. R. Co., 170 Ky. 188, 185 S. W. 815. **Mass.**—McCarthy *v.* William H. Wood Lumber Co., 219 Mass. 566, 107 N. E. 439. **Mich.**—Fisher *v.* Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192. **N. Y.**—Murphy *v.* John Hofman Co., 157 App. Div. 88, 141 N. Y. Supp. 900; Mace *v.* Mace, 24 App. Div. 291, 48 N. Y. Supp. 831. **N. C.**—Powell *v.* Dail, 172 N. C. 261, 90 S. E. 194; Bennett *v.* Holmes, 18 N. C. 486. **Pa.**—Ehrhart *v.* Bear, 51 Pa. Super. 39. **Tex.**—Chavez *v.* Schairer (Tex. Civ. App.), 199 S. W. 892; Ludtke *v.* Murray (Tex. Civ. App.), 199 S. W. 321; Houston Oil Co. *v.* Stepney (Tex. Civ. App.), 187 S. W. 1078; Miles *v.* Bodenheim (Tex. Civ. App.), 184 S. W. 633.

44. See *infra*, VII, I, 2.

45. U. S.—Kapiolani's Estate *v.* Atcherly, 238 U. S. 119, 35 Sup. Ct. 832, 59 L. ed. 1229, Ann. Cas. 1916E, 142; Anderson *v.* Hultberg (C. C. A.), 247 Fed. 273; Iroquois Iron Co. *v.* Kruse, 241 Fed. 433, 154 C. C. A. 265; Williamson *v.* Clay Center, 237 Fed. 329, 150 C. C. A. 343; Johnson *v.* Garner, 233 Fed. 756. **Ala.**—Dawsey *v.* Culbreth, 75 So. 459; Cox *v.* Brown, 73 So. 964; Winston *v.* Westfeldt, 22 Ala. 760, 58 Am. Dec. 278. **Ariz.** Cameron *v.* Bass, 168 Pac. 645. **Ark.** Cramer *v.* Remmel, 132 Ark. 158, 200 S. W. 811; Massey *v.* Doke, 123 Ark. 211, 185 S. W. 271; Biederman *v.* Parker, 105 Ark. 86, 150 S. W. 397; Garland *v.* Hot Springs, 68 Ark. 83, 56 S. W. 636. **Cal.**—Crouch *v.* Shafer, 169 Pac. 1019; Town of Cloverdale *v.* Smith, 128 Cal. 230, 60 Pac. 851; Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254. **Colo.**—Webster *v.* Kautz, 22 Colo. App. 111, 123 Pac. 139; Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505; Newman *v.* Tibbitts, 27 Colo. App. 325, 149 Pac. 266. **Conn.**—Cook *v.* Morris, 66 Conn. 137, 33 Atl. 594; Dennison *v.* Hyde, 6 Conn. 508. **Del.**—Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256; Burton *v.* Hazzard, 4 Harr. 100. **Fla.** State *ex rel.* Knott *v.* Crawford, 72 Fla. 232, 73 So. 584; Reddick *v.* Meffert, 32 Fla. 409, 13 So. 894; Marvin *v.* Hampton, 18 Fla. 131. **Ga.**—Moye *v.* Bedingfield, 146 Ga. 600, 91 S. E. 682; Clayton *v.* West, 97 Ga. 328, 22 S. E. 901; Brock *v.* Garrett, 16 Ga. 487. **Ill.**—Jordan *v.* Jordan, 274 Ill. 251, 113 N. E. 631, L. R. A. 1917D, 563; Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256; Garrigue *v.* Arnott, 80 Ill. App. 24. **Ind.**—Goss *v.* Wallace, 140 Ind. 541, 39 N. E. 920; Busick *v.* Busick (Ind. App.), 115 N. E. 1025; Cray *v.* Wright, 16 Ind. App. 258, 44 N. E. 1009. **Ia.**—Kock *v.* Burgess, 176 Iowa 493, 156 N. W. 174; Kitteridge *v.* Ritter, 172 Iowa 55, 151 N. W. 1097; Chadima *v.* Kovar, 168 Iowa 385, 150 N. W. 691. **Kan.**—Chapek *v.* Jurgensen, 99 Kan. 658, 162 Pac. 1165; Kansas Pac. Ry. Co. *v.* McBratney, 12 Kan. 9. **Ky.**—Sim *v.* Bishop, 177 Ky. 279, 197 S. W. 625; Jones *v.* Caldwell, 176 Ky. 15, 195 S. W. 122, L. R. A. 1918B, 50; Norton *v.* Norton, 15 Ky. L. Rep. 872, 25 S. W. 750, 27 S. W. 85. **La.**—Succession of Powers *v.* Howcott, 137 La. 818, 69 So. 198; Mestier *v.* New Orleans, O. & G. W. R. Co., 16 La. Ann. 354. **Me.**—Horton *v.* Wright, 113 Me. 439, 94 Atl. 883; Snow *v.* Russell, 94 Me. 322, 47 Atl. 536; Trustees of Putnam Free School *v.* Fisher, 34 Me. 172. **Md.**—Philadelphia, B. & W. R. Co. *v.* Baltimore, 124 Md. 635, 93 Atl. 146; Niller *v.* Johnson, 27 Md. 6; McClellan *v.* Kennedy, 8 Md. 230. **Mass.**—Habib *v.* Evans, 222 Mass. 480, 111 N. E. 362; Shores *v.* Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308; Vose *v.* Morton, 4 Cush. 27, 50 Am. Dec. 750. **Mich.**—Humiston, Keeling & Co. *v.* Bridgman, 195 Mich. 82, 161 N. W. 852; Fowler *v.* Blount, 191 Mich. 575, 158 N. W. 114; Luttermoser *v.* Zeuner, 110 Mich. 186, 68 N. W. 117. **Minn.**—Lamont *v.* Lamont, 128 Minn. 525, 151 N. W. 416; Kurtz *v.* St. Paul & D. R. Co., 65 Minn. 60, 67 N. W. 808; Nowack *v.* Knight, 44 Minn. 241, 46 N. W. 348. **Miss.**—Green

tarily submitted their interests for adjudication,[46] or substantially participated in the proceedings,[47] for it is an obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger.[48] To hold otherwise would be to condemn without a

v. Taylor, 111 Miss. 232, 71 So. 375; Adams *v.* Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 28 So. 956, 60 L. R. A. 33; McPike *v.* Wells, 54 Miss. 136. **Mo.**—Dugge *v.* Stumpe, 73 Mo. 513; Norcross *v.* Hudson, 32 Mo. 227; Meyer *v.* Nischwitz, 198 Mo. App. 101, 199 S. W. 744. **Neb.**—Connell *v.* Galligher, 36 Neb. 749, 55 N. W. 229; McCord Brady Co. *v.* Krause, 36 Neb. 764, 55 N. W. 215. **N. H.**—Wingate *v.* Haywood, 40 N. H. 437; Stevens *v.* Thompson, 17 N. H. 103. **N. J.**—Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919; Lehigh Z. & I. Co. *v.* New Jersey Z. & I. Co., 55 N. J. L. 350, 26 Atl. 920. **N. Y.**—New York Life Ins. & Trust Co. *v.* Viele, 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238; Westerburg *v.* Wachenheim, 164 N. Y. Supp. 677; Rosenthal *v.* United States Paper Co., 164 N. Y. Supp. 121. **N. C.**—Massey *v.* Alston, 173 N. C. 215, 91 S. E. 964; Powell *v.* Dail, 172 N. C. 261, 90 S. E. 194; Pinnell *v.* Burroughs, 168 N. C. 315, 84 S. E. 364. **Ohio.**—Stewart *v.* Wheeling & L. E. Ry. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Colston *v.* Bishop, 1 Ohio C. C. 460, 1 Ohio Cir. Dec. 257. **Okla.**—Ratcliff-Sanders Grocer Co. *v.* Bluejacket Mercantile Co., 164 Pac. 1142; Swaydan *v.* Ellis, 158 Pac. 434. **Ore.**—Robinson *v.* Phegley, 84 Ore. 124, 163 Pac. 1166; Bishop *v.* Henry, 84 Ore. 389, 165 Pac. 237; De Lashmutt *v.* Sellwood, 10 Ore. 319. **Pa.** Walker *v.* Philadelphia, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801; Mackey's Admr. *v.* Coates, 70 Pa. 350; Morrison's Admr. *v.* Mullin, 34 Pa. 12. **R. I.**—Miller *v.* Healey, 39 R. I. 339, 97 Atl. 796. **S. C.**—Continental Ins. Co. *v.* Seaboard Air Line Ry., 106 S. C. 43, 90 S. E. 318; Cathcart *v.* Matthews, 105 S. C. 329, 89 S. E. 1021; Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304. **Tenn.**—Chambers *v.* Preston, 137 Tenn. 324, 193 S. W. 109, Ann. Cas. 1918B, 428; Arnold *v.* Harris, 52 S. W. 715; Simpson *v.* Jones, 2 Sneed 36. **Tex.**—Main *v.* Cartwright (Tex. Civ. App.), 200 S. W 847; Connor *v.* Weik (Tex. Civ. App.), 116 S. W. 650; House *v.* Stephens (Tex. Civ. App.), 198 S. W. 384. **Vt.** Wright *v.* Hazen, 24 Vt. 143; Nason *v.* Blaisdell, 12 Vt. 165, 36 Am. Dec. 331. **Va.**—Linkous *v.* Stevens, 116 Va. 898, 83 S. E. 417; Downer & Co. *v.* Morrison, 2 Gratt. (43 Va.) 250; Frazier *v.* Frazier's Exrs., 2 Leigh (29 Va.) 642. **Wash.**—Allen *v.* Allen, 96 Wash. 689, 165 Pac. 889; Wylde *v.* Schoening, 96 Wash. 86, 164 Pac. 752; Coe *v.* Wormell, 88 Wash. 119, 152 Pac. 716, Ann. Cas. 1917C, 679. **W. Va.** McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; Renick *v.* Ludington, 20 W. Va. 511. **Wis.**—Mitchell *v.* Lyons, 163 Wis. 399, 158 N. W. 70; Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881; Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589.

[a] **A former ejectment suit** between different parties, determining the questions in issue in the present ejectment suit though not res judicata is a valuable precedent. France *v.* Chesapeake & O. R. Co., 170 Ky. 188, 185 S. W. 815.

[b] **A holder of one of several notes** secured by a mortgage is not concluded by a judgment in favor of another holder of the notes when he was not a party to the suit. Georgia Realty Co. *v.* Bank of Covington, 19 Ga. App. 219, 91 S. E. 267.

[c] **Alien heirs** who were not parties to a probate proceeding in New York wherein it was decided that decedent was a resident of that state, may in a subsequent proceeding to assess the transfer tax, show his residence to have been in Cuba. *In re* Mesa's Estate, 172 App. Div. 467, 159 N. Y. Supp. 59.

[d] **A divorce decree** is not res judicata in a suit subsequently brought against the husband for necessaries furnished his wife and daughter. Mullally *v.* Lott, 162 Ill. App. 533.

[e] **Judgment establishing a boundary** not admissible in evidence in proceedings between other parties. Dunn *v.* Land (Tex. Civ. App.), 193 S. W. 698.

46. See *supra*, VII, G, 3, d.
47. See *supra*, VII, G, 3, d.
48. **U. S.**—Humes *v.* Scruggs, 94

hearing and without notice, which is contrary to the law of the land and a taking without due process of law.[49]

2. Exceptions to the Rule. — a. *As Evidence of Its Rendition.* The general rule that judgments are binding only as between parties and privies is subject to exceptions. In the first place a judgment is always evidence of its own existence and is admissible wherever relevant, even as against strangers, to prove the fact of its rendition and the legal consequences that flow therefrom.[50] Thus a judgment may be used as against strangers, to evidence an indebtedness,[51] to

U. S. 22, 24 L. ed. 51; Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 244, 23 L. ed. 314; Golden Hill Distilling Co. *v.* Logue, 243 Fed. 342, 156 C. C. A. 122. **Ark.**—Cramer *v.* Remmel, 132 Ark. 158, 200 S. W. 811. **Cal.** Cloverdale *v.* Smith, 128 Cal. 230, 60 Pac. 851. **Fla.**—Knox *v.* Spratt, 19 Fla. 817. **Ga.**—Clayton *v.* West, 97 Ga. 328, 22 S. E. 901. **Kan.**—Kansas Pac. Ry. Co. *v.* McBratney, 12 Kan. 9. **Me.** Sheldon *v.* White, 35 Me. 233. **N. H.** Stevens *v.* Thompson, 17 N. H. 103. **N. J.**—Lehigh Z. & I. Co. *v.* New Jersey Z. & I. Co., 55 N. J. L. 350, 26 Atl. 920. **Ohio.**—Colston *v.* Bishop, 1 Ohio C. C. 460, 1 Ohio Cir. Dec. 257. **Okla.**—Swaydan *v.* Ellis, 158 Pac. 434.

49. Powell *v.* Dail, 172 N. C. 261, 90 S. E. 194; Morrison's Admr. *v.* Mullin, 34 Pa. 12.

50. **U. S.**—Anderson *v.* Hultberg (C. C. A.), 247 Fed. 273. **Ala.**—Taylor *v.* Means, 73 Ala. 468; Anderson *v.* Bright, 12 Ala. 478; Ansley *v.* Carlos, 9 Ala. 973. **Ark.**—Biederman *v.* Parker, 105 Ark. 86, 150 S. W. 397. **Cal.**—Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647. **Conn.** Smith *v.* Chapin, 31 Conn. 530. **Fla.** Love *v.* Gibson, 2 Fla. 598. **Ill.**—Koren *v.* Roemheld, 7 Ill. App. 646. **Ind.** Maple *v.* Beach, 43 Ind. 51. **La.**—Gillett *v.* Landis, 17 La. 470. **Me.**—Atkinson *v.* Parks, 84 Me. 414, 24 Atl. 891. **Md.**—Key *v.* Dent, 14 Md. 86. **Minn.**—Falconer *v.* Cochran, 68 Minn. 405, 71 N. W. 386. **Mo.**—Lee's Admx. *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247; Lloyd *v.* Tracy, 53 Mo. App. 175. **Nev.** Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351. **N. H.**—Harrington *v.* Wadsworth, 63 N. H. 400; Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759. **N. Y.** Walsh *v.* Ostrander, 22 Wend. 178. **N. C.**—Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737. **S. C.**—Baker *v.* Deliesseline, 4 McCord 372. **Tenn.**—Stephens *v.* Jack, 3 Yerg. 403, 24 Am. Dec. 583. **Tex.** McCamant *v.* Roberts, 66 Tex. 260, 1 S. W. 260. **Va.**—Shanks *v.* Lancaster, 5 Gratt. (46 Va.) 110, 50 Am. Dec. 108. **Vt.**—Spencer *v.* Dearth, 43 Vt. 98; Quinn *v.* Quinn, 16 Vt. 426. **Wis.** Landauer *v.* Espenhain, 95 Wis. 169, 70 N. W. 287.

[a] **A judgment against a grantor** in proceedings commenced after the conveyance estops the prior grantee who was not a party or privy, to deny that the judgment was rendered at the time specified in its record and that the grantor was at that time indebted to the judgment creditor in the amount therein stated but it estops him no further. Anderson *v.* Hultberg (C. C. A.), 247 Fed. 273.

51. **Ala.**—Bain *v.* Wells, 107 Ala. 562, 19 So. 774; Moore & Handley Hdw. Co. *v.* Curry, 106 Ala. 284, 18 So. 46. **Cal.**—Welch *v.* Sargent, 127 Cal. 72, 59 Pac. 319; Mosgrove *v.* Harris, 94 Cal. 162, 29 Pac. 490. **Ill.**—Rice *v.* Rice, 108 Ill. 199; Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532. **Ia.** Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74. **Kan.**—Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881. **La.**—Bothick *v.* Greves, 34 La. Ann. 907; Judson *v.* Connolly, 5 La. Ann. 400. **Me.**—Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527. **Minn.**—Pabst Brewing Co. *v.* Jensen, 68 Minn. 293, 71 N. W. 384. **Miss.**—Aron *v.* Chaffe, 72 Miss. 159, 17 So. 11. **Mo.**—Dempsey *v.* Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100. **N. Y.**—Raymond *v.* Richmond, 78 N. Y. 351. **N. C.** Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800. **Tenn.**—First Nat. Bank *v.* Oldham, 6 Lea 718. **Tex.**—Lehman *v.* Stone, 4 Wils. Civ. Cas., §121, 16 S. W. 784. **Va.**—Cox *v.* Thomas' Admx., 9 Gratt. (50 Va.) 323. **W. Va.**—Tur-

establish a link in a chain of title,[52] or to prove the fact of conviction or acquittal.[53]

b. *Judgments in Rem.* — In so far as an adjudication is one in rem, it is binding on the world.[54]

J. Application to Particular Relations. — 1. **Landlord and Tenant.** — A landlord is not, generally speaking, in privity with his tenant so as to be estopped by a judgment for or against the latter.[55] It would seem, however, that the landlord ought to be concluded by such judgment if he had notice of the proceeding and occupied such relation to the controversy that he was bound to appear and defend,[56] as also where, though not a party of record, he sub-

ner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924. **Wis.**—Clasgens Co. *v.* Silber, 93 Wis. 579, 67 N. W. 1122.

52. **Ala.**—Steele *v.* Tutwiler, 57 Ala. 113; Bumpass *v.* Webb, 3 Ala. 109. **Cal.**—Richardson *v.* McNulty, 24 Cal. 339. **Conn.**—Fowler *v.* Savage, 3 Conn. 90. **Ga.**—Bussey *v.* Dodge, 94 Ga. 584, 21 S. E. 151; Clayton *v.* Roe, 36 Ga. 321. **Ill.**—Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320; Delano *v.* Bennett, 90 Ill. 533. **Ia.**—Lathrop *v.* American Emigrant Co., 41 Iowa 547. **Md.**—House *v.* Wiles, 12 Gill & J. 338. **Mass.** Chamberlain *v.* Bradley, 101 Mass. 188, 3 Am. Rep. 331. **Minn.**—Kurtz *v.* St. Paul & D. R. Co., 61 Minn. 18, 63 N. W. 1. **N. Y.**—Railroad Equipment Co. *v.* Blair, 145 N. Y. 607, 39 N. E. 962. **N. C.**—Finch *v.* Finch, 131 N. C. 271, 42 S. E. 615. **Ohio.**—Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285. **Pa.**—Martin *v.* Rutt, 127 Pa. 380, 17 Atl. 993. **R. I.**—Glezen *v.* Haskins, 23 R. I. 601, 51 Atl. 219. **S. C.**—Wardlaw *v.* Hammond, 9 Rich. L. 454. **Tex.**—Ellis *v.* Le Bow, 96 Tex. 532, 74 S. W. 528. **Va.**—Building, L. & W. Co. *v.* Fray, 96 Va. 559, 32 S. E. 58.

53. See *supra*, V, D, 2, b, (VI).

54. See *supra*, V, D, 3.

55. **U. S.**—Chirac *v.* Reinecker, 2 Pet. 613, 617, 7 L. ed. 538. **Ala.**—Wilson *v.* State, 115 Ala. 129, 22 So. 567. **Cal.**—Chant *v.* Reynolds, 49 Cal. 213. **Ill.**—Orthwein *v.* Thomas, 13 N. E. 564; Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468. **Ind.**—Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792. **Mass.**—Bartlett *v.* Boston Gas Light Co., 122 Mass. 209. **Mich.**—Powers *v.* Scholtens, 79 Mich. 299, 44 N. W. 613. **Mo.**—Magwire *v.* Labeaume, 7 Mo. App. 179. **N. Y.** Bradt *v.* Church, 110 N. Y. 537, 18 N. E. 357; Ryerss *v.* Rippey, 25 Wend. 432. **S. C.**—Samuel *v.* Dinkins, 12 Rich. L. 172, 75 Am. Dec. 729. **Tenn.**—Cope *v.* Payne, 111 Tenn. 128, 76 S. W. 820, 102 Am. St. Rep. 746; Boles *v.* Smith, 5 Sneed 105. **Tex.**—Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272; Stout *v.* Taul, 71 Tex. 438, 9 S. W. 329; Penfield *v.* Harris, 7 Tex. Civ. App. 659, 27 S. W. 762. **Wis.**—Kent *v.* Lasley, 48 Wis. 257, 4 N. W. 23.

[a] **Must Be a Party of Record.** There is authority which goes so far as to hold that where a tenant was assisted by his landlord on a trial of trespass to try title, yet the latter was not bound since he was not made a party to the record. Samuel *v.* Dinkins, 12 Rich. L. (S. C.) 172, 75 Am. Dec. 729.

[b] **Tort Action by Tenant.**—Bartlett *v.* Boston Gas Light Co., 122 Mass. 209.

[c] **Trespass to try title** against tenant. Samuel *v.* Dinkins, 12 Rich. L. (S. C.) 172, 75 Am. Dec. 729; Lamar County *v.* Talley (Tex. Civ. App.), 127 S. W. 272; Stout *v.* Taul, 71 Tex. 438, 9 S. W. 329.

[d] **Ejectment** against tenant. **U. S.** Chirac *v.* Reinecker, 2 Pet. 613, 617, 7 L. ed. 538. **Ala.**—Stanley *v.* Johnson, 113 Ala. 344, 21 So. 823. **Ind. Ter.**—Lochner *v.* Garborina, 3 Ind. Ter. 664, 64 S. W. 570. **Kan.**—Miller *v.* Ditlinger, 81 Kan. 9, 105 Pac. 20, 26 L. R. A. (N. S.) 595. **Mich.**—Powers *v.* Scholtens, 79 Mich. 299, 44 N. W. 613. **Mo.**—Magwire *v.* Labeaume, 7 Mo App. 179. **N. J.**—Baxter *v.* Carrol (N. J. Eq.), 41 Atl. 407. **N. Y.** Ryerss *v.* Rippey, 25 Wend. 432. **Vt.** Knapp *v.* Marlboro, 31 Vt. 674. **Wis.** Kent *v.* Lasley, 48 Wis. 257, 4 N. W. 23.

56. **Smith** *v.* **Gayle, 58 Ala. 600;**

stantially participated in the litigation in order to protect his own interests.[57] The tenant claims through and under the landlord and will be concluded by a judgment for or against the landlord rendered prior to the making of the lease,[58] and a tenant who has actual notice of the pendency of an ejectment suit against his landlord is bound by the judgment.[59]

2. Husband and Wife.[60] — No privity arises from the mere personal relation of husband and wife,[61] a judgment for or against the wife is not res judicata as to her husband,[62] nor is a judgment for or

Rodgers *v.* Bell, 53 Ga. 94. See *supra*, VII, G, 3, c.

[a] **Ejectment. — Ark.** — Boswell *v.* Jordan, 112 Ark. 159, 165 S. W. 295. **Ill.**—Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373. **Ky.**—Pleak *v.* Chambers, 5 Dana 60. **Pa.**—Chambers *v.* Lapsley, 7 Pa. 24. **W. Va.**—Clark *v.* Perdue, 40 W. Va. 300, 21 S. E. 735.

57. **Ala.**—Wilson *v.* State, 115 Ala. 129, 22 So. 567. **Cal.**—Tyrrell *v.* Baldwin, 67 Cal. 1, 6 Pac. 867; McCreery *v.* Everding, 54 Cal. 168; Valentine *v.* Mahoney, 37 Cal. 389. **Fla.**—Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190, 20 So. 255. **Ill.**—Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373. **Ind. Ter.**—Lochner *v.* Garborina, 3 Ind. Ter. 664, 64 S. W. 570. **Me.**—Sevey *v.* Chick, 13 Me. 141. **N. Y.**—Kosower *v.* Sandler, 49 Misc. 443, 98 N. Y. Supp. 65.

See *supra*, VII, G, 3, d.

[a] **Unless made a party of record**, participation by landlord not sufficient. See Samuel *v.* Dinkins, 12 Rich. L. (S. C.) 172, 75 Am. Dec. 729.

[b] **Judgment in forcible entry and detainer** against tenant, binding on landlord who participated in the defense. Harvie *v.* Turner, 46 Mo. 444; but not where he had no legal right to participate in the proceedings. Cope *v.* Payne, 111 Tenn. 128, 76 S. W. 820, 102 Am. St. Rep. 746.

[c] **Judgment in ejectment** binding on landlord who contested the case. Chambers *v.* Lapsley, 7 Pa. 24.

[d] **Employment of counsel** to defend does not alone make landlord party. **Mo.**—Magwire *v.* Labeaume, 7 Mo. App. 179. **N. Y.**—Ryerss *v.* Rippey, 25 Wend. 432. **Tex.**—Haney *v.* Brown (Tex. Civ. App.), 46 S. W. 55.

[e] **Being a mere witness** in the suit is not such a participation therein as concludes the landlord. Lochner *v.* Garborina, 3 Ind. Ter. 664, 64 S. W. 570.

[f] **Judgment in summary dispossession** proceedings against tenant. Kosower *v.* Sandler, 49 Misc. 443, 98 N. Y. Supp. 65.

58. Hessel *v.* Johnson, 124 Pa. 233, 16 Atl. 855. See Samuel *v.* Dinkins, 12 Rich. L. (S. C.) 172, 75 Am. Dec. 729.

59. Moate *v.* Rives, 146 Ga. 425, 91 S. E. 420. See *supra*, VII, G, 3, c.

60. See generally the title "**Husband and Wife.**"

61. **Kan.**—King *v.* Wilson, 95 Kan. 390, 148 Pac. 752. **Mich.**—Kovacs *v.* Mayoras, 175 Mich. 582, 141 N. W. 662. **Mo.**—Crouch *v.* Holterman, 272 Mo. 432, 199 S. W. 193; Womach *v.* St. Joseph, 201 Mo. 467, 100 S. W. 443, 10 L. R. A. (N. S.) 140. **N. Y.** Kowal *v.* Lehrman, 144 App. Div. 219, 128 N. Y. Supp. 968. **Ore.**—Dale *v.* Marvin, 76 Ore. 528, 148 Pac. 1116, 1151, Ann. Cas. 1917C, 557.

[a] **Ground of privity is property** and not personal relation. Womach *v.* St. Joseph, 201 Mo. 467, 100 S. W. 443, 10 L. R. A. (N. S.) 140.

62. **Mo.**—Canterbury *v.* Kansas City, 130 Mo. App. 1, 108 S. W. 574. **N. Y.** Kowal *v.* Lehrman, 144 App. Div. 219, 128 N. Y. Supp. 968; Stamp *v.* Franklin, 75 Hun 373, 27 N. Y. Supp. 84, 58 N. Y. St. 608. **Wis.**—Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691.

See 11 STANDARD PROC. 803.

[a] **Judgment in personal injury suit** (1) brought by or in behalf of the wife is not evidence in a suit by the husband for damages to him resulting from the same injury (**Minn.** Mageau *v.* Great Northern R. Co., 103 Minn. 290, 115 N. W. 651, 946, 15 L. R. A. (N. S.) 511. **Mo.**—Womach *v.* St. Joseph, 201 Mo. 467, 100 S. W. 443, 10 L. R. A. (N. S.) 140; Canter-

against the husband conclusive as to the wife,[63] unless she claims through or under him,[64] or he was authorized under the law to represent whatever interests she had in the property involved.[65]

3. Parent and Child. — Privity of estate does not exist between parent and child so as to render a judgment as to the child[66] res judi-

bury *v.* Kansas City, 130 Mo. App. 1, 108 S. W. 574. **N. Y.**—Groth *v.* Washburn, 39 Hun 324; Neeson *v.* Troy, 29 Hun 173. **Wis.**—Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691. See 11 STANDARD PROC. 803), even (2) where he was a formal though unnecessary party, if he had no right to control the action. Walker *v.* Philadelphia, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801.

63. Ala.—Milam *v.* Coley, 144 Ala. 535, 39 So. 511. **Ga.**—Taylor *v.* Neither, 108 Ga. 765, 33 S. E. 420. **Ill.**—Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434. **Ky.**—Morrison *v.* Price, 130 Ky. 139, 112 S. W. 1090. **Mich.**—Kovacs *v.* Mayoras, 175 Mich. 582, 141 N. W. 662. **Mo.**—Crouch *v.* Holterman, 272 Mo. 432, 199 S. W. 193. **N. Y.** Frisbee *v.* Tufts, 74 Misc. 49, 133 N. Y. Supp. 641. **N. C.**—Patterson *v.* Franklin, 168 N. C. 75, 84 S. E. 18. **Ore.**—Barnes *v.* Spencer, 79 Ore. 205, 153 Pac. 47; Dale *v.* Marvin, 76 Ore. 528, 148 Pac. 1116, 1151, Ann. Cas. 1917C, 557. **Tex.**—Galveston, H. & S. A. R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Read *v.* Allen, 56 Tex. 182; Bishop *v.* Gestean (Tex. Civ. App.), 136 S. W. 1141. **Vt.**—Ballantine & Sons *v.* Fenn, 84 Vt. 117, 78 Atl. 713, 40 L. R. A. (N. S.) 698. **Wash.** Woste *v.* Rugge, 68 Wash. 90, 122 Pac. 988.

See 11 STANDARD PROC. 803.

[a] **In respect to her separate property** the wife is not concluded by a judgment against her husband. Childress *v.* Robinson (Tex. Civ. App.), 161 S. W. 78. See 11 STANDARD PROC. 804.

[b] **Judgment for husband in slander suit** where the alleged slander concerned him and his wife, is not res judicata as to her. Kovacs *v.* Mayoras, 175 Mich. 582, 141 N. W. 662.

64. Ark.—McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731. **Cal.**—Page *v.* Garver, 5 Cal. App. 383, 90 Pac. 481. **Ind.**—Tanguey *v.* O'Connell, 132 Ind. 62, 31 N. E. 469. **Ia.**—Schroeder *v.* State Bank, 144 Iowa 42, 121 N. W. 505; Campbell *v.* Ayres, 18 Iowa 252. **Mich.**—Dalton *v.* Mertz, 197 Mich. 390, 163 N. W. 912. **Tex.**—Whiteselle *v.* Jones (Tex. Civ. App.), 39 S. W. 405.

[a] **Succession Prior to Suit.**—The wife is not concluded by the judgment where her succession to the rights of property accrued prior to the suit against her husband. Barnes *v.* Spencer, 79 Ore. 205, 153 Pac. 47.

[b] **Judgment in ejectment** against husband. Delacey *v.* Commercial Trust Co., 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112.

65. Fla.—Connor *v.* Elliott, 74 So. 649. **Ia.**—Lea *v.* Woods, 67 Iowa 304, 25 N. W. 255. **Minn.**—Stitt *v.* Smith, 102 Minn. 253, 113 N. W. 632, 13 L. R. A. (N. S.) 723.

[a] **Divorce pending the suit** does not affect the conclusiveness of the judgment as against her. Gabb *v.* Boston (Tex.), 193 S. W. 137.

[b] **Judgments affecting the community property** rendered in suits to which the husband is a party will generally bind the wife. Lichty *v.* Lewis, 63 Fed. 535; Gabb *v.* Boston (Tex.), 193 S. W. 137; Treadwell *v.* Walker County Lumber Co. (Tex. Civ. App.), 161 S. W. 397; Childress *v.* Robinson (Tex. Civ. App.), 161 S. W. 78. But see Woste *v.* Rugge, 68 Wash. 90, 122 Pac. 988; Gustin *v.* Crockett, 44 Wash. 536, 87 Pac. 839.

[c] **In an action to remove a cloud from the title** brought against her in respect to the same land, she cannot relitigate questions decided in the suit against her husband. Stitt *v.* Smith, 102 Minn. 253, 113 N. W. 632, 13 L. R. A. (N. S.) 723.

66. Akers *v.* Fulkerson, 153 Ky. 228, 154 S. W. 1101; Bridger *v.* Asheville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

[a] **Judgment in an action by parent as next friend** for his infant child, not res judicata as to the parent in his subsequent suit for loss of the child's services. Akers *v.* Fulkerson, 153 Ky. 228, 154 S. W. 1101.

[b] **An adjudication refusing to re-**

cata as to the parent, or a judgment against the parent res judicata as to the child.[67]

4. Vendor and Purchaser. — A vendor or grantor does not ordinarily stand in privity with the purchaser so as to render a judgment for or against the purchaser res judicata as to him,[68] nor is a purchaser, as a rule, concluded by a judgment affecting his vendor or grantor,[69] unless his title to or interest in the property was acquired after the commencement of the proceedings in which the judgment was rendered.[70] A judgment which is not res judicata as to

voke letters of administration, at the instance of a child, is not res judicata as to the child's mother. White *v.* Hill, 176 Ala. 480, 58 So. 444.

Actions based on injuries to child, see 15 STANDARD PROC. 539.

67. **Ark.** — Thompson *v.* Southern Lumber Co., 113 Ark. 380, 168 S. W. 1068. **Ga.**—Jackson *v.* Butt, 147 Ga. 415, 94 S. E. 235. **Minn.**—Bamka *v.* Chicago, St. P. M. & O. Ry. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618. **N. Y.**—*In re* Biersack, 159 N. Y. Supp. 519.

[a] **A finding that the mother was not the widow** of intestate made in a former action to which the child was not a party is not res judicata as to him in a suit by him against the administratrix for an accounting. *In re* Biersack, 159 N. Y. Supp. 519.

[b] **Judgment in personal injury suit** brought by widow for herself and certain of her children not res judicata as to a child not made a party. Thompson *v.* Southern Lumber Co., 113 Ark. 380, 168 S. W. 1068.

68. Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416.

[a] **A judgment in action to quiet title** brought by the grantee of a mortgagor against the mortgagee is not res judicata as to the mortgagor in a subsequent foreclosure suit. Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416.

69. **U. S.**—Dull *v.* Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. ed. 733; Anderson *v.* Hultberg (C. C. A.), 247 Fed. 273; Ruppel *v.* Patterson, 1 Fed. 220. **Ala.**—Nunnelly *v.* Barnes, 139 Ala. 657, 36 So. 763. **Ark.**—Farmers' & Merchants' Bank *v.* Layson Lumber Co., 113 S. W. 793; Roulston *v.* Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97. **Cal.**—Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712. **Fla.**—Austin *v.* Hoxsie, 44 Fla. 199, 32 So. 878. **Ga.**—Elwell *v.* New England Mtg. Sec. Co., 101 Ga. 496, 28 S. E. 833; Simms *v.* Freiherr, 100 Ga. 607, 28 S. E. 288. **Ill.**—Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317. **Ind.**—Cray *v.* Wright, 16 Ind. App. 258, 44 N. E. 1009. **Ia.**—Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604. **La.**—McWilliams *v.* Gulf States Land & Imp. Co., 111 La. 194, 35 So. 514. **Mass.**—Stone *v.* Stone, 179 Mass. 555, 61 N. E. 268. **Mo.** Jones *v.* Hubbard, 193 Mo. 147, 90 S. W. 1137. **N. C.**—Latta *v.* Catawba Electric & Power Co., 146 N. C. 285, 59 S. E. 1028. **Okla.**—Blackwell *v.* McCall, 54 Okla. 96, 153 Pac. 815; De Watteville *v.* Sims, 44 Okla. 708, 146 Pac. 224. **S. C.**—Hodge *v.* Hodge, 56 S. C. 263, 34 S. E. 517. **S. D.**—State *v.* Coughran, 19 S. D. 271, 103 N. W. 31. **Tex.**—Ellis *v.* Le Bow, 96 Tex. 532, 74 S. W. 528. **W. Va.**—Smith *v.* White, 63 W. Va. 472, 60 S. E. 404, 14 L. R. A. (N. S.) 530; Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875. **Wis.**—Kimberly-Clark Co. *v.* Patten Paper Co., 153 Wis. 69, 140 N. W. 1066; Cypreanson *v.* Berge, 112 Wis. 260, 87 N. W. 1081.

[a] **Decree in Partition.** — Timberlake *v.* Sorrell, 125 La. 554, 51 So. 586.

[b] **Judgment in Trespass To Quiet Title.**—Elliott *v.* Morris (Tex. Civ. App.), 121 S. W. 209.

[c] **Party in possession under contract to purchase,** not bound by judgment respecting the property in an action commenced after contract completed. Schuler *v.* Ford, 10 Idaho 739, 80 Pac. 219, 109 Am. St. Rep. 233.

[d] **But where vendors sue to protect their vendee,** bringing the action in their own name, such vendee although they acquired title prior to the suit are concluded by the judgment. Souffront *v.* La Compagnie Des Sucreries, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. ed. 846.

70. **U. S.**—Collins *v.* Goldsmith, 71 Fed. 580; Central Nat. Bank *v.* Hazard,

30 Fed. 484. **Ala.**—Marsh *v.* Fricke, 1 Ala. App. 649, 56 So. 110. **Cal.** Sampson *v.* Ohleyer, 22 Cal. 200. **Fla.** Connor *v.* Elliott, 74 So. 649. **Ga.** Jinks *v.* Lewis, 94 Ga. 677, 20 S. E. 6. **Idaho.**—Schuler *v.* Ford, 10 Idaho 739, 80 Pac. 219, 109 Am. St. Rep. 233. **Ill.**—Clark *v.* Zaleski, 253 Ill. 63, 97 N. E. 272; Schumann *v.* Sprague, 189 Ill. 425, 59 N. E. 945. **Ind.**—Long *v.* Schowe, 181 Ind. 13, 103 N. E. 785. **Ia.**—Cushing *v.* Edwards, 68 Iowa 145, 25 N. W. 940. **Kan.**—Hungate *v.* Hetzer, 83 Kan. 265, 111 Pac. 183; Provident Loan Trust Co. *v.* Marks, 6 Kan. App. 34, 49 Pac. 625. **Ky.**—Shanahan *v.* McIntire, 169 Ky. 160, 183 S. W. 529; Hoskins *v.* Hoskins' Admrs., 157 Ky. 738, 164 S. W. 77; Farnsworth *v.* Barrett (Ky. App.), 142 S. W. 1049; Day & Congleton Lumber Co. *v.* Mack, 24 Ky. L. Rep. 640, 69 S. W. 712; Hisle *v.* Witherspoon, 19 Ky. L. Rep. 1013, 42 S. W. 842. **La.**—Roach *v.* Craig, 124 La. 684, 50 So. 652; Hargrave *v.* Moulton, 109 La. 533, 33 So. 590. **Mich.**—Sawyer *v.* McAdie, 70 Mich. 386, 38 N. W. 292. **Minn.**—White *v.* Hewitt, 119 Minn. 340, 138 N. W. 421; Minnesota Debenture Co. *v.* Johnson, 94 Minn. 150, 102 N. W. 381, 110 Am. St. Rep. 354. **Mo.**—State *ex rel.* Knisely *v.* Board of Trustees, 268 Mo. 163, 186 S. W. 680; Williams *v.* Hayti, 184 S. W. 470; Bristow *v.* Thackston, 187 Mo. 332, 86 S. W. 94, 106 Am. St. Rep. 472; Julian *v.* Kansas City Granite & Monument Co. (Mo. App.), 187 S. W. 584. **Nev.**—Bank of Italy *v.* Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863; Ahlers *v.* Thomas, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820. **N. Y.**—Sheridan *v.* Andrews, 49 N. Y. 478. **N. C.**—Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472. **N. D.** Salemonson *v.* Thompson, 13 N. D. 182, 101 N. W. 320. **Okla.**—Scott *v.* Wise-Autry Stock Co., 156 Pac. 340. **Ore.** Bergman *v.* Inman, 43 Ore. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771. **Pa.**—Tuthill *v.* Sweeting, 258 Pa. 250, 101 Atl. 989; Diamond *v.* Lawrence, 37 Pa. 353, 78 Am. Dec. 429; Hersey *v.* Turbett, 27 Pa. 418. **R. I.** Brightman *v.* Brightman, 1 R. I. 112. **S. C.**—Smith *v.* Moore, 7 S. C. 209, 24 Am. Rep. 479. **Tenn.**—Buckner *v.* Geodeker (Tenn. Ch.), 45 S. W. 448; American Exchange Bank *v.* Andrews, 12 Heisk. 306. **Tex.**—Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193; Davidson *v.* Bodan Lumb. Co. (Tex. Civ. App.), 143 S. W. 700; Henry *v.* Thomas (Tex. Civ. App.), 74 S. W. 599. **Va.**—Steinman *v.* Clinchfield Coal Corp., 121 Va. 611, 93 S. E. 684. **Wash.** State *ex rel.* Olding *v.* Stampfly, 69 Wash. 368, 125 Pac. 148. **Wash. Ter.** Eakin *v.* McCraith, 2 Wash. Ter. 112, 3 Pac. 838. **Wis.**—Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279.

[a] **United States** as purchaser, concluded. Chicago, M. & St. P. Ry. Co. *v.* United States, 159 U. S. 372, 16 Sup. Ct. 26, 40 L. ed. 185.

[b] **Adjudication in will contest** res judicata as to grantees of devisees. Hines *v.* Hines, 243 Mo. 480, 147 S. W. 774.

[c] **Purchasers at judicial sales** and all persons claiming through such purchasers concluded. **U. S.**—Zimmerman *v.* Kansas City Northwestern R. Co., 144 Fed. 622, 75 C. C. A. 424. **Miss.** Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375. **N. C.**—Skinner *v.* Terry, 134 N. C. 305, 46 S. E. 517. **Okla.**—Arnold *v.* Joines, 50 Okla. 4, 150 Pac. 130. **Tex.**—Deaton *v.* Southern Irr. Co. (Tex. Civ. App.), 144 S. W. 294. **W. Va.**—Hurxthal *v.* St. Lawrence Boom & Lumber Co., 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954; State *v.* Irwin, 51 W. Va. 192, 41 S. E. 124.

[d] **Purchasers of mortgaged land,** having notice of the mortgage are concluded by a prior decree declaring the amount of the indebtedness secured by the mortgage. Connor *v.* Elliott (Fla.), 74 So. 649.

[e] **Grantee of water rights** bound by judgment in action against former owner. Adams *v.* Barber, 21 Cal. App. 503, 132 Pac. 273; Dexter Sulphite Pulp & Paper Co. *v.* Jefferson Power Co., 179 App. Div. 332, 166 N. Y. Supp. 311. See Hanley *v.* Pacific Live Stock Co., 234 Fed. 522, 148 C. C. A. 288.

[f] **One who purchases personal property** after suit respecting the property is begun, is concluded by judgment therein. Bank of Italy *v.* Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863; Lumley *v.* Miller, 23 S. D. 16, 119 N. W. 1014.

[g] **Judgment in attachment suit against consignee of automobile** is res judicata as to the title of the automobile in a subsequent replevin suit by one who purchased the machine after the commencement of the former suit, even though the vendor was not a party to that suit. Bank of Italy

the vendor is not res judicata as to a purchaser from him.[71]

5. Principal and Agent. — Agents and principals are not in privity with each other in respect to property rights.[72] A judgment affecting the principal is not res judicata in a subsequent proceeding against the agent,[73] unless subsequent to the commencement of the former suit the agent succeeded to some property or interest involved.[74] The principal may, however, be estopped by a judgment against his agent where he had knowledge of the pendency of the suit and was bound to appear and defend,[75] or where he actually participated in the proceeding,[76] or where under the circumstances the agent was authorized to represent him in the litigation.[77]

6. Mortgagor and Mortgagee. — A mortgagee is privy in estate with the mortgagor only as to judgments in actions begun before the mortgage is executed,[78] and then only when the requirements as to "lis pendens" have been met.[79] Judgments for or against the mortgagor in suits begun after the mortgage is given are not res judicata as to the mortgagee, who was not a party to the suit.[80] A judg-

v. Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863.

71. Miller *v.* Ditlinger, 81 Kan. 9, 105 Pac. 20, 26 L. R. A. (N. S.) 595.

72. **Mich.**—Warner *v.* Comstock, 55 Mich. 615, 22 N. W. 64; Phillips *v.* Jamieson, 51 Mich. 153, 16 N. W. 318. **N. H.**—Fogg *v.* Plumer, 17 N. H. 112. **N. Y.**—Chapman *v.* L. E. Waterman Co., 176 App. Div. 697, 163 N. Y. Supp. 1059. **N. C.**—Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421. **Pa.** Goundie *v.* Northampton Water Co., 7 Pa. 233.

See also Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. 362, 21 Fed. Cas. No. 12,602.

73. **Ky.**—McCallister *v.* Bridges, 19 Ky. L. Rep. 107, 40 S. W. 70. **Mich.** Phillips *v.* Jamieson, 51 Mich. 153, 16 N. W. 318. **S. C.**—Rookard *v.* Atlantic & C. Air Line R. Co., 84 S. C. 190, 65 S. E. 1047, 137 Am. St. Rep. 839, 27 L. R. A. (N. S.) 435.

But see 15 STANDARD PROC. 613.

[a] **An agent representing his principal** in an action respecting title to property is not in privity with him and is not estopped in a subsequent action by him against the same defendants. Fogg *v.* Plumer, 17 N. H. 112.

74. Warren Featherbone Co. *v.* De Camp, 154 Fed. 198.

[a] **Where the liability of an insurance agent** for failure to cancel a policy is an issue in a suit by the company against him, the judgment roll in a former action against the insurance company based on the policy is admissible. Westchester Fire Ins. Co. *v.* Bollin, 106 S. C. 45, 90 S. E. 327.

[b] **The president of a steamship company** who executed a charter in behalf of the company, is in privity with the company. Cuneo Importing Co. *v.* American Importing & T. Co. (C. C. A.), 247 Fed. 413.

75. See *supra*, VII, G, 3, c.

76. McKinzie *v.* Baltimore & O. R. Co., 28 Md. 161. See *supra*, VII, G, 3, d.

77. **Ill.** — Perfection Pulverizing Mills *v.* Keiser, 203 Ill. App. 383. **Mo.**—Lippman *v.* Campbell, 40 Mo. App. 564. **Tenn.**—Farnsworth *v.* Arnold, 3 Sneed 252.

See *supra*, VII, G, 3, b.

78. **U. S.**—National Foundry & Pipe Works *v.* Oconto City Water Supply Co., 113 Fed. 793, 51 C. C. A. 465. **Ala.**—Cook *v.* Parham, 63 Ala. 456. **Fla.**—Connor *v.* Elliott, 74 So. 649. **Ga.** Moody *v.* Vondereau, 131 Ga. 521, 62 S. E. 821. **N. Y.**—Wilson *v.* Tompkins, 24 Misc. 598, 54 N. Y. Supp. 6. **Pa.** Schnepf's Appeal, 47 Pa. 37. **S. C.** Wilkes *v.* Southern Ry. Co., 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890.

Subsequent Incumbrancer.—Necessity of making him a party, see the title "**Mortgages.**"

79. See the title "**Lis Pendens.**"

80. **U. S.**—Old Colony Trust Co. *v.* Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. ed. 1410; Keokuk & Western

ment for or against the mortgagee is not binding on the mortgagor who was not a party to the suit.[81]

7. Assignor and Assignee. — An assignee who claims property under one who was a party to a judgment affecting his right to or in such property, is a privy and concluded by the judgment,[82] if his interest in the property accrued subsequent to the former proceed-

R. Co. *v.* Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; Southern Bank & Trust Co. *v.* Folsom, 75 Fed. 929, 21 C. C. A. 568; Illinois Trust & Savings Bank *v.* Des Moines, 224 Fed. 620; Saunders *v.* Publishers' Paper Co., 208 Fed. 441; Farmers' Loan & Trust Co. *v.* Meridian Waterworks Co., 139 Fed. 661. **Cal.**—Hewlett *v.* Pilcher, 85 Cal. 542, 24 Pac. 781. **Ga.**—Moody *v.* Vondereau, 131 Ga. 521, 62 S. E. 821. **Ind.**—Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394. **Kan.**—Chapek *v.* Jurgensen, 99 Kan. 658, 162 Pac. 1165; Provident Loan Trust Co. *v.* Marks, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349. **Mich.** Vincent *v.* Hansen, 113 Mich. 173, 71 N. W. 488; Damm *v.* Mason, 102 Mich. 545, 61 N. W. 3.

[a] **A second mortgagee** of land is not estopped by a judgment in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but may litigate the amount due upon the first mortgage, notwithstanding the judgment. Campbell *v.* Hall, 16 N. Y. 575.

[b] **Mortgagee of street-railroad franchises** not concluded by judgment determining the validity of the franchises. Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

[c] **Where mortgagee participated in defense** of the former suit by employing counsel, paying costs, etc., he did not thereby become a party so as to be bound if it appears that such participation was as agent of mortgagor. Williams *v.* Cooper, 124 Cal. 666, 57 Pac. 577.

[d] **Mortgage trustees of a railroad company** are not bound by a judgment against the company to which they were not parties. Central Trust Co. *v.* Hennen, 90 Fed. 593, 33 C. C. A. 189.

[e] **But an adjudication in bankruptcy** upon the ground that the party had, within four months prior to the commencement of such proceeding, mortgaged his entire property with the intent to hinder, delay and defraud his creditors, is conclusive against the mortgagee as to the intent of the mortgagor. Dedrick *v.* Farmers' Bank, 75 Kan. 187, 88 Pac. 883, 121 Am. St. Rep. 414.

81. Shattuck *v.* Bascom, 105 N. Y. 39, 12 N. E. 283.

82. **Mo.**—Carthage *v.* Weesnes, 116 Mo. App. 118, 92 S. W. 178. **N. Y.** Butterly *v.* Deering, 102 App. Div. 395, 92 N. Y. Supp. 675; Bonney *v.* Von Novelly, 164 N. Y. Supp. 42. **Ore.** Seaward *v.* First Nat. Bank, 84 Ore. 678, 165 Pac. 232; Corvallis & A. R. R. Co. *v.* Portland, E. & E. R. Co., 84 Ore. 524, 163 Pac. 1173. **Wis.**—Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589.

[a] **An assignor to whom a reassignment** of tax bills is made by the assignee after a judgment against the assignee cancelling the bills, is bound by such judgment. Carthage *v.* Weesner, 116 Mo. App. 118, 92 S. W. 178.

[b] **Assignee pending suit** concluded by judgment. *In re* Roberts, 98 App. Div. 155, 90 N. Y. Supp. 731; Davis *v.* Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526.

[c] **The assignee of a contract to build railroad** concluded by a judgment against the assignor for breach of the contract when such assignee was notified to appear and defend the action but failed to do so. Corvallis & A. R. R. Co. *v.* Portland, E. & E. R. Co., 84 Ore. 524, 163 Pac. 1173.

[d] **In an action by an assignee of bills for repairs** on an auto previously bought by the defendant from the plaintiff, the judgment roll of a former action between the seller and the buyer is admissible as res judicata of a question concerning liability for repairs on the auto as between the buyer and the seller. Bonney *v.* Von Novelly, 164 N. Y. Supp. 42.

[e] **But an assignee of a judgment,** who became such pending a garnishment suit by a judgment creditor is not entitled to invoke the judgment in

ing,[83] otherwise he is not bound.[84] A judgment against the assignee is not res judicata as to the assignor,[85] unless the latter was a party or was legally represented by the assignee.[86]

8. Guardian and Ward. — A ward is concluded by a judgment rendered in a proceeding in which he is regularly represented by his guardian or tutor,[87] or a guardian ad litem,[88] and a guardian is bound by a former judgment determining the rights of his ward.[89] A judgment by one ward against the guardian on his bond is not res judicata as to another ward who was not a party.[90]

9. Decedent and Representatives, Heirs, Devisees and Legatees. Heirs and devisees are in privity with the deceased in so far as their rights are derived through him, and judgments for and against him are to that extent res judicata as to them.[91] Administrators and

such suit as res judicata. Allen *v.* Ellis, 125 Wis. 565, 104 N. W. 739.

83. **Ia.**—Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109, 68 N. W. 587, 61 Am. St. Rep. 226. **Mo.** Julian *v.* Kansas City Granite & Monument Co. (Mo. App.), 187 S. W. 584. **Ore.**—Peacock *v.* Kirkland, 74 Ore. 279, 145 Pac. 281.

84. **U. S.**—Brown *v.* Fletcher, 203 Fed. 70. **Cal.**—Gregory *v.* Clabrough's Exrs., 129 Cal. 475, 62 Pac. 72. **Kan.** Goodin *v.* Newcomb, 6 Kan. App. 431, 49 Pac. 821. **Mich.**—Aultman, Miller & Co. *v.* Sloan, 115 Mich. 151, 73 N. W. 123. **N. Y.**—Kahn *v.* Richard L. Walsh Co., 129 N. Y. Supp. 137.

85. Broadwell *v.* Banks, 134 Fed. 470; Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109, 68 N. W. 587, 61 Am. St. Rep. 226.

86. Hodson *v.* Union Pac. Ry. Co., 14 Utah 402, 47 Pac. 859, 60 Am. St. Rep. 902.

[a] **One who assigns a claim for collection** is concluded by judgment for or against the assignee. Hodson *v.* Union Pac. Ry. Co., 14 Utah 402, 47 Pac. 859, 60 Am. St. Rep. 902.

87. Loehr *v.* Colburn, 92 Ind. 24; Krone *v.* Krone, 138 La. 666, 70 So. 605; Ross *v.* Enaut, 46 La. Ann. 1250, 15 So. 803; Porche *v.* Ledoux, 12 La. Ann. 350. See 10 STANDARD PROC. 874.

88. **Ill.**—Chudleigh *v.* Chicago, R. I. & P. Ry. Co., 51 Ill. App. 491. **Ia.** Buchan *v.* German-American Land Co., 180 Iowa 911, 164 N. W. 119, L. R. A. 1918A, 84. **N. Y.**—Heuel *v.* Stein, 165 App. Div. 14, 150 N. Y. Supp. 540.

89. Burkett *v.* Burkett, 81 Miss. 593, 33 So. 417.

90. Cotton *v.* State, 64 Ind. 573.

91. **U. S.**—Shields *v.* Schiff, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. ed. 445; Avegno *v.* Schmidt, 113 U. S. 293, 5 Sup. Ct. 487, 28 L. ed. 976. **Ala.** Boykin *v.* Cook, 61 Ala. 472. **Cal.** Ladd *v.* Durkin, 54 Cal. 395. **Ky.** McNeill's Heirs *v.* Thompson, 178 Ky. 90, 198 S. W. 571; Henderson *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197. **La.** Sharkey *v.* Bankston, 30 La. Ann. 891. **Minn.**—Bausman *v.* Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201. **Mo.**—Seaman *v.* Seaman, 181 S. W. 22; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. **N. Y.** Wadsworth *v.* Murray, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265; Christie *v.* Bishop, 1 Barb. Ch. 105. **Pa.**—Newbold's Estate, 65 Pa. Super. 151. **Tex.**—Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213; Stephenson *v.* Wiess (Tex. Civ. App.), 145 S. W. 287; Rodriguez *v.* Priest (Tex. Civ. App.), 126 S. W. 1187; Davenport *v.* Bearden, 49 Tex. Civ. App. 196, 108 S. W. 474. **Va.**—Williams *v.* Tomlin, 28 S. E. 883.

[a] **A judgment establishing the validity of a deed** in a suit by the ancestor to have the deed set aside is res judicata as to the devisees. Hurrell *v.* Hurrell, 65 App. Div. 527, 72 N. Y. Supp. 902.

[b] **Decree reforming deed** as against ancestor, res judicata as to heirs. Seaman *v.* Seaman (Mo.), 181 S. W. 22.

[c] **Judgment construing a will** in a suit to which a husband is a party is res judicata as to his wife, who is his devisee. Landers *v.* Landers, 151 Ky. 206, 151 S. W. 386, Ann. Cas. 1915 A, 223.

[d] **A judgment against a surviving**

executors are in privity with the decedent in so far as they succeed to his estate.[92]

Co-heirs and co-distributees do not claim through or under one another and so a judgment for or against one does not conclude another who was not a party to the action.[93]

10. Legal Representatives and Heirs, Devisees and Legatees. Executors and administrators do not claim through or under heirs and devisees so as to be concluded by judgments for or against these latter.[94] At common law heirs and devisees are not concluded by judgments, respecting deceased's realty, against the executor or administrator,[95] a rule which does not obtain where statutes empower

husband in respect to community property is conclusive as to the heirs of the wife. Oliver *v.* Bordner, (Tex. Civ. App.), 145 S. W. 656.

[e] **The fact of marriage** determined in a suit against testator for separate maintenance is res judicata in a suit to set aside probate of testator's will. Hutchinson *v.* Hutchinson, 250 Ill. 170, 95 N. E. 143.

[f] **As to questions not determined by the judgment** for or against the ancestor, it does not estop the heirs or devisees. Goatley *v.* Crow, 23 Ky. L. Rep. 2237, 66 S. W. 1029.

92. **Ill.**—McGarvey *v.* Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861. **Pa.**—Steele *v.* Lineberger, 59 Pa. 308. **S. C.**—Manigault *v.* Deas' Admrs., Bailey Eq. 283. **Tex.**—Hunt *v.* Butterworth, 21 Tex. 133, 73 Am. Dec. 223.

93. **U. S.**—Kearney *v.* Denn, 15 Wall. 51, 21 L. ed. 41; Blackburn *v.* Crawford's Lessee, 3 Wall. 175, 18 L. ed. 186. **Ala.**—White *v.* Hill, 176 Ala. 480, 58 So. 444. **Ga.**—Walker *v.* Perryman, 23 Ga. 309. **Ind.**—Farmer *v.* Farmer, 93 Ind. 435. **Mich.**—Weeks *v.* Downing, 30 Mich. 4. **N. Y.**—Weeks *v.* Ostrander, 20 Jones & S. 512. **Pa.** Good *v.* Good, 7 Watts 195.

[a] **Determination of Kinship.**—A determination may in a proceeding to obtain letters of administration, that a brother who resisted the grant of letters was not next of kin to the decedent, does not conclude his sister who was not a party to that proceeding. Kearney *v.* Denn, 15 Wall. (U. S.) 51, 21 L. ed. 41.

[b] **A grant of letters of administration** in so far as it determines the right to such letters is a proceeding in personam and not res judicata upon coheirs or distributees who were not parties thereto. White *v.* Hall, 176 Ala. 480, 58 So. 444.

94. **Ga.**—Buchan *v.* Williamson, 142 Ga. 198, 82 S. E. 548. **Ia.**—*In re* Brigham's Estate, 144 Iowa 71, 120 N. W. 1054; Dorr *v.* Stockdale, 19 Iowa 269. **Ky.**—Cole *v.* Lewis, 159 Ky. 747, 169 S. W. 490; Martin *v.* Barnhill, 21 Ky. L. Rep. 1384, 56 S. W. 160. **Mass.** Forbes *v.* Douglass, 175 Mass. 191, 55 N. E. 847.

See Brock *v.* Kirkpatrick, 72 S. C. 491, 52 S. E. 592. But see *In re* Parks' Est., 166 Iowa 403, 147 N. W. 850.

95. **U. S.**—Ingle *v.* Jones, 9 Wall. 486, 19 L. ed. 621; Garnett *v.* Macon, 2 Brock. 185, 6 Call. (10 Va.) 308, 10 Fed. Cas. No. 5,245. **Ala.**—Howell *v.* Hughes, 168 Ala. 460, 53 So. 105. **D. C.**—Hunt *v.* Russ, 7 Mackey 527. **Ill.**—Poiset *v.* Townsend, 166 Ill. App. 384; Stone *v.* Wood, 16 Ill. 177. **Ia.** Dorr *v.* Stockdale, 19 Iowa 269. **Kan.** Black *v.* Elliott, 63 Kan. 211, 65 Pac. 215, 88 Am. St. Rep. 239. **Ky.**—Hobbs *v.* McMakin, 9 Ky. L. Rep. 221, 4 S. W. 793. **Md.**—Birely's Heirs *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303; Gaither *v.* Welch's Est., 3 Gill & J. 259. **Mich.** Buck *v.* Lockwood, 193 Mich. 242, 159 N. W. 509. **Miss.**—Andrews *v.* Anderson, 16 So. 346; McCoy *v.* Nichols, 4 How. 31. **Mo.**—Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. 135; Beck *v.* Kallmeyer, 42 Mo. App. 563. **Neb.** Eayrs *v.* Nason, 54 Neb. 143, 74 N. W. 408. **N. H.**—Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358. **N. Y.**—Platt *v.* Platt, 105 N. Y. 488, 12 N. E. 22; Sharpe *v.* Freeman, 45 N. Y. 802; Osgood *v.* Manhattan Co., 3 Cow. 612, 15 Am. Dec. 304; Moss *v.* McCullough, 5 Hill, 131; Burnham *v.* Burnham, 27 Misc. 106, 58 N. Y. Supp. 196. **N. C.** Redmond *v.* Collins, 15 N. C. 430, 27 Am. Dec. 208. **Pa.**—Steele *v.* Lineberger, 59 Pa. 308; Stewart *v.* Montgomery, 23 Pa. 410. **S. C.**—Brock *v.* Kirkpatrick, 72 S. C. 491, 52 S. E. 592.

the legal representative to administer the realty as well as the personalty.[96] Legatees and heirs are concluded by a judgment in respect to the personal estate rendered in a proceeding to which the personal representative was a party.[97]

11. As Between Executors and Administrators.[98] — a. *Successive Representatives of Deceased.* — Succeeding legal representatives of a deceased are in privity with the previous representatives.[99]

Va.—Robertson *v.* Wright, 17 Gratt. (58 Va.) 534. **W. Va.**—Saddler's Admr. *v.* Kennedy's Admr., 26 W. Va. 636; Merchant's Nat. Bank *v.* Good, 21 W. Va. 455; Laidley *v* Kline, 8 W. Va. 218.

[a] **The reason is** that the title of the devisee does not come through the legal representative but directly from the testator. Carey *v.* Roosevelt, 81 Fed. 608.

[b] **Allowance of Claim.**—In an action to charge devisees with a certain debt of testator a judgment against the executor allowing a claim for such indebtedness is not admissible in evidence. Burnham *v.* Burnham, 27 Misc. 106, 58 N. Y. Supp. 196. See also Flora *v.* Brown, 159 Iowa 253, 140 N. W. 364.

[c] **Remaindermen** not estopped by judgment against administrator. Pryor *v.* Winter, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162.

96. U. S.—Lloyd *v.* Ball, 77 Fed. 365. **Cal.**—Cunningham *v.* Ashley, 45 Cal. 485. **Fla.**—Walker *v.* Redding, 40 Fla. 124, 23 So. 565; Merritt *v.* Daffin, 24 Fla. 320, 4 So. 806. **Ga.**—Gunn *v.* James, 120 Ga. 482, 48 S. E. 148. **Ind.** Chicago & E. R. Co. *v.* Harshman, 21 Ind. App. 23, 51 N. E. 343. **La.**—Genella *v.* McMurray, 49 La. Ann. 988, 22 So. 198. **Mo.**—Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604. **Neb.**—Eayrs *v.* Nason, 54 Neb. 143, 74 N. W. 408. **N. C.**—Hinton *v.* Pritchard, 126 N. C. 8, 35 S. E. 127. **Wash.**—Litzell *v.* Hart, 96 Wash. 471, 165 Pac. 393.

[a] **Judgment establishing a debt** against the estate. Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

[b] **Contingent remaindermen** are concluded by a decree though their interests had not arisen when the decree was rendered. Woolsey *v.* Woolsey, 78 N. J. Eq. 517, 76 Atl. 1076.

97. U. S.—Schnepfe *v.* Schnepfe, 230 Fed. 781, 145 C. C. A. 91; Carey *v.* Roosevelt, 81 Fed. 608. **Ga.**—Morris *v.* Murphey, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; Castellaw *v.* Guilmartin, 54 Ga. 299. **Mass.**—Batt *v.* Stevens, 209 Mass. 319, 95 N. E. 784. **Mo.**—Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604. **N. Y.**—Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299; Masten *v.* Olcott, 101 N. Y. 152, 4 N. E. 274. **N. C.**—Redmond *v.* Coffin, 17 N. C. 437. **S. C.**—Bell *v.* Bell, 25 S. C. 149; Fraser *v.* Charleston City Council, 19 S. C. 384. **W. Va.**—Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937.

[a] **Question whether legacy exempt from taxation** decided in a suit by the executor cannot be relitigated by legatees in a subsequent proceeding. Batt *v.* Stevens, 209 Mass. 319, 95 N. E. 784.

[b] **A creditor** of one to whom a bequest is made is in privity with such legatee and a judgment res judicata as to the latter binds the former. First Nat. Bank *v.* Burns (Mo. App.), 199 S. W. 282.

[c] **Judgment for payment of antenuptial contract** out of the personalty in the hands of the executor is res judicata as to the heirs. Schnepfe *v.* Schnepfe, 230 Fed. 781, 145 C. C. A. 91.

[d] **But after the property passes from the executor** and (1) vests in the legatee, privity by representation ceases, and a judgment in a suit commenced thereafter by or against the legal representative is not conclusive upon the legatees (Carey *v.* Roosevelt, 83 Fed. 242), unless (2) they are made parties or substantially participate in the suit. Carey *v.* Roosevelt, 83 Fed. 242.

[e] **Where legacy charged upon realty** the rule does not apply. First Baptist Church *v.* Syms, 51 N. J. Eq. 363, 28 Atl. 461.

98. Decedent and representatives, see *supra,* VII, J, 9.

99. See *infra,* this note.

[a] **An administrator de bonis non**

b. *Domiciliary and Ancillary Representatives.* — Executors under the same will appointed for different jurisdictions stand in such privity that a judgment for or against one is res judicata as to the other,[1] but no such relation of privity exists between administrators appointed in different states,[2] nor, according to the weight of authority, between an executor in one state and an administrator with the will annexed in another,[3] even though the same person be appointed to represent the estate in both jurisdictions.[4]

12. Public Officers. — A public officer is in respect to public rights in privity with his predecessor when both derive their authority from the same source and a judgment for or against such predecessor is res judicata as to him.[5] Likewise a judgment against one officer is

is privy with his predecessor in the trust, and estopped by a judgment against him. Dykes *v.* Woodhouse's Admr., 3 Rand. (24 Va.) 287; Snape *v.* Norgate, Cro. Car. 167, 79 Eng. Reprint 745.

1. Owsley *v.* Central Trust Co., 196 Fed. 412; Hill *v.* Tucker, 13 How. (U. S.) 458, 14 L. ed. 223.

2. **U. S.**—Ingersoll *v.* Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. ed. 208; Brown *v.* Fletcher's Est., 210 U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966; Johnson *v.* Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. ed. 112; Stacy *v.* Thrasher, 6 How. 44, 12 L. ed. 337; Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059. **Ill.**—Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403; Smith *v.* Goodrich, 167 Ill. 46, 47 N. E. 316; McGarvey *v.* Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861. **Mont.** Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101. **Pa.**—Brodie *v.* Bickley, 2 Rawle 431. **Tex.**—Jones *v.* Jones' Heirs, 15 Tex. 463, 65 Am. Dec. 174.

3. **U. S.**—Brown *v.* Fletcher's Est., 210 U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966; Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059. **Ala.**—Hatchett *v.* Berney, 65 Ala. 39. **Cal.**—Richards *v.* Blaisdell, 12 Cal. App. 101, 106 Pac. 732. **Ill.**—Rosenthal *v.* Renick, 44 Ill. 202. **Mass.**—Ela *v.* Edwards, 13 Allen 48, 90 Am. Dec. 174; Low *v.* Bartlett, 8 Allen 259; Grout *v.* Chamberlin, 4 Mass. 613.

Contra.—**Ga.**—Latine *v.* Clements, 3 Ga. 426. **La.**—Turley *v.* Dreyfus, 33 La. Ann. 885. **Va.**—Garland's Admr. *v.* Garland's Admr., 84 Va. 181, 4 S. E. 334. See also Hopper *v.* Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237.

[a] **The argument for and against sustaining privity** in such cases is this: "'That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts, therefore the plaintiff having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again.' This argument assumes that the judgment is in rem and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." Richards *v.* Blaisdell, 12 Cal. App. 101, 106 Pac. 732.

[b] "**The authority to act, flows,** in either case, from the testator. Now, the executor is in privity with the testator; so is the administrator with the will annexed, and if both are in privity with the common testator, it is difficult to imagine that they are not in privity with each other." Latine *v.* Clements, 3 Ga. 426.

4. Ela *v.* Edwards, 13 Allen (Mass.) 48, 90 Am. Dec. 174. *Contra,* Lomas *v.* Hilliard, 60 N. H. 148. See Carpenter *v.* Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. ed. 640.

5. **U. S.**—Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 26 Sup. Ct. 252, 50 L. ed. 477; New Orleans

conclusive against another officer of the same governmental body, representing the same interest.[6] The municipal corporation which the officer represents is also estopped by a judgment against the officer in his official capacity.[7]

13. Governmental Bodies.[8] — A judgment for or against a state, municipality or other governmental body or their legal representatives, in a matter of general interest to all citizens, is res judicata as to such citizens though they are not parties to the suit.[9]

14. Where Right to Contribution or Indemnity Exists. — Where one of the parties has the right to call upon a third person to indemnify him for losses resulting from an action or for contribution,

v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202; Vance *v.* Wesley, 85 Fed. 157, 29 C. C. A. 63; Starr *v.* Chicago, R. I. & P. Ry. Co., 110 Fed. 3. **Fla.**—State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72. **Ind.**—State *ex rel.* Moore *v.* Board of Commissioners, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984. **Miss.**—Finch *v.* Dobbs, 112 Miss. 73, 72 So. 858. **Neb.**—State *v.* Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; State *v.* Kennedy, 60 Neb. 300, 83 N. W. 87; Holsworth *v.* O'Chander, 49 Neb. 42, 68 N. W. 334. **Wis.**—State *v.* Kispert, 21 Wis. 387.

6. **U. S.**—Vance *v.* Wesley, 85 Fed. 157, 29 C. C. A. 63. **Ind.**—Zimmerman *v.* Savage, 145 Ind. 124, 44 N. E. 252. **Tex.**—McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518.

See *supra*, VII, B.

7. **U. S.**—Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585. **Ill.**—Lyons *v.* Cooledge, 89 Ill. 529. **Ind.**—Board of Commissioners *v.* Beaver, 156 Ind. 450, 60 N. E. 150; Millikan *v.* Lafayette, 118 Ind. 323, 20 N. E. 847. **Ky.**—Henderson *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197. **N. Y.**—Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619. **Wis.**—Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831.

8. **Successors in office,** see *supra*, VII, J, 12.

Estoppel applicable to government as well as individuals, see *supra*, VII, F.

9. **Fla.**—Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190. **Ill.**—Pear *v.* East St. Louis, 273 Ill. 501, 113 N. E. 60; Healy *v.* Deering, 231 Ill. 423, 83 N. E. 226, 121 Am. St. Rep. 331; Harmon *v.* Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502. **Ia.**—Lyman *v.* Faris, 53 Iowa 498, 5 N. W. 621; Clark *v.* Wolf, 29 Iowa 197. **Kan.** McEntire *v.* Williamson, 63 Kan. 275, 65 Pac. 244. **Ky.**—Stone *v.* Winn, 165 Ky. 9, 176 S. W. 933; Henderson *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197. **La.**—Taxpayers *v.* O'Kelly, 49 La. Ann. 1039, 22 So. 311. **Mich.**—Detroit *v.* Ellis, 103 Mich. 612, 61 N. W. 886, 27 L. R. A. 211. **Mo.**—Williams *v.* Hayti, 184 S. W. 470. **Neb.**—Shanahan *v.* South Omaha, 2 Neb. (Unof.) 466, 89 N. W. 285. **N. Y.**—Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619. **N. C.** Bear *v.* Brunswick, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711. **Ohio.** Cincinnati Union Stockyards Co. *v.* Cincinnati, 1 Ohio App. 452, 34 Ohio C. C. 251. **Ore.**—Rose *v.* Port of Portland, 82 Ore. 541, 162 Pac. 498.

[a] **Judgment Against County. Fla.**—Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190. **Ky.** Stone *v.* Winn, 165 Ky. 9, 176 S. W. 933. **Mich.**—Detroit *v.* Ellis, 103 Mich. 612, 61 N. W. 886, 27 L. R. A. 211. **N. C.**—Bear *v.* Brunswick, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

[b] **Every taxpayer is a real,** though not a nominal, party to such judgment, and cannot relitigate any of the questions which were litigated in the original action. Bear *v.* Brunswick, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

[c] **A judgment quieting title as** against a municipal corporation, is conclusive against the corporation and all persons claiming an easement in the premises, depending upon the right and title to the municipality to the same. Knight *v.* All Persons, 32 Cal. App. 381, 162 Pac. 1051.

the person thus liable when properly notified to defend the action is estopped by the judgment.[10]

15. Other Relations. — The foregoing principle as to the necessity of being either party or privy, has been applied to other relations such as principal and surety,[11] master and servant,[12] bailor and bailee,[13] cotenants,[14] corporations and stockholders,[15] receivers,[16] trus-

10. **Cal.**—Commercial Union Assur. Co. *v.* American Cent. Ins. Co., 68 Cal. 430, 9 Pac. 712. **Mich.**—Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311. **N. Y.**—Konitzky *v.* Meyer, 49 N. Y. 571. **Pa.**—Mehaffy *v.* Lytle. 1 Watts 314.

[a] **Though not a party of record** to the former suit a surety is nevertheless bound by the judgment, where notice of the pendency of the suit is given him by his co-surety. Love *v.* Gibson, 2 Fla. 598.

[b] **A dormant partner** who is not served with process in an action brought against him and the other partners, but who though notified by the latter to appear and defend fails to do so, is concluded by the judgment and it may be admitted in evidence against him in a suit by the other partners for contribution. Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

[c] **Where the indemnitor** appears and testifies in the case he cannot say that he had no notice thereof. American Bonding Co. *v.* Loeb, 47 Wash. 447, 92 Pac. 282.

11. See *infra*, this note, and the title "**Principal and Surety.**"

[a] **Sureties concluded** by judgment against the principal though not made parties to the proceeding. Eberle *v.* Schilling, 32 Misc. 195, 65 N. Y. Supp. 728.

[b] **A decree in a guardian's accounting**, rendered on petition of the ward, is conclusive upon the sureties as to the amount due from the guardian to the ward, even though the sureties were not parties to the proceeding. Eberle *v.* Schilling, 32 Misc. 195, 65 N. Y. Supp. 728.

[c] **As Between Co-sureties.** — A judgment against a principal in a suit to which the sureties are parties has been denied the effect of res judicata as between the sureties on the ground that they are not adversary parties. **Mo.**—Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416; Miller *v.* Gillespie, 59 Mo. 220. **Ohio.**—Koelsch *v.* Mixer, 52 Ohio St. 207, 39 N. E. 417. **W. Va.**—Central Banking & Sec. Co. *v.* United States F. & G. Co., 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (N. S.) 797. But see **La.**—Ledoux *v.* Durrive, 10 La. Ann. 7. **Miss.**—Ruff *v.* Montgomery, 83 Miss. 185, 36 So. 67. **Tenn.**—Cross *v.* Scarboro, 6 Baxt. 134.

12. See *infra*, this note, and also 15 STANDARD PROC. 613.

[a] **A judgment against a servant** is not res judicata against the master who was not a party. Rosenthal *v.* United States Paper Co., 164 N. Y. Supp. 121.

13. See *infra*, this note.

[a] **A bailor is bound** by a judgment in an action against his bailee in respect to the title or possession of the property in bailment, providing he had knowledge of the suit and an opportunity to appear. Ladany *v.* Assad, 91 Conn. 316, 99 Atl. 762.

14. See *infra*, this note.

[a] **No privity** within the rule of res judicata exists between co-tenants. **Ga.**—Stokes *v.* Morrow, 54 Ga. 597; Walker *v.* Perryman, 23 Ga. 309. **Miss.** Shuler *v.* Murphy, 91 Miss. 518, 44 So. 810, 114 Am. St. Rep. 708, 14 L. R. A. (N. S.) 333. **N. C.**—Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924. **Tex.**—Bass *v.* Sevier, 58 Tex. 567.

15. See *infra*, this note.

[a] **Stockholders concluded** by judgment against the corporation. **Cal.** Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. **Ga.**—Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156. **Kan.** Ball *v.* Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638. **Mass.**—Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750. **N. C.**—Bear *v.* Brunswick, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

16. See *infra*, this note, and also the title "**Receivers.**"

[a] **Those represented by receiver** are bound by judgment for or against

tees,[17] taxpayers.[18]

VIII. PLEADING RES JUDICATA. — Questions relative to pleading a former judgment as res judicata are treated elsewhere in this work.[19]

IX. BURDEN OF PROOF. — It devolves upon the litigant asserting the estoppel by verdict to show either by the record or by extraneous evidence that the particular question then before the court has been previously determined,[20] in a former suit between the same parties or their privies.[21]

X. PROVINCE OF JUDGE AND JURY.[22] — Where there is no dispute regarding the effect of the matters in controversy in either action, the question of res judicata is one of law for the court.[23] But the jury under proper instructions from the court[24] must pass upon conflicting evidence as to the manner and extent of a party's participation in the prior proceeding.[25]

XI. REFERENCE ON QUESTION OF RES JUDICATA.[26] — In a proper case the cause may be referred to the master in chancery to

receiver. Jaggers *v.* Sparks, 127 Ark. 567, 193 S. W. 67.

17. See *infra*, this note, and the title "**Trusts and Trustees.**"

[a] **Cestui que trust** concluded by judgment in suit prosecuted or defended by trustee. Village Mills Co. *v.* Houston Oil Co. (Tex. Civ. App.), 186 S. W. 785.

[b] **A trustee substituted for another trustee** is concluded by judgments by or against the latter. Roller *v.* Catlett, 118 Va. 185, 86 S. E. 909.

18. See *supra*, VII, J, 13.

[a] **Other taxpayers are concluded** by a judgment in a suit instituted against the municipality by taxpayers in behalf of themselves and others similarly situated. **Ill.**—Greenberg *v.* Chicago, 256 Ill. 213, 99 N. E. 1039, 49 L. R. A. (N. S.) 108. **Wash.**—Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25. **W. Va.**—Gallaher *v.* Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942. **Wis.**—State *v.* McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878.

19. See 15 STANDARD PROC. 614.

Raised by answer, see 18 STANDARD PROC. 592.

Replication to plea of res judicata, see 18 STANDARD PROC. 42, and see the title "**Replication and Reply.**"

20. **U. S.**—New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Stacy *v.* Thrasher, 6 How. 44, 12 L. ed. 337. **Ala.**—Crausby *v.* Crausby, 164 Ala. 471, 51 So. 529. **Colo.**—Webster *v.* Kautz, 22 Colo. App. 111, 123 Pac. 139. **Miss.**—Scottish-American Mortg. Co. *v.* Bunckley, 88 Miss. 641, 41 So. 502, 117 Am. St. Rep. 763. **Mo.**—Nevins *v.* Coleman, 198 Mo. App. 252, 200 S. W. 445; Fritch, etc. Machine Co. *v.* Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136. **N. Y.**—*In re* Leonard, 218 N. Y. 513, 113 N. E. 491. **Tenn.**—Pile *v.* Pile, 134 Tenn. 370, 183 S. W. 1004. **Tex.**—Tompkins *v.* Hooker (Tex. Civ. App.), 200 S. W. 193.

21. Cuneo Importing Co. *v.* American Importing & T. Co. (C. C. A.), 247 Fed. 413.

[a] **A party who seeks as privy** to the prior judgment to urge it as estoppel must prove that he was such privy. Cuneo Importing Co. *v.* American Importing & T. Co. (C. C. A.), 247 Fed. 413.

22. See generally the title "**Province of Judge and Jury.**"

23. Jeremy Fuel & Grain Co. *v.* Mellen (Utah), 165 Pac. 791.

24. Hauke *v.* Cooper, 108 Fed. 922, 48 C. C. A. 144.

[a] **For an instruction pertinent** to the question, see Hauke *v.* Cooper, 108 Fed. 922, 48 C. C. A. 144.

25. Hauke *v.* Cooper, 108 Fed. 922, 48 C. C. A. 144.

26. See generally the title "**Reference.**"

take testimony and report his conclusions of law and fact on the question of res judicata.[27]

27. Doubet *v.* Doubet, 196 Ill. App. 289. See generally the title "References."

RESPONDEAT SUPERIOR. — See **Master and Servant; Negligence; Principal and Agent.**

RESTAURANT, DISCRIMINATION BY. — See **Civil Rights.**

RESTRAINT OF TRADE

By the Editorial Staff.

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II. JURISDICTION AND VENUE, 95

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CROSS-REFERENCES:

Conspiracy; Monopolies.

Injunction against unlawful combination tending to promote a monopoly, see 19 STANDARD PROC. 846; against federal anti-trust act, see 19 STANDARD PROC. 843.

Unfair competition, see the title "Trade-Marks and Trade Names."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. GENERALLY. — The remedy on violation of valid contracts in restraint of trade, is either by an action for damages,[1] or if this remedy is not adequate,[2] by injunction.[3] And on breach of a valid contract for the sale of a business with its good will and with an agreement not to carry on the business in competition with the purchaser, he has an action for damages,[4] or for an injunction,[5] as he

1. United Fuel Gas Co. *v.* West Virginia Pav. & P. Brick Co., 74 W. Va. 484, 82 S. E. 329.

2. United Fuel Gas Co. *v.* West Virginia Pav. & P. Brick Co., 74 W. Va. 484, 82 S. E. 329.

3. **Ia.**—Reeves *v.* Decorah Farmers' C. Soc., 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104. **Ky.**—Royer Wheel Co. *v.* Miller, 20 Ky. L. Rep. 1851, 50 S. W. 62, where a manufacturer, granted a subsidy, agreed not to engage in retail trade. **Mass.**—Central Shade Roller Co. *v.* Cushman, 143 Mass. 353, 9 N. E. 629, where manufacturers gave a corporation exclusive right to sell their product.

[a] **Sales of a product in violation of an agreement** or license imposing certain restrictions thereon, will be enjoined. National Phonograph Co. *v.* Schlegel, 128 Fed. 733, 64 C. C. A. 594.

4. **Ala.**—McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177. **Ill.**—Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826. **Ind.**—Van Valkenburgh *v.* Dean, 15 Ind. App. 693, 44 N. E. 652. **Mass.**—Dwight *v.* Hamilton, 113 Mass. 175; Bassett *v.* Percival, 5 Allen 345.

5. **U. S.**—Davis *v.* A. Booth & Co., 131 Fed. 31, 65 C. C. A. 269; Camors-McConnell Co. *v.* McConnell, 140 Fed. 412; American Fisheries Co. *v.* Lennen, 118 Fed. 869. **Ala.**—McCurry *v.* Gib-

elects,[6] and in some states he may obtain both kinds of relief in one action.[7] But an action to recover the consideration paid or a part thereof will not lie.[8]

The damages sustained are deemed irreparable,[9] and to obtain an injunction, a substantial injury need not be shown.[10]

Effect of Stipulation as to Damages. — When the contract contains a provision as to stipulated damages, the right to injunctive relief depends upon the intention of the parties as evidenced by the contract. If the damages are clearly intended as the measure of damages for a violation of the contract, an injunction will not lie,[11] unless the

son, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177. **Cal.**—Ragsdale *v.* Nagle, 106 Cal. 332, 39 Pac. 628; Brown *v.* Kling, 101 Cal. 295, 35 Pac. 995. **Ill.** Old Rose Dist. Co. *v.* Feuer, 202 Ill. App. 210. **Ind.**—Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119; Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118; Baker *v.* Pottmeyer, 75 Ind. 451. **Ind. Ter.** W. S. Wolverton & Son *v.* Bruce, 6 Ind. Ter. 135, 89 S. W. 1018. **Mass.** Dwight *v.* Hamilton, 113 Mass. 175. **Mich.**—Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Grow *v.* Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. St. Rep. 737. **Neb.** Roberts *v.* Lemont, 73 Neb. 365, 102 N. W. 770; Downing *v.* Lewis, 56 Neb. 386, 76 N. W. 900. **N. J.**—Fleckenstein Bros. Co. *v.* Fleckenstein (N. J. Eq.), 53 Atl. 1043. **N. M.**—Locke *v.* Murdoch, 20 N. M. 522, 151 Pac. 298, L. R. A. 1917B, 267. **N. Y.**—American Ice Co. *v.* Meckel, 109 App. Div. 93, 95 N. Y. Supp. 1060. **N. C.**—Faust *v.* Rohr, 166 N. C. 187, 81 S. E. 1096. **Okla.**—Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927. **Pa.**—Richards *v.* Shipley, 257 Pa. 134, 101 Atl. 456; Pittsburg Stove & Range Co. *v.* Pennsylvania Stove Co., 208 Pa. 37, 57 Atl. 77; Smith's Appeal, 113 Pa. 579, 6 Atl. 251. **Tenn.**—Jackson *v.* Byrnes, 103 Tenn. 698, 704, 54 S. W. 984. **Tex.** Sheehan *v.* Sheehan-Hackley & Co. (Tex. Civ. App.), 196 S. W. 665; Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

[a] **The remedy at law is inadequate,** because the damage is continuing and accruing from day to day. Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927.

[b] **Granting injunction is discretionary** with the court. Swanson *v.* Sims (Utah), 170 Pac. 774.

6. Bradshaw *v.* Millikin, 173 N. C. 432, 92 S. E. 161, L. R. A. 1917E, 880.

[a] **If the party proceeds at law** and recovers damages, it has been held that he cannot have an injunction. Fox *v.* Scard, 33 Beav. 327, 55 Eng. Reprint 394.

7. Swanson *v.* Kirby, 98 Ga. 586, 26 S. E. 712; Berger *v.* Armstrong, 41 Iowa 447.

8. Bassett *v.* Percival, 5 Allen (Mass.) 345.

9. American Fisheries Co. *v.* Lennen, 118 Fed. 868; Gordon *v.* Mansfield, 84 Mo. App. 367, statute merely requires that remedy at law be inadequate.

10. **U. S.**—American Fisheries Co. *v.* Lennen, 118 Fed. 868. **Cal.**—Brown *v.* Kling, 101 Cal. 295, 35 Pac. 995, where nominal damages only were proven. **Ill.**—Andrews *v.* Kingsbury, 212 Ill. 97, 72 N. E. 11. **N. J.**—*Compare* Marvel *v.* Jonah, 81 N. J. Eq. 369, 86 Atl. 968.

11. **Conn.**—Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432. **Ind.**—Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118. **Me.**—Augusta Steam Laundry Co. *v.* Debow, 98 Me. 496, 57 Atl. 845. **Mass.** Ropes *v.* Upton, 125 Mass. 258. **Tenn.** See Jackson *v.* Byrnes, 103 Tenn. 698, 704, 54 S. W. 984. **Tex.**—Miller *v.* Chicago Portrait Co. (Tex. Civ. App.), 195 S. W. 619.

[a] **Form of words do not control** in determining whether the sum named is a penalty or liquidated damages. Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432; Ropes *v.* Upton, 125 Mass. 258.

[b] **It Is the Intention of the Parties Which Governs.**—(1) If it appear that the performance of the contract is intended, and not merely the payment of damages in case of a breach, equity will enforce the con-

defendant is insolvent and unable to respond in damages.[12] But a provision as to the payment of a penalty will not prevent injunctive relief.[13]

Relief as Affected by Character of Business, etc. — These remedies lie not only to enforce contracts not to engage in competition in business,[14] but also to enforce contracts not to practice a profession,[15] or trade.[16] So also a skilled employe may be enjoined from violating a contract not to engage in the same business.[17]

Even where the vendor violates the contract through the instrumentality of another, an injunction will issue.[18]

But where there is no express covenant against resumption of business, in a sale of good will, an injunction will not be granted,[19] unless the vendor holds out or represents himself as carrying on the identical business sold.[20]

tract. Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 486, 13 N. E. 419, 60 Am. Rep. 464. See to same effect, **Ala.**—McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177. **N. Y.** Zimmermann *v.* Gerzog, 13 App. Div. 210, 43 N. Y. Supp. 339. **N. C.**—Bradshaw *v.* Millikin, 173 N. C. 432, 92 S. E. 161, L. R. A. 1917E, 880. **Tex.** Miller *v.* Chicago Portrait Co. (Tex. Civ. App.), 195 S. W. 619. (2) In the absence of any words showing an intention to give the defendant an option of engaging in business and paying the sum named, the plaintiff must be held to have the option to elect on which agreement he will proceed. Augusta Steam Laundry Co. *v.* Debow, 98 Me. 496, 57 Atl. 845.

[c] **Rule Stated.**—When the contract stipulates for one of two things in the alternative, or on the one side the doing or not doing of certain acts, and on the other the payment of a certain sum in money in lieu thereof, equity will not interfere. Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432.

[d] **Taking of a bond** in connection with the covenant does not deprive equity of jurisdiction. Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 486, 13 N. E. 419, 60 Am. Rep. 464.

12. Zimmermann *v.* Gerzog, 13 App. Div. 210, 43 N. Y. Supp. 339. See Rusk *v.* Wolf & Co., 143 Ga. 18, 84 S. E. 63.

13. **Conn.**—Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432. **Mass.**—Ropes *v.* Upton, 125 Mass. 258. **Pa.**—Knickerbocker Ice Co. *v.* Montgomery, 7 Pa. Dist. 463. **Eng.**—Fox *v.* Scard, 33 Beav. 327, 55 Eng. Reprint 394.

14. See *supra*, this section.

15. **Ala.**—McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177. **Ill.**—Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781. **Ind.**—Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118, physician. **Mass.**—Dwight *v.* Hamilton, 113 Mass. 175. **Mo.**—Glover *v.* Shirley, 169 Mo. App. 637, 155 S. W. 878. **Okla.**—Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927.

16. Ragsdale *v.* Nagle, 106 Cal. 332, 39 Pac. 628, business of abstracting and conveyancing.

17. Harrison *v.* Glucose Sugar Ref. Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; Shoemaker Ice Co. *v.* Rutherford, 15 Pa. Dist. 67.

18. Baker *v.* Pottmeyer, 75 Ind. 451; Salzman *v.* Siegelman, 102 App. Div. 406, 92 N. Y. Supp. 844.

[a] **Where He Engaged in Business in His Wife's Name.**—Fleckenstein Bros. Co. *v.* Fleckenstein (N. J. Eq.), 53 Atl. 1043, 66 N. J. Eq. 252, 57 Atl. 1025.

19. **Md.**—Zeigler *v.* Sentzner, 8 Gill & J. 150, 29 Am. Dec. 534. **N. Y.** Stephens *v.* Aulls, 3 Thomp. & C. 781. **Wash.**—McMartin *v.* Stevens, 37 Wash. 616, 79 Pac. 1099. **Eng.**—Cruttwell *v.* Lye, 17 Ves. Jr. 335, 34 Eng. Reprint 129; Shackle *v.* Baker, 14 Ves. Jr. 468, 33 Eng. Reprint 600.

20. Churton *v.* Douglas, 7 Wkly. Rep. (Eng.) 365, where the vendor resumed business in the same name (John Douglas & Co.) and in the same place.

[a] **But an injunction against using**

II. JURISDICTION AND VENUE. — The jurisdictional amount in suits for violation of contracts under discussion is, the value of the object to be gained, and not the amount of damages.[21]

III. PARTIES. — The question of parties to suits for damages and for injunctions for violation of contracts in restraint of trade is governed by the general rules relating to parties.[22]

IV. PLEADINGS. — The complaint or bill for damages or injunction must state a cause of action in accordance with the general rules.[23] It should allege the contract and its execution,[24] a consideration,[25] and a breach of the contract[26] and injury as a result

the vendor's own name will not be granted. Townsend *v.* Jarman, 49 Wkly. Rep. (Eng.) 158.

21. American Fisheries Co. *v.* Lennen, 118 Fed. 869. See the titles "**Jurisdiction;**" "**Venue.**"

22. See the titles "**Implied and Express Agreements;**" **Injunctions;**" "**Parties.**"

[a] **The purchaser after a sale** to another with like covenants, cannot enjoin the original vendor. Jones *v.* Wooley, 16 Grant Ch. (Can.) 106.

[b] **The assignee** of the business may sue for an injunction when the obligation runs to the purchaser and his assigns. Graca *v.* Rodrigues, 33 Cal. App. 296, 165 Pac. 1012; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 486, 13 N. E. 419, 60 Am. Rep. 464.

[c] **After dissolution of the partnership which purchased** the good will of a business, the retiring partner is not a necessary party plaintiff. Jenkins *v.* Eliot, 192 Mass. 474, 78 N. E. 431.

[d] **Where a retiring partner** violates an agreement not to enter into the same business, he may be enjoined. Ropes *v.* Upton, 125 Mass. 258; Althen *v.* Vreeland (N. J.), 36 Atl. 479.

[e] **Other persons joined with the vendor** in violating the contract may be restrained as well. **Ind.**—Baker *v.* Pottmeyer, 75 Ind. 451. **Mich.**—Grow *v.* Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737. **N. Y.**—A. Booth & Co. *v.* Seebold, 37 Misc. 101, 74 N. Y. Supp. 776.

[f] **A corporation of which the vendor became principal stockholder,** president and manager may be enjoined. Beal *v.* Chase, 31 Mich. 490.

[g] **Personal Covenant.** — Even though the covenant, not to engage or permit others to engage in the business on the premises, is personal, a subsequent purchaser of the vendor with notice may be enjoined. Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

23. Erwin *v.* Hayden (Tex. Civ. App.), 43 S. W. 610, petition held sufficient as against general demurrer. See the titles "**Bills and Answers;**" "**Declaration and Complaint;**" "**Implied and Express Agreements;**" "**Injunctions.**"

[a] **Form of bill,** see McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

[b] **In a suit to enjoin a breach of a contract for purchase of a physician's practice** with a covenant not to practice, the plaintiff need not allege that he was practicing when the contract was made, or that he was licensed to practice. McCurry *v.* Gibson, 108 Ala. 451, 459, 18 So. 806, 54 Am. St. Rep. 177.

24. **As to manner of alleging execution of contracts generally,** see 11 STANDARD PROC. 983, et seq.

25. **Cal.**—Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466. **Ind.** Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118. **Tex.**—Kennedy *v.* Winfrey (Tex. Civ. App.), 163 S. W. 1018.

See 11 STANDARD PROC. 986.

[a] **Consideration presumed** when the contract is in writing, and when the petition is silent. Roller *v.* Ott, 14 Kan. 609.

26. **Cal.**—Fletcher *v.* Dennison, 101 Cal. 292, 35 Pac. 868. **Ind.**—Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118. **Mo.**—Mallinckrodt Chem. Wks. *v.* Nemnich, 169 Mo. 388, 69 S. W. 355, what particular chemicals were being manufactured should be stated. **N. Y.**—Moffat *v.* Archibald M. Ainslie Co., 181 App. Div. 37, 168 N. Y. Supp. 417,

thereof.[27] The plaintiff must allege that at the commencement of the action or at the time of moving for an injunction he is engaged in carrying on the business,[28] and a performance or a readiness to perform any conditions precedent.[29] If an injunction is sought the pleading must show the inadequacy of the remedy at law,[30] but under some statutes he need not allege that the injury is irreparable.[31] Although the contract provides for the payment of a fixed sum as liquidated damages, this agreement is merely incidental and nonpayment need not be alleged.[32]

The answer of the defendant must contain matter of denial and new matter constituting a defense in accordance with the general rules.[33]

V. DETERMINATION AND RELIEF GRANTED. — Although the contract may be broader in some respects than the law allows, an injunction as to those particulars in which it is valid may be had.[34] And where the agreement is not specific, the injunction will be granted only so far as it is not open to doubt.[35]

The court will not, in the absence of fraud, determine the adequacy of the consideration.[36]

allegation in disjunctive held insufficient.

[a] **The Establishment of the Rival Business.**—Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

27. Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118.

28. McCurry *v.* Gibson, 108 Ala. 451, 461, 18 So. 806, 54 Am. St. Rep. 177; Berger *v.* Armstrong, 41 Iowa 447.

29. Hollis *v.* Shaffer, 38 Kan. 492, 17 Pac. 86. See 11 STANDARD PROC. 998.

30. Gordon *v.* Mansfield, 84 Mo. App. 367. See 18 STANDARD PROC. 865.

31. Gordon *v.* Mansfield, 84 Mo. App. 367. See 13 STANDARD PROC. 73.

32. Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

33. See the titles "**Answers;**" "**Confession and Avoidance;**" and McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177, as to alleging defense that plaintiff is not licensed to practice medicine.

34. Ragsdale *v.* Nagle, 106 Cal. 332, 39 Pac. 628; Dean *v.* Emerson, 102 Mass. 480. But see Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927.

35. Sanford Dairy Co. *v.* Sanford, 114 App. Div. 862, 100 N. Y. Supp. 270.

36. **Ind.**—Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119. **Mo.**—Gordon *v.* Mansfield, 84 Mo. App. 367. **N. J.** Marvel *v.* Jonah, 81 N. J. Eq. 369, 86 Atl. 968.

RETRAXIT. — See **Dismissal, Discontinuance and Nonsuit.**

RETURNS

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CROSS-REFERENCES:

Attachments;	Judicial Sales;
Contempt;	Process;
Judgment Records,	Service of Process and Papers;
Judgments and Decrees, Enforcement of;	Sheriffs, Constables and Marshals;
	Subpoena;
	Warrants.

In actions before justices of the peace, see 17 STANDARD PROC. 1025; entry of time of return, see 18 STANDARD PROC. 156.

Return of service on infants, see 12 STANDARD PROC. 749.

Return of indictment, see 12 STANDARD PROC. 95.

Amendment of judgment after return, see 14 STANDARD PROC. 870.

To writ of certiorari, see 4 STANDARD PROC. 935.

To writ of habeas corpus, see 10 STANDARD PROC. 929.

To writ of mandamus, see 19 STANDARD PROC. 269.

To writ of prohibition, see the title "Prohibition."

For forms, see 9 STANDARD PROC. 1085, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout the article.

I. OFFICIAL RETURNS. — A. DEFINITION. — A return includes not only the officer's certificate of service, but the actual return of the writ or process to the office from which it issued,[1] although oftentimes the term is used in the former sense only.[2] In the latter sense, it is merely evidence of the fact that statutory service has been had.[3]

B. NECESSITY OF. — The court cannot proceed against a defendant who has not appeared, in the absence of a valid return of summons.[4]

1. **Ark.**—Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462. **Ill.**—Nelson *v.* Cook, 19 Ill. 440. **Miss.**—Beall *v.* Shattuck, 53 Miss. 358. **Neb.**—Graves *v.* MacFarland, 58 Neb. 802, 79 N. W. 707. **Vt.**—Gibson *v.* Holmes, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451.

[a] **The officer's indorsement on the writ does not become a return until it** is actually returned to the office from which it issued. Nelson *v.* Cook, 19 Ill. 440, 455.

2. **Ark.**—Phillips *v.* Pillow, 47 Ark. 404, 1 S. W. 686. **Cal.**—Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116. **Va.**—Rowe's Admr. *v.* Hardy's Admr., 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

3. **La.**—Harris *v.* Alexander, 1 Rob. 30. **Neb.**—Graves *v.* MacFarland, 58 Neb. 802, 79 N. W. 707. **Okla.**—Bollenbach *v.* Huber, 46 Okla. 127, 148 Pac. 716.

4. Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Albright-Pryor Co. *v.* Pacific Selling Co., 126 Ga. 498, 55 S. E. 251, 115 Am. St. Rep. 108; Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25; Callaway *v.* Douglasville College, 99 Ga. 623, 25 S. E. 850. See Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751, it is the fact of

But by a general appearance, the defendant waives a return.[5]

C. By Whom Made. — It is the duty of the officer serving a writ to make a return thereof within the time prescribed by law, whether or not he executed it.[6]

D. When Made. — At common law, process for appearance must be returned at the same or next term.[7] The writ may be returned before return day, if it has been served,[8] but not otherwise.[9] A return made after the time limited by statute is valid.[10] And it has been held that a sheriff may make a return after expiration of his term of office.[11]

E. To What Court Made. — The writ should be returned to the office or court which issued it.[12]

F. Indorsement on Writ. — The return is endorsed on the process served and returned.[13]

G. Form and Sufficiency of. — **1. Generally.** — As a general

service and not the sufficiency of the return which gives the court jurisdiction.

Rendition of default judgment in absence of return, see 14 Standard Proc. 869.

5. Hall *v.* Biever, Morris (Ia.), 113; Swann *v.* Shemwell, 2 Har. & G. (Md.) 283.

6. U. S.—United States *v.* Scroggins, 3 Woods 529, 27 Fed. Cas. No. 16,244. **Ark.**—Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462; Wilson *v.* Young, 48 Ark. 593, 25 S. W. 870; Atkinson *v.* Heer & Co., 44 Ark. 174. **Vt.**—Gibson *v.* Holmes, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451.

[a] *Compare* Scully *v.* Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62, holding statute does not require officer to return a warrant of arrest. He must arrest the defendant and bring him before the judge issuing the warrant.

Enforcing liability of officer failing to make return, see the title "**Sheriffs, Constables and Marshals.**"

[b] **The clerk** cannot certify to the mailing of a copy of the petition. Roberts *v.* Burris, 12 Iowa 394.

[c] **Where a deputy served the writ,** the sheriff may make and sign a return, especially after the former's death. **Kan.**—Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281. **N. Y.**—Barber *v.* Goodell, 56 How. Pr. 364. **Tex.** Swearingen *v.* Swearingen (Tex. Civ. App.), 193 S. W. 442.

7. Bowden *v.* T. A. Gillispie Co., 75 N. J. L. 296, 68 Atl. 238.

[a] **But a return in vacation of a writ returnable in term** time is irregular and will be set aside. Johnson *v.* Wilmington & N. E. Ry. Co., 1 Penne. (Del.) 87, 39 Atl. 777, but allowing the plaintiff to make a motion that the sheriff be allowed to make his return at next term.

8. Lively *v.* Southern B. & L. Assn., 46 W. Va. 180, 33 S. E. 93.

9. Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Glover *v.* Rawson, 3 Pinn. (Wis.) 226, 3 Chand. 249.

10. Ga.—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. **Ill.**—Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232. **Kan.**—Smith *v.* Payton, 13 Kan. 362; Miller *v.* Forbes, 6 Kan. App. 617, 49 Pac. 705. **Neb.** Graves *v.* MacFarland, 58 Neb. 802, 79 N. W. 707. **N. J.**—Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

See Bankers' Iowa S. Bank *v.* Jordan, 111 Iowa 324, 82 N. W. 779.

After rendition of default judgment, see 14 Standard Proc. 869.

[a] **Court has power to permit return** of writ after return day. Langdell *v.* Eastern Basket & V. Co. (N. H.), 99 Atl. 90; Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

11. Howell *v.* Albany City Ins. Co., 62 Ill. 50. *Contra,* Richards *v.* Porter, 7 Johns. (N. Y.) 137.

12. See *infra,* this note.

[a] **A return of process to an office other than that directed** does not warrant setting aside proceedings. Garlock *v.* Ontario Bank, 1 Wend. (N. Y.) 288.

13. Thompson *v.* Griffis, 19 Tex. 115.

[a] **Indorsement on petition is mere**

rule the statutes do not provide a form for return of service.[14] It must be in writing,[15] but need not state facts appearing of record.[16]

Abbreviations may be used where they are not ambiguous.[17]

2. Manner of Service. — The return must state the manner of service of the writ,[18] and show a compliance with its direction and with the requirements of the law,[19] or a sufficient reason for any non-compliance.[20] That the writ and petition served were those in the action should be shown.[21]

If substituted service is had, the existence of facts authorizing such service should be shown,[22] as well as facts showing a compliance with

irregularity in form. Johnson *v.* Gilkeson, 81 Mo. 55.

14. First Nat. Bank *v.* Ellis, 27 Okla. 699, 114 Pac. 620, Ann. Cas. 1912C, 687; Bartlett *v.* Winkler, 15 Tex. 515.

Return of service on corporation, see 5 STANDARD PROC. 628.

15. Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462; Phillips *v.* Pillow, 47 Ark. 404, 1 S. W. 686.

16. Mills *v.* Howard, 12 Tex. 9.

[a] **That attorney served was attorney of record** need not appear in the return. Mills *v.* Howard, 12 Tex. 9.

17. Odd Fellows Bldg. Assn. *v.* Hogan, 28 Ark. 261, 264.

18. **Ark.**—Pillow *v.* Sentelle & Co., 39 Ark. 61; Henry *v.* Ward, 4 Ark. 150. **Ga.**—Hayden *v.* Atlanta Sav. Bank, 66 Ga. 150. **Ill.**—Terry *v.* Eureka College, 70 Ill. 236; Botsford *v.* O'Conner, 57 Ill. 72. **Tex.**—Thompson *v.* Griffis, 19 Tex. 115. **Vt.**—Gibson *v.* Holmes, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451. **Wash.**—Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389.

[a] **Facts, not conclusions,** should be stated. **Cal.**—Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116. **Ky.** Youngstown Bridge Co. *v.* White's Admr., 105 Ky. 273, 49 S. W. 36. **Miss.** Dogan *v.* Barnes, 76 Miss. 566, 24 So. 965.

[b] **A return of "executed"** (1) is sufficient, except where a corporation is defendant. **Ala.**—Cantley & Co. *v.* Moody, 7 Port. 443. **Miss.**—Dogan *v.* Barnes, 76 Miss. 566, 24 So. 965. **Va.** Barksdale *v.* Neal, 16 Gratt. (57 Va.) 314. See Bartlett *v.* Winkler, 15 Tex. 515, "executed by a copy of this writ and petition." (2) But a return "executed by personal service" is not, there being an insufficient attempt to show manner of service, and therefore no presumption in favor of the return, as there would be in support of a general return "executed." Dogan *v.* Barnes, 76 Miss. 566, 24 So. 965. (3) A return "executed in person" is sufficient after judgment by default. Barksdale *v.* Neal, 16 Gratt. (57 Va.) 314.

[c] **A return of "served personally"** (1) is sufficient. McDowell *v.* Cooper, 2 Harr. (Del.) 480. But see Botsford *v.* O'Conner, 57 Ill. 72. (2) So is a return "served by reading." Holsinger *v.* Dunham, 11 Ind. 346. *Contra,* Bain *v.* Galyear, 10 Iowa 585. (3) But a return "served by copy" is not. Groves *v.* Hickman, 1 Harr. (Del.) 33. (4) A return of service of a copy of the declaration on the defendant is deemed personal service. Central Bank *v.* Wright, 12 Wend. (N. Y.) 190.

[d] **Service of copy of petition** must be shown where personal service is had. Neally *v.* Redman, 5 Iowa 387.

[e] **Disposition of defendant arrested** must be shown. Gibson *v.* Holmes, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451.

[f] **Waiver of reading** may be stated. Gregory, Tilton & Co. *v.* Harmon, 10 Iowa 445.

19. **Ala.**—McGowin *v.* Dickson, 182 Ala. 161, 62 So. 685. **Cal.**—People *v.* Bernal, 10 Cal. 66; Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116. **Ill.** Noleman *v.* Weil, 72 Ill. 502. **Mo.**—Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 279, 86 S. W. 880. **Vt.**—Gibson *v.* Holmes, 78 Vt. 110, 121, 62 Atl. 11, 4 L. R. A. (N. S.) 451. **Wis.**—Wilkinson *v.* Bayley, 71 Wis. 131, 36 N. W. 836.

[a] **Return showing substantial compliance** with statute is sufficient. Macklot *v.* Hart, 12 Iowa 428; Nipp *v.* Bower, 9 Kan. App. 854, 61 Pac. 448.

20. Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116.

21. Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341, 346; Thompson *v.* Griffis, 19 Tex. 115.

22. **U. S.**—Scott *v.* Stockholders'

every material requirement of the statute regulating such service.[23] The name of the member of defendant's family with whom a copy of the process is left need not be stated,[24] except in some states,[25] but he must be shown to be an adult,[26] and a member of the family of the defendant.[27]

Oil Co., 122 Fed. 835; Collins *v.* American Spirit Mfg. Co., 96 Fed. 133. **Ala.** Melvin *v.* Clark, 45 Ala. 285. **Fla.** Drew Lumber Co. *v.* Walter, 45 Fla. 252, 34 So. 244. **Ga.**—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. **Ill.**—Kepcha *v.* Lowman, 249 Ill. 118, 94 N. E. 102. **Kan.**—Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373. **N. Y.**—Shapiro *v.* Goldberg, 31 Misc. 755, 64 N. Y. Supp. 88. **Okla.** First Nat. Bank *v.* Latham, 37 Okla. 286, 132 Pac. 891. **Ore.**—Whittier *v.* Woods, 57 Ore. 432, 112 Pac. 408. **Wash.** Mitchell, Lewis & Staver Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235. **W. Va.** Johnson *v.* Ludwick, 58 W. Va. 464, 52 S. E. 489.

[a] **An omission** in this regard renders the return defective merely, and not void. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

[b] **That defendant could not be found** must be shown. Mitchell, Lewis & Staver Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235. *Compare* Wilson & Co. *v.* Call, 49 Iowa 463, under statute authorizing substituted service if defendant is not found in county. See Macklot *v.* Hart, 12 Iowa 428; Davis *v.* Burt, 7 Iowa 56.

[c] **Diligence** in searching for defendant need not be shown. Neally *v.* Redman, 5 Iowa 387.

23. **U. S.**—King *v.* Davis, 137 Fed. 198, 206. **Ga.**—See Reynolds *v.* Atlanta Nat. B. & L. Assn., 104 Ga. 703, 30 S. E. 942. **Ind.**—Supreme Council Catholic Ben. Legion *v.* Boyle, 10 Ind. App. 301, 304, 37 N. E. 1105. **Mich.**—Adams *v.* Abram, 38 Mich. 302. **N. Y.**—Proctor *v.* Whitcher, 15 App. Div. 227, 44 N. Y. Supp. 190. **Va.**—Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180. **Wash.** Powell *v.* Nolan, 27 Wash. 318, 332, 67 Pac. 712, 68 Pac. 389; Mitchell, Lewis & Staver Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235. **W. Va.**—Lively *v.* Southern B. & L. Assn., 46 W. Va. 180, 33 S. E. 93; Van Diver *v.* Roberts, 4 W. Va. 493.

[a] **That the copy was left at the "usual place of abode" (1) of defendant should be stated. Ia.**—Davis *v.* Burt, 7 Iowa 56. **Mo.**—Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237; Ser *v.* Bobst, 8 Mo. 506. **Wash.**—Mitchell, Lewis & Staver Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235. **W. Va.**—Van Diver *v.* Roberts, 4 W. Va. 493. (2) Leaving a copy at defendant's "residence" is sufficient. Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180.

[b] **A return that a copy was left at defendant's "dwelling house"** is insufficient. Ser *v.* Bobst, 8 Mo. 506.

[c] **That copy was certified** must be shown. Proctor *v.* Whitcher, 15 App. Div. 227, 44 N. Y. Supp. 190.

[d] **A return of service upon a person "as agent"** of the party is insufficient. Reynolds *v.* Missouri, K. & T. R. Co., 224 Mass. 253, 112 N. E. 859.

24. Box *v.* Equitable Securities Co., 71 Ark. 286, 73 S. W. 100; Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540.

25. Montgomery *v.* Brown, 7 Ill. 581; Davis *v.* Burt, 7 Iowa 56; Neally *v.* Redman, 5 Iowa 387.

[a] **Christian Name Need Not Be Stated.**—Morehead *v.* Chaffe, 52 Miss. 161.

[b] **Name of wife** need not be stated. Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811; Wilson & Co. *v.* Call, 49 Iowa 463.

26. **Ia.**—Davis *v.* Burt, 7 Iowa 56. **Mo.**—Ser *v.* Bobst, 8 Mo. 506. **Okla.** See Bollenbach *v.* Huber, 46 Okla. 127, 148 Pac. 716. **Pa.**—Williams *v.* McDonald, 1 Just. L. Rep. 121.

[a] **A return of leaving a copy with defendant's "wife"** is insufficient where a marriage between infants is permitted. Ser *v.* Bobst, 8 Mo. 506.

27. **Ill.**—Montgomery *v.* Brown, 7 Ill. 581. **Ia.**—Wilson & Co. *v.* Call, 49 Iowa 463. **Mich.**—Laidlow *v.* Morrow, 44 Mich. 547, 7 N. W. 191. **Mo.**—Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237; Ser *v.* Bobst, 8 Mo. 506. **Pa.** Hoffa *v.* Weidenhamer, 22 Pa. Co. Ct. 528; Kester *v.* Howley, 17 Pa. Dist. 398. **Va.**—Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180.

[a] **A daughter** must be shown to

3. **Time and Place of Service.** — The return should state the time of service,[28] but the place where the writ was executed need not be stated,[29] unless the statute so requires.[30]

4. **Designation and Name of Defendant.** — The return of service of process must show a service upon the defendant or defendants named in the writ.[31] Although proper, it is not necessary to state the defendant's name if he is otherwise identified as the person served.[32] And slight variances in name between the writ and the

be a member of the family. Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180.

[b] **The father** of the defendant also. Hoffa *v.* Weidenhamer, 22 Pa. Co. Ct. 528.

[c] **A statement of leaving a copy with defendant's "wife"** is not sufficient to show leaving a copy with a member of a family. King *v.* Davis, 137 Fed. 222, 230; King *v.* Davis, 137 Fed. 198. *Contra,* Ser *v.* Bobst, 8 Mo. 506. And *compare* Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180, dictum.

28. **Ark.**—Pillow *v.* Sentelle & Co., 39 Ark. 61; Thompson *v.* Bank of the State, 5 Ark. 245. **Ill.**—Botsford *v.* O'Conner, 57 Ill. 72; Harmon *v.* Campbell, 30 Ill. 25. **Ia.**—Wilson & Co. *v.* Call, 49 Iowa 463. **La.**—O'Hara *v.* Independence Lumb. & Imp. Co., 42 La. Ann. 226, 7 So. 533. **Okla.**—Lee *v.* State, 47 Okla. 738, 150 Pac. 665. **Tex.** Sloan *v.* Batte, 46 Tex. 215; Williams *v.* Downes, 30 Tex. 51; Miller *v.* Davis (Tex. Civ. App.), 180 S. W. 1140. **Wash.**—Powell *v.* Nolan, 27 Wash. 318, 331, 67 Pac. 712, 68 Pac. 389.

Presumption of time of service, see 11 ENCY. OF EV. 719.

[a] **Omission of Date Not Ground of Collateral Attack.**—Wilson & Co. *v.* Call, 49 Iowa 463, on motion to set aside default.

29. **U. S.**—Knowles *v.* Gaslight & Coke Co., 19 Wall. 58, 22 L. ed. 70. **Ark.**—McNabb *v.* Bank of State, 4 Ark. 555; Henry *v.* Ward, 4 Ark. 150. **Miss.** Gulf & S. I. R. Co. *v.* Ramsey, 98 Miss. 863, 54 So. 440. **N. M.**—Orosco *v.* Gonzales, 19 N. M. 130, 141 Pac. 617. **N. Y.**—Beach *v.* Baker, 25 App. Div. 9, 48 N. Y. Supp. 1042. **Okla.** Bollenbach *v.* Huber, 46 Okla. 127, 148 Pac. 716. **Vt.**—Davis *v.* Richmond, 35 Vt. 419. **Va.**—Guarantee Co. *v.* First Nat. Bank, 95 Va. 480, 28 S. E. 909. **W. Va.**—Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

But *compare* **Kester *v.* Howley, 17 Pa.** Dist. 398, where substituted service **is** had.

Presumption as to place of service, see 11 ENCY. OF EV. 718.

[a] **Place will be referred to the** venue at the head of the return. **Davis** *v.* Richmond, 35 Vt. 419. *Contra,* **Taylor** *v.* Helter, 198 Mo. App. 643, **201** S. W. 618.

30. See generally the statutes **and** the following: **Ia.**—Wilson & Co. *v.* **Call,** 49 Iowa 463; Davis *v.* Burt, 7 **Iowa** 56. **Mo.**—Taylor *v.* Helter, 198 **Mo.** App. 643, 201 S. W. 618. **S. C.**—Lyles *v.* Haskell, 35 S. C. 391, 403, 14 S. E. 829. **Wash.**—Powell *v.* Nolan, 27 **Wash.** 318, 331, 67 Pac. 712, 68 Pac. 389.

[a] **A return of service "in the county of X"** is sufficient. Lyles *v.* Haskell, 35 S. C. 391, 403, 14 S. E. 829.

31. **Ill.**—Botsford *v.* O'Conner, **57** Ill. 72; Richardson *v.* Thompson, 41 **Ill.** 202. **Ind.**—Wright *v.* Mack, 95 **Ind.** 332, 340. **Ia.**—Cobb *v.* Newcomb, **7** Iowa 43, return of service "on the defendant" is sufficient. **Neb.**—Gate City Abstract Co. *v.* Post, 55 Neb. **742,** 76 N. W. 471. **N. H.**—Pendexter *v.* Cate, 66 N. H. 270, 20 Atl. 331. **Tex.** Hendon *v.* Pugh, 46 Tex. 211; Kellam *v.* Trail (Tex. Civ. App.), 185 S. W. 988. **Wis.**—See Keith Bros. & Co. *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

[a] **That defendant is resident of** the county need not be stated. Mantle *v.* Casey, 31 Mont. 408, 78 Pac. 591.

[b] **Service on Defendant Implied.** Holsinger *v.* Dunham, 11 Ind. **346,** where return was "served by reading." *Contra,* Bain *v.* Galyear, 10 Iowa 585.

32. See *infra,* this note.

[a] **A service on "the within named defendant"** (1) is sufficient (Pendexter *v.* Cate, 66 N. H. 270, 20 Atl. 331), unless (2) there are two defendants because then it cannot be told which is served. **Richardson *v.* Thompson, 41**

return, not sufficient to create a doubt as to whether the defendant is served, do not invalidate the process or service.[33]

5. Signature. — The name of the officer making the return should be signed thereto,[34] but as the court is presumed to know its own officers, a designation of the office need not be added.[35] In some states, a deputy may sign a return in his own name,[36] but in others the act of the deputy must be done in the name of the officer under whom he acts.[37]

6. Verification. — The return of a sheriff or officer of whom the court will take judicial notice need not be verified by his oath.[38]

H. CONSTRUCTION OF RETURN. — In construing a return, the court

Ill. 202. (3) A service on the "within named defendants, in person" is insufficient where there are two defendants. Chamblee *v.* Hufsmith (Tex. Civ. App.), 44 S. W. 616.

[b] **Use of initials of Christian name** is sufficient. German Ins. Co. *v.* Frederick, 57 Neb. 538, 77 N. W. 1106.

33. **Cal.**—Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24. **Colo.**—Schlacks *v.* Johnson, 13 Colo. App. 130, 56 Pac. 673. **Fla.**—Putnam Lumb. Co. *v.* Ellis-Young Co., 50 Fla. 251, 39 So. 193, where name was stated under a videlicet. **Ky.**—Claryville, G. L. & B. Tp. Co. *v.* Com., 32 Ky. L. Rep. 1157, 107 S. W. 327. **P. R.**—Dinkins *v.* Prescot, 6 Porto Rico Fed. 470. **Tex.**—Dunn *v.* Hughes (Tex. Civ. App.), 36 S. W. 1084.

[a] **Where Name Is Idem Sonans.** Dinkins *v.* Prescot, 6 Porto Rico Fed. 470; Townsend *v.* Ratcliff, 50 Tex. 148. See McClaskey *v.* Barr, 45 Fed. 151.

[b] **A difference of one initial** of Christian name vitiates return. Houghton *v.* Tibbets, 126 Cal. 57, 58 Pac. 318; Hendon *v.* Pugh, 46 Tex. 211.

34. **Ark.**—Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462. **Colo.**—Thomas *v.* Colorado Nat. Bank, 11 Colo. 511, 19 Pac. 501. **Mo.**—Bennett *v.* Vinyard, 34 Mo. 216.

35. Thompson *v.* Haskell, 21 Ill. 215, 74 Am. Dec. 98. See Fleugel *v.* Lards, 108 Mich. 682, 66 N. W. 585. But see Laidley's Admrs. *v.* Bright's Admr., 17 W. Va. 779, 786.

[a] **The county of which the officer is sheriff** need not be stated. Davis *v.* Burt, 7 Iowa 56; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042.

36. Bean *v.* Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042; Wheeler *v.* Wilkins, 19 Mich. 78; Calender *v.* Olcott, 1 Mich. 344.

37. **Cal.**—Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52. **Ill.**—Glencoe *v.* People, 78 Ill. 382 (except where he is a special deputy under statute); Zepp *v.* Hager, 70 Ill. 223. **Mo.**—McClure *v.* Wells, 46 Mo. 311; Stuckert *v.* Thompson, 181 Mo. App. 518, 164 S. W. 692. **N. C.**—McMurphey *v.* Campbell, 2 N. C. 181. **Okla.**—First Nat. Bank *v.* Ellis, 27 Okla. 699, 114 Pac. 620, Ann. Cas. 1912C, 687. **Pa.**—Emley *v.* Drum, 36 Pa. 123. **Tex.**—Hays *v.* Byrd, 14 Tex. Civ. App. 24, 36 S. W. 777. **Vt.**—Eastman *v.* Curtis, 4 Vt. 616. **Va.**—Barksdale *v.* Neal, 16 Gratt. (57 Va.) 314, statute requires deputy to subscribe return in his own name as well as that of his principal.

[a] **Return in Name of Deputy Is Void.**—Stuckert *v.* Thompson, 181 Mo. App. 518, 164 S. W. 692.

[b] **Writ may bear signature of sheriff with or without signature** of the deputy. Hays *v.* Bird, 14 Tex. Civ. App. 24, 36 S. W. 777, where returned was signed by sheriff "by C, deputy."

[c] **Signature of sheriff below** that of deputy is valid. Zepp *v.* Hager, 70 Ill. 223.

38. Wolf *v.* Moyer, 21 Pa. Co. Ct. 624; Barksdale *v.* Neal, 16 Gratt. (57 Va.) 314. See Brauchle *v.* Nothhelfer, 107 Wis. 457, 83 N. W. 653, where marshal's return was unverified.

[a] **Constable must verify** a return of summons from a superior court. Herdlicka *v.* Evans, 165 Iowa 207, 145 N. W. 84. See Berentz *v.* Belmont Oil Min. Co., 148 Cal. 577, 84 Pac. 47, query.

[b] **Special deputy** must verify return by statute. Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13; Glencoe *v.* People, 78 Ill. 382.

will consider every part, one with the other,[39] and give to it a reasonable and natural interpretation,[40] although some courts give returns a strict construction.[41] The complaint cannot be looked to in determining the sufficiency of a return,[42] but the summons to which it is attached may.[43]

Two or more returns referring to the same transaction will be construed together.[44]

I. AMENDMENT. — **1. Generally.** — A defective or irregular return of service of process does not defeat the jurisdiction of the court where there has been legal service,[45] and it may be amended in conformity with the facts,[46] if the rights of third parties acquired in good faith have not intervened.[47]

39. Thompson *v.* Bank of the State, 5 Ark. 245.

40. Bacon *v.* S. Bevan & Co., 44 Miss. 293; Davis *v.* Jacksonville S. E. Line, 126 Mo. 69, 28 S. W. 965. *Compare* Holtschneider *v.* Chicago, R. I. & P. R. Co., 107 Mo. App. 381, 81 S. W. 489.

[a] **Words may be implied** as well as in other written evidence when the implication is justified. Farnsworth *v.* Strasler, 12 Ill. 482. *Contra,* Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 279, 86 S. W. 880.

[b] **The misuse of words** which can mislead no one will not vitiate the return. Hammond *v.* Baker, 39 Mich. 472.

[c] **Surplusage Will Be Disregarded.** Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 280, 86 S. W. 880.

41. See *infra,* this note.

[a] **Returns of substituted service** are given strict construction. King *v.* Davis, 137 Fed. 198.

[b] **A strict construction means** that the return cannot be aided by presumptions or intendments. Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 279, 86 S. W. 880.

42. Supreme Council *v.* Boyle, 10 Ind. App. 301, 304, 37 N. E. 1105.

43. First Nat. Bank *v.* Latham, 37 Okla. 286, 132 Pac. 891.

44. Pillow *v.* Sentelle & Co., 39 Ark. 61.

45. Paulin *v.* Sparrow, 91 Ohio St. 279, 110 N. E. 528.

46. **U. S.**—King *v.* Davis, 137 Fed. 198, 206. **Ark.**—Humphries *v.* Lawson, 7 Ark. 341. **Ga.**—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. **Ill.** Montgomery *v.* Brown, 7 Ill. 581. **Kan.** Bond *v.* Wilson, 8 Kan. 228, 12 Am. Rep. 466. **Ky.**—Ramey *v.* Francis, Day & Co., 169 Ky. 469, 184 S. W. 380; Tyler *v.* Jewell, 10 Ky. L. Rep. 887, 11 S. W. 25. **La.**—O'Hara *v.* Independence Lumb. & Imp. Co., 42 La. Ann. 226, 7 So. 533. **Md.**—Main *v.* Lynch, 54 Md. 658. **Mich.** Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226. **Neb.**—Wittstruck *v.* Temple, 58 Neb. 16, 78 N. W. 456; Phoenix Ins. Co. *v.* King, 52 Neb. 562, 72 N. W. 855; Shufeldt *v.* Barlass, 33 Neb. 785, 51 N. W. 134. **N. H.**—Farmington *v.* Somersworth, 44 N. H. 589; Northwood *v.* Barrington, 9 N. H. 369. **N. C.** Swain *v.* Burden, 124 N. C. 16, 32 S. E. 319; Stealman *v.* Greenwood, 113 N. C. 355, 18 S. E. 503. **Okla.**—Payne *v.* Long-Bell Lumb. Co., 9 Okla. 683, 60 Pac. 235. **Ore.**—Matthes *v.* Holman, 69 Ore. 100, 138 Pac. 248; Fisk *v.* Hunt, 33 Ore. 424, 54 Pac. 660; Weaver *v.* Southern Ore. Co., 30 Ore. 348, 48 Pac. 171. **Tex.**—Delaware Ins. Co. *v.* Hutto (Tex. Civ. App.), 159 S. W. 73; Brewster *v.* State, 40 Tex. Civ. App. 1, 88 S. W. 858. **Va.**—Commercial Union Assur. Co. *v.* Everhart's Admr., 88 Va. 952, 14 S. E. 836; Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898. **Wash. Ter.**—Washington Mill Co. *v.* Kinnear, 1 Wash. Ter. 99. **W. Va.**—McCormick *v.* Southern Exp. Co., 81 W. Va. 87, 93 S. E. 1048; Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194.

[a] **A common law right** not dependent on statute. Main *v.* Lynch, 54 Md. 658.

47. **Ill.**—Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13. **Mo.**—Scruggs *v.* Scruggs, 46 Mo. 271. **Va.**—Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

2. Who May Make. — Returns should be amended by the officer who served the writ and knows the facts.[48] But some statutes authorize the court to make the amendment if the officer fails to do so.[49]

3. When Made. — Returns may be amended before[50] and after[51] judgment as well as after writ of error brought.[52] They may be amended at a subsequent term of court,[53] or after a lapse of years,[54] and even after the officer is out of office,[55] or while a suit or motion on the original return is pending.[56] But after a removal of the cause

48. **Ga.**—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. **Ill.**—O'Conner *v.* Wilson, 57 Ill. 226. **N. H.**—Carroll Co. Bank *v.* Goodall, 41 N. H. 81.

[a] **An officer may amend (1) the return of his deceased deputy** (Avery *v.* Bowman, 39 N. H. 393), except (2) where he is ignorant of the facts and there is no memoranda of the deputy. O'Conner *v.* Wilson, 57 Ill. 226; Knapp *v.* Wallace, 50 Ore. 348, 92 Pac. 1054, 126 Am. St. Rep. 742.

[b] **On Application of Sheriff's Administrator.**—Scruggs *v.* Scruggs, 46 Mo. 271.

[c] **Court cannot correct** the return. Wilcox *v.* Moudy, 89 Ind. 232.

49. See generally the statutes and Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

50. **Md.**—Main *v.* Lynch, 54 Md. 658, 669. **N. C.**—Grady *v.* Richmond & D. R. Co., 116 N. C. 952, 21 S. E. 304. **Va.**—Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

[a] **At Any Time During Pendency of Suit.**—Magrew *v.* Foster, 54 Mo. 258.

51. **Ga.**—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. **Ill.**—Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13. **Ky.** Ramey *v.* Francis, Day & Co., 169 Ky. 469, 474, 184 S. W. 380. **Mich.**—Wilcox *v.* Sweet, 24 Mich. 355. **Mo.**—Stewart *v.* Stringer, 45 Mo. 113. **N. C.** Grady *v.* Richmond & D. R. Co., 116 N. C. 952, 21 S. E. 304. **Ohio.**—Paulin *v.* Sparrow, 91 Ohio St. 279, 110 N. E. 528. **Tex.**—Delaware Ins. Co. *v.* Hutto (Tex. Civ. App.), 159 S. W. 73. **Va.** Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898. **W. Va.**—Hopkins *v.* Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187.

And see 14 STANDARD PROC. 870, note 43.

52. **Ark.**—Lungren *v.* Harris, 6 Ark. 474. **Colo.**—Anderson *v.* Sloan, 1 Colo. 33. **Ill.**—Terry *v.* Eureka College, 70 Ill. 236. **Mo.**—Blaisdell *v.* Wm. Pope, 19 Mo. 157; Muldrow *v.* Bates, 5 Mo. 214. **Pa.**—Shamburg *v.* Noble, 80 Pa. 158. **Tex.**—Thomson *v.* Bishop, 29 Tex. 154.

53. **Ill.**—Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 86 Ill. 587. **Mo.** Magrew *v.* Foster, 54 Mo. 258. **Tex.** Burke *v.* Thomson, 29 Tex. 158.

54. **Ill.**—Spellmyer *v.* Gaff, 112 Ill. 29, 1 N. E. 170, sixteen years. **Mo.** Judd *v.* Smoot, 93 Mo. App. 289. **Va.** Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898 (thirteen years); Walker *v.* Com., 18 Gratt. (59 Va.) 13, 98 Am. Dec. 631.

[a] **Amendments will be allowed only with caution** after a lapse of years lest the rights of innocent third parties should be injuriously affected. Scruggs *v.* Scruggs, 46 Mo. 271; Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898. See O'Conner *v.* Wilson, 57 Ill. 226; Thatcher *v.* Miller, 13 Mass. 270.

55. **U. S.**—King *v.* Davis, 137 Fed. 198, 206. **Ill.**—Howell *v.* Albany City Ins. Co., 62 Ill. 50. **Kan.**—Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105. **Ky.**—Ramey *v.* Francis, Day & Co., 169 Ky. 469, 184 S. W. 380; Louisville, H. & St. L. R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207. **Mass.**—Adams *v.* Robinson, 1 Pick. 461. **Mo.**—McClure *v.* Wells, 46 Mo. 311; Scruggs *v.* Scruggs, 46 Mo. 271; Judd *v.* Smoot, 93 Mo. App. 289. **N. H.**—Avery *v.* Bowman, 39 N. H. 393. **Va.**—Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

56. **Kan.**—Smith *v.* Martin, 20 Kan. 572. **N. C.**—Swain *v.* Burden, 124 N. C. 16, 32 S. E. 319. **Va.**—Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898; Stone *v.* Wilson, 10 Gratt. (51 Va.) 529, 533.

into a federal court an amendment cannot be made either in the state or federal court.[57]

4. Leave and Discretion of Court. — The officer may amend his indorsement on the writ at his pleasure while it is still in his control.[58] But after the writ has been returned he can amend only on leave of court.[59] The granting of applications to amend rests in the discretion of the court,[60] which is very liberally exercised,[61] except where their effect is to create error in the judgment.[62]

5. To Whom Application Made. — One court cannot authorize amendments to a return made to another tribunal in a suit between other parties.[63] The appellate court in some states may allow amendments to the return,[64] but in some states, the application should be made to the trial court,[65] although it has been held that a referee may permit the amendment.[66]

[a] **Even though it takes away the foundation for the suit** or motion. Stone *v.* Wilson, 10 Gratt. (51 Va.) 529, 533.

[b] **After Suit or Motion for Penalty for False Return.**—Stealman *v.* Greenwood, 113 N. C. 355, 18 S. E. 503; Finley *v.* Hayes, 81 N. C. 368; Patton *v.* Marr, 44 N. C. 377. *Compare* Brinkley *v.* Mooney, 9 Ark. 445; Smith *v.* Martin, 20 Kan. 572.

[c] **On Motion To Set Aside or Reverse Judgment.** — **Mich.** — Wilcox *v.* Sweet, 24 Mich. 355. **Mo.**—Blaisdell *v.* Wm. Pope, 19 Mo. 157. **W. Va.** Hopkins *v.* Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187; Laidley's Admr. *v.* Bright's Admrs., 17 W. Va. 779.

57. Hawkins *v.* Peirce, 79 Fed. 452.

[a] **Procedure.** — In the federal courts after removal of a cause thereto, affidavits may be filed in support of a defective return to show the service had was legal. Fountain *v.* Detroit M. & T. S. L. Ry. Co., 210 Fed. 982, based on Mechanical Appliance Co. *v.* Castleman, 215 U. S. 437, 445, 30 Sup. Ct. 125, 54 L. ed. 272.

58. **Ill.**—Nelson *v.* Cook, 19 Ill. 440, 455. **Ind.**—Wilcox *v.* Moudy, 89 Ind. 232. **Mass.**—Welsh *v.* Joy, 13 Pick. 477.

59. Nelson *v.* Cook, 19 Ill. 440, 455; Ledford *v.* Weber, 7 Ill. App. 87; Ramey *v.* Francis, Day & Co., 169 Ky. 469, 184 S. W. 380.

60. **U. S.**—King *v.* Davis, 137 Fed. 222, 231; King *v.* Davis, 137 Fed. 198. **Ind.**—Wilcox *v.* Moudy, 89 Ind. 232. **Mass.**—Johnson *v.* Day, 17 Pick. 106. **Mo.**—Feurt *v.* Caster, 174 Mo. 289, 299, 73 S. W. 576; Scruggs *v.* Scruggs, 46 Mo. 271. **Neb.**—Wittstruck *v.* Temple, 58 Neb. 16, 78 N. W. 456; Phoenix Ins. Co. *v.* King, 52 Neb. 562, 72 N. W. 855. **N. C.**—Swain *v.* Burden, 124 N. C. 16, 32 S. E. 319. **Ore.**—Fisk *v.* Hunt, 33 Ore. 424, 54 Pac. 660.

61. **Ill.**—Nelson *v.* Cook, 19 Ill. 440, 455. **Mo.**—McClure *v.* Wells, 46 Mo. 311. **S. D.**—Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751. **Va.**—Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898. **W. Va.**—Hopkins *v.* Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187.

[a] **But when the effect of the first return fixes a liability on the officer,** an amendment which would relieve him from liability, especially when the party would suffer loss thereby, should be allowed only on a clear showing of error. Smith *v.* Martin, 20 Kan. 572.

62. McClure *v.* Wells, 46 Mo. 311; Stewart *v.* Stringer, 45 Mo. 113.

63. Ledford *v.* Weber, 7 Ill. App. 87.

64. **Mo.**—Muldrow *v.* Bates, 5 Mo. 214; Holtschneider *v.* Chicago, R. I. & P. Co., 107 Mo. App. 381, 81 S. W. 489. **N. Y.**—Lonas *v.* Myers, 98 Misc. 476, 163 N. Y. Supp. 390. **W. Va.**—McClure-Mabie Lumber Co. *v.* Brooks, 46 W. Va. 732, 34 S. E. 921 (on writ of certiorari); Hopkins *v.* Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187.

65. Barndollar *v.* Patton, 4 Colo. 474.

[a] **After change of venue,** the motion must be made in the court to which the venue is changed. **State *v.*** Rayburn, 31 Mo. App. 385.

66. **Camp *v.* First Nat. Bank, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.**

6. Notice of Application. — It has been held that notice of the application to amend the return is not necessary,[67] unless made after a lapse of time or at a subsequent term.[68] But some authorities hold that notice should always be given.[69]

7. Hearing. — On the hearing of an application to amend a return of service, the parties are not entitled to a jury trial.[70] And the evidence to justify the amendment need not be record evidence.[71]

8. Scope of Amendment. — A return of an officer may be amended by correcting or supplying deficiencies in regard to the venue,[72] the date of the return,[73] the time,[74] place,[75] and manner[76] of service, as well as the existence of facts authorizing substituted service,[77] the person served,[78] the character in which the officer served the writ,[79] the signature,[80] and the verification.[81]

9. Compelling Amendment. — A sheriff may be compelled to amend

67. **Ark.**—Lungren *v.* Harris, 6 Ark. 474. **Ill.**—O'Conner *v.* Wilson, 57 Ill. 226. **Tex.**—El Paso & S. W. R. Co. *v.* Kelly (Tex. Civ. App.), 83 S. W. 855.

68. **U. S.**—King *v.* Davis, 137 Fed. 222, 231. **Ill.**—Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 86 Ill. 587; O'Conner *v.* Wilson, 57 Ill. 226. **Tex.**—Burke *v.* Thomson, 29 Tex. 158.

69. **U. S.**—King *v.* Davis, 137 Fed. 198. **Mich.**—Denison *v.* Smith, 33 Mich. 155. **Mo.**—Little Rock Trust Co. *v.* Southern M. & A. R. Co., 195 Mo. 669, 93 S. W. 944; Wealaka Merc. & M. Co. *v.* Lumbermen's Mut. Ins. Co., 128 Mo. App. 129, 106 S. W. 573. **Neb.** Wittstruck *v.* Temple, 58 Neb. 16, 78 N. W. 456; Phonix Ins. Co. *v.* King, 52 Neb. 562, 72 N. W. 855; Shufeldt *v.* Barlass, 33 Neb. 785, 51 N. W. 134.

[a] **Notice to attorney** is sufficient. Thomson *v.* Bishop, 29 Tex. 154.

70. Wilcox *v.* Moudy, 89 Ind. 232.

71. Magrew *v.* Foster, 54 Mo. 258; Judd *v.* Smoot, 93 Mo. App. 289.

[a] **Affidavits May Be Considered.** Fisk *v.* Hunt, 33 Ore. 424, 54 Pac. 660, where an affidavit was filed by person moving to dismiss showing officer's inability to make a true return of service.

72. Northwood *v.* Barrington, 9 N. H. 369.

73. Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226.

Amending indorsement as to date of receipt of process, see the title "Process."

74. Lee *v.* State, 47 Okla. 738, 150 Pac. 665; Powell *v.* Nolan, 27 Wash. 318, 332, 67 Pac. 712, 68 Pac. 389.

75. Taylor *v.* Helter, 198 Mo. App. 643, 201 S. W. 618.

76. **Ill.**—Noleman *v.* Weil, 72 Ill. 502. **Mich.**—Wilcox *v.* Sweet, 24 Mich. 355. **Mo.**—Muldrow *v.* Bates, 5 Mo. 214. **Ohio.**—Paulin *v.* Sparrow, 91 Ohio St. 279, 290, 110 N. E. 528.

77. Hopkins *v.* Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187, that agent resided in county.

78. Dutton *v.* Hobson, 7 Kan. 196; Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105; Louisville, H. & St. L. R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207.

[a] **Where defendant is sued by a fictitious name,** his true name may be inserted. McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52.

[b] **Showing Person To Be Agent of Corporation.**—M. Rumely Co. *v.* Bledsoe (Okla.), 155 Pac. 872.

[c] **Showing Person To Be Member of Family.**—King *v.* Davis, 137 Fed. 222, 231; King *v.* Davis, 137 Fed. 198.

79. Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751, amendment to show service as an individual because of disqualification of officer as deputy. See Williams *v.* Hutchinson, 20 Kan. 513, holding evidence insufficient to show officer was a deputy.

80. **Ky.**—Louisville, H. & St. L. R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207. **Mo.**—McClure *v.* Wells, 46 Mo. 311, where deputy signed in his own name. **N. C.**—Manning *v.* Roanoke & T. R. R. Co., 122 N. C. 824, 28 S. E. 963. **Okla.** Lee *v.* State, 47 Okla. 738, 150 Pac. 665, where deputy signed in own name. **W. Va.**—Laidley's Admrs. *v.* Bright's Admr., 17 W. Va. 779, 786.

81. Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13.

a return which is defective,[82] but it is otherwise if the return is regular on its face.[83]

10. Effect of Amendment. — The amended return relates back to the original return and has the same effect as if the amended return had been originally made.[84]

J. DEFECTS AND OBJECTIONS. — **1. Time of Objection.** — It is too late to raise for the first time on appeal after default,[85] or after appearance without objection in the trial court,[86] objections to defects in the return of service of process.

2. Quashing the Writ. — A defect in the return is not a ground for quashing the writ.[87]

3. Quashing and Vacating the Return or Service. — Where a return is irregular or defective and is not amended,[88] or where the service shown to have been made was not legally sufficient,[89] the defendant may specially appear,[90] and make a motion to quash the

82. Washington Mill Co. *v.* Kinnear, 1 Wash. Ter. 99.

83. Sawyer *v.* Curtis, 2 Ashm. (Pa.) 127; Washington Mill Co. *v.* Kinnear, 1 Wash. Ter. 99. See Wilcox *v.* Moudy, 89 Ind. 232.

84. **U. S.**—King *v.* Davis, 137 Fed. 222, 231. **Ark.**—Lungren *v.* Harris, 6 Ark. 474. **Ga.**—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. **Mo.** Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481. **N. C.**—Manning *v.* Roanoke & T. R. R. Co., 122 N. C. 824, 28 S. E. 963; Grady *v.* Richmond & D. R. Co., 116 N. C. 952, 21 S. E. 304. **Tex.**—El Paso & S. W. R. Co. *v.* Kelly (Tex. Civ. App.), 83 S. W. 855. **Va.**—Shenandoah V. R. Co. *v.* Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898. **W. Va.**—McClure-Mabie Lumber Co. *v.* Brooks, 46 W. Va. 732, 34 S. E. 921.

85. **Idaho.**—Zimmerman *v.* Bradford-Kennedy Co., 14 Idaho 681, 95 Pac. 825. **Ia.**—Davis *v.* Burt, 7 Iowa 56. **Kan.**—Dutton *v.* Hobson, 7 Kan. 196.

[a] **Although return is so defective** it would have been quashed on motion. Zimmerman *v.* Bradford-Kennedy Co., 14 Idaho 681, 95 Pac. 825.

86. **Ark.**—Martin *v.* Godwin & Co., 34 Ark. 682. **Mich.**—Froman *v.* Froman, 53 Mich. 581, 19 N. W. 193. **N. Y.** State Board of Pharmacy *v.* Jacob, 46 Misc. 607, 92 N. Y. Supp. 836. **Vt.** McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438. **Va.**—Shenandoah V. R. Co. *v.* Griffith, 76 Va. 913.

87. **Fla.**—Engelke & F. Milling Co. *v.* Grunthal, 46 Fla. 349, 423, 35 So. 17. **Ore.**—Lane *v.* Ball, 83 Ore. 404, 416, 160 Pac. 144, 163 Pac. 975. **W. Va.** Hopkins *v.* Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187.

See the title "**Process.**"

88. **Ark.**—Martin *v.* Godwin & Co., 34 Ark. 682. **Idaho.**—Zimmerman *v.* Bradford-Kennedy Co., 14 Idaho 681, 95 Pac. 825. **Ind.**—Supreme Council Catholic Ben. Legion *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105. **Mo.**—Newcomb *v.* New York C. & H. R. R. Co., 182 Mo. 687, 707, 81 S. W. 1069; Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 279, 86 S. W. 880. **Ore.** See Lane *v.* Ball, 83 Ore. 404, 416, 160 Pac. 144, 163 Pac. 975.

[a] **A return which has a double meaning** or is duplicitous will be quashed. Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 279, 86 S. W. 880.

[b] **Review.**—An error in failing to sustain a motion to set aside a return is not necessarily a reversible error. Supreme Council Catholic Ben. Legion *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105.

89. **U. S.**—Scott *v.* Stockholders' Oil Co., 122 Fed. 835 (motion to quash return); Benton *v.* McIntosh, 96 Fed. 132. **Ky.**—Brumleve *v.* Cronan, 176 Ky. 818, 197 S. W. 498 (motion to quash return); Gainesboro Tel. Co. *v.* Buckner, 160 Ky. 604, 169 S. W. 1000. **N. H.**—Crawford *v.* Crawford, 44 N. H. 428. **Ohio.**—Goodrich *v.* Hamer, 8 Ohio Dec. 441, 8 Wkly. L. Bul. 11, holding this to be a motion to quash the service. **Tenn.**—Padgett *v.* Ducktown Sulphur C. & I. Co., 97 Tenn. 690, 37 S. W. 698.

See the title "**Service of Process and Papers.**"

90. **Ga.**—Bell *v.* New Orleans & N.

return or service. If the question of jurisdiction appears on the face of the return, a plea or answer is not appropriate,[91] but if not apparent, as where the truth of the return is assailed, a plea in abatement is necessary in some states,[92] whereas in other states, a motion supported by affidavit is the proper remedy,[93] unless there is a controversy as to the facts.[94] If the motion to quash is sustained, the return is vacated or quashed, and the suit remains pending;[95] if overruled, the defendant is in court and must plead.[96] But the sustaining of a plea in abatement puts an end to the suit.[97]

Subsequent Suit. — Under some statutes if the action fails because of a failure to make a proper return, a new action may be brought within a year.[98]

4. Dismissal of Suit. — A defective return is not ground for a dismissal of the suit,[99] except in certain cases.[1]

5. Vacation of Judgment. — A default judgment may sometimes be set aside on the ground of a false return,[2] or, it has been held,

E. R. Co., 2 Ga. App. 812, 59 S. E. 102. **Mo.**—Newcomb *v.* New York C. & H. R. R. Co., 182 Mo. 687, 707, 81 S. W. 1069. **Neb.**—Stelling *v.* Peddicord, 78 Neb. 779, 111 N. W. 793. **N. C.** Brown *v.* Taylor, 174 N. C. 423, 93 S. E. 982, L. R. A. 1918B, 293; Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

91. Thomasson *v.* Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 S. W. 1092; Newcomb *v.* New York C. & H. R. R. Co., 182 Mo. 687, 707, 81 S. W. 1069.

92. **U. S.**—Scott *v.* Stockholders' Oil Co., 122 Fed. 835. **Fla.**—Putnam Lumb. Co. *v.* Ellis-Young Co., 50 Fla. 251, 258, 39 So. 193. **Ill.**—Willard *v.* Zehr, 215 Ill. 148, 155, 74 N. E. 107. **Mass.**—Harriman *v.* Reading & L. St. Ry. Co., 173 Mass. 28, 53 N. E. 156. **Miss.**—Lamb *v.* Russell, 81 Miss. 382, 32 So. 916. **Mo.** Thomasson *v.* Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 S. W. 1092; Newcomb *v.* New York C. & H. R. R. Co., 182 Mo. 687, 707, 81 S. W. 1069. **N. H.**—Crawford *v.* Crawford, 44 N. H. 428. **Tenn.**—Padgett *v.* Ducktown Sulphur, C. & I. Co., 97 Tenn. 690, 37 S. W. 698.

But see McDaniels *v.* De Groot, 77 Vt. 160, 59 Atl. 166.

93. **U. S.**—Mechanical Appliance Co. *v.* Castleman, 215 U. S. 437, 445, 30 Sup. Ct. 125, 54 L. ed. 272; Benton *v.* McIntosh, 96 Fed. 132; American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276. **Idaho.**—See Forsman *v.* Bright, 8 Idaho 467, 69 Pac. 473. **Kan.** Bond *v.* Wilson, 8 Kan. 228, 12 Am. Rep. 466. **N. C.**—See Brown *v.* Taylor, 174 N. C. 423, 93 S. E. 982, L. R. A. 1918B, 293. **Ohio.**—Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768; Goodrich *v.* Harner, 8 Ohio Dec. 441, 8 Wkly. L. Bul. 11.

Conclusiveness of return in such case, see 11 Ency. of Ev. 721.

[a] **Where Person Served Is Not an Agent.**—Forrest *v.* Union Pac. R. Co., 47 Fed. 1. See Fulton *v.* Commercial Travelers' Mut. Acc. Assn., 172 Pa. 117, 33 Atl. 324.

94. Forrest *v.* Union Pac. R. Co., 47 Fed. 1, denying motion without prejudice to filing of a plea or answer.

95. American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276.

96. American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276.

Pleading after overruling motion as a waiver of objection, see 2 Standard Proc. 533.

97. American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276.

98. Ricaby *v.* Gentle, 122 Mich. 336, 80 N. W. 1093, though the statute of limitations has run.

99. Noleman *v.* Weil, 72 Ill. 502; O'Hara *v.* Independence Lumb. & Imp. Co., 42 La. Ann. 226, 7 So. 533. See Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

[a] **The Suit Should Be Continued and the Return Amended.**—Noleman *v.* Weil, 72 Ill. 502.

1. Hawkins *v.* Peirce, 79 Fed. 452, after removal to federal court because an amendment cannot be had.

2. See 6 Standard Proc. 830.

on the ground of a defective return if it is not corrected by amendment.[3]

6. Equitable Relief Against Judgment. — Mere defects in the proof of service do not warrant equitable relief against the judgment, but a false return may.[4]

7. Collateral Attack on Judgment. — A judgment cannot be collaterally attacked on the ground the return of service is informal or defective.[5]

K. PRESUMPTIONS IN AID OF RETURN. — The presumption that an officer has done his duty may be urged in support of a defective return of service.[6] But this presumption cannot be invoked to dispense with a clear showing of facts which are required to be shown affirmatively.[7]

L. CURE OF DEFECTS BY APPEARANCE AND WAIVER. — Any defects in the return of service of process are cured by a voluntary general appearance of the defendant,[8] or by a voluntary waiver of service.[9]

M. AIDER BY JUDGMENT. — Some defects in the return are cured by the judgment.[10]

N. EFFECT OF RETURN. — **1. On Summons and Return Itself.** The return of a writ terminates the authority of the officer to execute it.[11] But the return does not lose its force by having been filed in

3. McClure *v.* Wells, 46 Mo. 311. See 15 STANDARD PROC. 159.

4. See 15 STANDARD PROC. 296, 300.

5. See 15 STANDARD PROC. 443.

6. See 11 ENCY. OF EV. 717.

7. Pillow *v.* Sentelle & Co., 39 Ark. 61; First Nat. Bank *v.* Latham, 37 Okla. 286, 132 Pac. 891. See King *v.* Davis, 137 Fed. 198, 206.

8. **Colo.**—Union Pac. Ry. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350. **Conn.** Denison *v.* Crofts, 74 Conn. 38, 49 Atl. 851. **Fla.**—Keil *v.* West, 21 Fla. 508. **Md.**—Dugan *v.* Baltimore, 70 Md. 1, 16 Atl. 501. **Mass.**—Riley *v.* Brusendorff, 226 Mass. 310, 115 N. E. 311. **Mo.** Thomasson *v.* Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 S. W. 1092; Newcomb *v.* New York Cent. & H. R. R. Co., 182 Mo. 687, 81 S. W. 1069. **N. J.**—Doughty *v.* Jones, 3 N. J. L. 653; Halsey *v.* Nutman, 2 N. J. L. 329. **N. Y.**—Lonas *v.* Myers, 98 Misc. 476, 163 N. Y. Supp. 390, *affirmed*, 176 App. Div. 945, 162 N. Y. Supp. 1128. **Pa.** Zion Church *v.* St. Peter's Church, 5 Watts & S. 215. **Tex.**—Thomson *v.* Bishop, 29 Tex. 154. **Va.**—Lane Bros. & Co. *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872. **W. Va.** McCormick *v.* Southern Express Co., 81 W. Va. 87, 93 S. E. 1048. **Wis.** McGeehan *v.* Bedford, 128 Wis. 167, 107 N. W. 296.

See the titles "**Appearances;**" "**Jurisdiction.**"

[a] **By Requesting an Adjournment.** Doughty *v.* Jones, 3 N. J. L. 653.

[b] **By petitioning for removal of cause** to federal court, defects in return are not waived. Hawkins *v.* Peirce, 79 Fed. 452.

9. Montgomery *v.* Brown, 7 Ill. 581.

10. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25; Southern Exp. Co. *v.* Skipper, 85 Ga. 565, 11 S. E. 871.

[a] **Misnomer.**—Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

[b] **Failure to allege that the secretary served "was in charge of the office or business"** of the company. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

[c] **A recital in a judgment of due service** does not aid the return where the mode of service set out is insufficient. Knapp *v.* Wallace, 50 Ore. 348, 92 Pac. 1054, 126 Am. St. Rep. 742; Northcut *v.* Lemery, 8 Ore. 316, 322.

11. Fanning *v.* Foley, 99 Cal. 336, 33 Pac. 1098; Eaton *v.* Fullett, 11 Ill. 491.

[a] **Redelivery of summons after return** does not revive it so as to confer authority to serve it. Eaton *v.* Fullett, 11 Ill. 491.

entering judgment, and it may be used on a second application for judgment after vacation of the first judgment.[12]

2. Conclusiveness. — The return of an officer is prima facie evidence of the facts recited,[13] even in his own favor.[14] But statements made in a return which are not properly a part thereof do not affect the rights of the parties and are not evidence of the fact stated.[15] The return cannot be collaterally attacked by a party affected thereby,[16] and in some states it cannot be contradicted even in a direct proceeding,[17] but it is not conclusive on strangers to the record.[18]

O. COMPELLING RETURN. — A return may be compelled by a rule against the officer.[19]

II. AFFIDAVIT OF SERVICE.[20] — Proof of service of process when made by a person other than an officer, is by the affidavit of such person,[21] usually indorsed upon or attached to the summons.[22]

Form. — Affidavit must possess a venue,[23] and it must show[24] the

[b] **Withdrawal of summons** for further service permitted. Hancock *v.* Pruess, 40 Cal. 572; First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823. See also the title "**Process.**"

12. Brien *v.* Casey, 2 Abb. Pr. (N. Y.) 416.

13. See 11 ENCY. OF EV. 721.

14. State *ex rel.* Carroll *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440.

15. Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116; Aultman, Miller & Co. *v.* McGrady, 58 Iowa 118, 12 N. W. 233.

16. See 11 ENCY. OF EV. 728.

17. See 11 ENCY. OF EV. 722, and 15 STANDARD PROC. 296.

18. See 11 ENCY. OF EV. 728.

19. United States *v.* Scroggins, 3 Woods (U. S.) 529, 27 Fed. Cas. No. 16,244; People *ex rel.* Duncan *v.* Needlees, 3 Ill. 361.

20. **Presumptions in favor of unofficial return,** see 11 ENCY. OF EV. 716.

21. **Cal.**—Berentz *v.* Belmont Oil Min. Co., 148 Cal. 577, 84 Pac. 47; Hamilton *v.* Hamilton, 20 Cal. App. 117, 128 Pac. 338. **Ill.**—Williams *v.* Williams, 221 Ill. 541, 77 N. E. 928. **Ia.** See Blair *v.* Hemphill, 111 Iowa 226, 82 N. W. 501 (as to defective jurat); Weil *v.* Lowenthal, 10 Iowa 575; Moss *v.* Blinn, 7 Iowa 261. **Nev.**—See Long *v.* Tighe, 36 Nev. 129, 133 Pac. 60. **N. Y.**—Vitolo *v.* Bee Pub. Co., 66 App. Div. 582, 73 N. Y. Supp. 273, 10 N. Y. Ann. Cas. 337. **S. C.**—Marine Wharf & Storage Co. *v.* Parsons, 49 S. C. 136, 26 S. E. 956. **Va.**—Henry Myers & Co. *v.* Lewis, 121 Va. 50, 92 S. E. 988. **Wash.**—State *ex rel.* Thomas *v.* Superior Court, 42 Wash. 521, 85 Pac. 256; Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389.

[a] **Two Affidavits.**—State *ex rel.* Thomas *v.* Superior Court, 42 Wash. 521, 85 Pac. 256.

[b] **Oath may be made before a consular agent** (1) of the United States. Marine Wharf & Storage Co. *v.* Parsons, 49 S. C. 136, 26 S. E. 956. (2) But not before a deputy clerk of court. Adams *v.* Heckscher, 80 Fed. 742.

[c] **Mistake in date of jurat** does not necessarily vitiate. Hamilton *v.* Hamilton, 20 Cal. App. 117, 128 Pac. 338.

[d] **Separate filing of affidavit** is not required where it is annexed to the summons. Hibernia S. & L. Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425.

22. Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389. See Hibernia S. & L. Soc. *v.* Clarke, 110 Cal. 27, 32, 42 Pac. 425. *Compare* Steinhardt *v.* Baker, 20 Misc. 470, 46 N. Y. Supp. 707, holding statute does not require it to be annexed.

23. Frees *v.* Blyth, 99 App. Div. 541, 91 N. Y. Supp. 103.

24. Hamilton *v.* Hamilton, 20 Cal. App. 117, 128 Pac. 338.

[a] **A recitation in the body of the affidavit that it is under oath** need not be made where the jurat shows the affidavit was sworn to. Mitchell *v.* National Surety Co., 206 Fed. 807.

[b] **Literal compliance** with statute unnecessary. Porath *v.* Reigh & Salentine Co., 112 Wis. 433, 88 N. W. 315.

facts required by the statute, the time,[25] place,[26] and manner[27] of service, that the party serving the writ is an adult,[28] and under some statutes, that he is not interested in the suit,[29] and, according to some authorities, that he knows that the person served is the defendant named in the summons.[30] An affidavit of substituted service must show the existence of facts authorizing such service,[31] and state facts showing a valid service in compliance with the requirements of the law.[32]

Amendment. — The affidavit may be amended,[33] to the same extent as an officer might amend under the same circumstances.[34]

25. Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389; Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

26. **Wash.**—Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389. **W. Va.**—Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606; Gouley Coal Land Association *v.* Spies, 61 W. Va. 19, 55 S. E. 903. **Wis.**—Weis *v.* Schoerner, 53 Wis. 72, 9 N. W. 794.

See Fisher *v.* Fredericks, 33 Mo. 612.

27. **N. Y.**—Vitolo *v.* Bee Pub. Co., 66 App. Div. 582, 73 N. Y. Supp. 273, 10 N. Y. Ann. Cas. 337. **Wash.**—Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389. **W. Va.**—Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

28. **Cal.**—Woodward *v.* Brown, 119 Cal. 283, 299, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938; Cooper *v.* Superior Court, 26 Cal. App. 629, 147 Pac. 606. **Nev.**—Long *v.* Tighe, 36 Nev. 129, 133, 133 Pac. 60. **Wash.**—French *v.* Ajax Oil & Dev. Co., 44 Wash. 305, 87 Pac. 359.

[a] **Except Where the Affiant Is an Attorney.**—Booth *v.* Kingsland Ave. Bldg. Assn., 18 App. Div. 407, 46 N. Y. Supp. 457.

[b] **A statement that he is "a white male citizen"** is not sufficient. Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938.

29. Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933. See Dimick *v.* Campbell, 31 Cal. 238.

30. Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44; Porath *v.* Reigh & Salentine Co., 112 Wis. 433, 88 N. W. 315; Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403. But see Cunningham *v.* Water-Power Sandstone Co., 74 Minn. 282, 77 N. W. 137, rule applies only to service of orders and notices.

31. Hog's Back Consol. Min. Co. *v.* New Basil Con. Min. Co., 63 Cal. 121.

32. Den *ex dem.* Auten *v.* Fen, 10 N. J. L. 237; Cameron *v.* United Traction Co., 67 App. Div. 557, 73 N. Y. Supp. 981.

Affidavit of service by publication, see 11 ENCY. OF EV. 730.

33. **U. S.**—King *v.* Davis, 137 Fed. 198, 206. **Cal.**—Woodward *v.* Brown, 119 Cal. 283, 299, 51 Pac. 2, 542, 63 Am. St. Rep. 108; McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52. **Kan.**—Hackett *v.* Lathrop, 36 Kan. 661, 14 Pac. 220; Hammerslough *v.* Hackett, 30 Kan. 57, 1 Pac. 41. **S. C.**—Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5. **Wis.**—First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823.

[a] **Leave of court** is required after the filing of the affidavit. First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823.

[b] **Special notice** is required where the action has been disposed of and the term ended. Hammerslough *v.* Hackett, 30 Kan. 57, 1 Pac. 41.

[c] **Opportunity of Adverse Party To Be Heard.**—First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823.

34. First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823. See *supra*, I. I.

[a] **By Stating the Affiant Is Over Eighteen Years of Age.**—Woodward *v.* Brown, 119 Cal. 283, 299, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

REVENUE. — See **Customs Duties; Internal Revenue; Taxation.**

REVERSIONS. — See **Lands and Land Transfers.**

REVIEW

By the Editorial Staff.

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CROSS-REFERENCES:

Appeals;
Bills of Exceptions;
Bills of Review;
Briefs;
Case and Question Certified;
Case on Appeal;
Certificate of Reasonable Cause;
Certiorari;
Judgments;
Justices of the Peace;
Law of the Case;
Mandate and Proceedings Thereafter;
New Trial;
Statement or Abstract of Case;
Writ of Error.

Habeas corpus for purpose of review, see 10 STANDARD PROC. 962, et seq.

Effect of death of accused pending appeal, see the title "Survival."

For further references and cross-references, see the index to this work and the cross-references throughout the article.

I. REVIEW OF CRIMINAL ACTIONS. — A. REVIEW OF ACTIONS GENERALLY. — **1. Methods of Review.** — A review by writ of error in criminal cases, was recognized at common law, and is recognized by statute in some jurisdictions,[1] but some statutes have expressly

1. **U. S.** — See United States *v.* Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. ed. 445. **Ala.**—*Ex parte* Smotherman, 140 Ala. 168, 37 So. 376; *Ex parte* Knight, 61 Ala. 482. **Fla.** Simmons *v.* State, 40 Fla. 467, 25 So. 62. **Haw.**—*In re* Hoopai, 10 Hawaii 610. **Minn.**—Bonfanti *v.* State, 2 Minn. 123. **Mo.**—State *v.* Rosenblatt, 185 Mo. 114, 83 S. W. 975. **N. J.**—Roesel

abolished writs of error in criminal cases.[2] Review by appeal is a statutory remedy, the right to which exists only when expressly conferred.[3]

Certiorari. — A review in criminal cases may be had by a writ of certiorari in a proper case.[4] But some statutes have abolished this writ in criminal cases.[5]

Habeas Corpus. — In a proper case, a review in criminal cases may be had by the writ of habeas corpus.[6]

Case or Question Certified. — By statute, the judge may certify criminal cases to an appellate court for its decision upon questions of law arising therein.[7]

Prohibition. — A writ of prohibition will not issue where the defendant has a complete remedy for the grievance complained of, by appeal.[8]

2. Review by Appeal and Error. — a. *Jurisdiction.* — By constitution and statute the jurisdiction of appellate courts in criminal cases is restricted to questions of law alone.[9] Jurisdiction cannot be conferred on an appellate court by consent where it is not authorized by law.[10]

b. *Orders and Decisions Reviewable.* — What orders and decisions are reviewable by appeal is a matter of statutory regulation.[11] But

v. State, 62 N. J. L. 368, 41 Atl. 833. **Ohio.**—Mick *v.* State, 72 Ohio St. 388, 74 N. E. 284. **S. D.**—State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809. **Tenn.**—State *v.* Reynolds, 4 Hayw. 110. **Va.**—Morgan *v.* Com., 115 Va. 943, 79 S. E. 388.

[a] **Writ of error in misdemeanor cases is a matter of right** upon a showing of probable cause, but it is by favor only in treason and felony. Caviness *v.* People, 27 Colo. 283, 60 Pac. 565. See **Fla.**—State *v.* Mitchell, 29 Fla. 302. **N. J.**—Kohl *v.* State, 59 N. J. L. 195, 35 Atl. 652, statute provides writ of error is a matter of right. **Va.**—Morgan *v.* Com., 115 Va. 943, 79 S. E. 388.

[b] **Writ of Error Does Not Lie Until After Final Judgment.—Ala.**—*Ex parte* Smotherman, 140 Ala. 168, 37 So. 376. **Md.**—Clare *v.* State, 30 Md. 163. **Wis.**—McKinney *v.* State, 25 Wis. 378.

2. Dougherty *v.* State, 5 Ind. 453; People *v.* Dempsey, 31 Hun (N. Y.) 526, 2 N. Y. Crim. 117. See People *v.* Bork, 78 N. Y. 346.

3. **U. S.**—American Sur. Co. *v.* United States, 239 Fed. 680, 152 C. C. A. 514. **Ariz.**—Villalobo *v.* State, 17 Ariz. 261, 151 Pac. 946. **Idaho.**—State *v.* Grady, 170 Pac. 85. **Ia.**—State *v.* Olsen, 180 Iowa 97, 162 N. W. 781. **Ky.**—Com. *v.* Starrett, 175 Ky. 89, 193 S. W. 1044. **N. Y.**—People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247; People *v.* Dempsey, 31 Hun 526, 2 N. Y. Crim. 117. **P. I.**—Duarte *v.* Dade, 32 Phil. Isl. 36.

4. **Cal.**—*Ex parte* Horr, 171 Pac. 801. **N. J.**—Handlin *v.* State, 16 N. J. L. 96. **N. C.**—State *v.* Green, 85 N. C. 600.

See the title "**Certiorari.**"

5. People *v.* Dempsey, 31 Hun (N. Y.) 526, 2 N. Y. Crim. 117.

6. See the title "**Habeas Corpus.**"

7. See 4 STANDARD PROC. 664, 750, 760.

8. People *ex rel.* Hummel *v.* Trial Term, 184 N. Y. 30, 76 N. E. 732. See the title "**Prohibition.**"

9. People *v.* Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881.

10. Com. *v.* Starrett, 175 Ky. 89, 193 S. W. 1044; State *v.* Sparks, 180 Mo. App. 495, 166 S. W. 642.

11. See generally the statutes and *infra*, I, A, 2, c.

[a] **Statute authorizing appeals in cases commenced by indictment does not extend** to cases commenced by information. State *v.* Brown, 153 Mo. 578, 55 S. W. 76; State *v.* Ross, 119 Mo. App. 401, 94 S. W. 842. See present statute of Missouri.

[b] **An absolutely void judgment**

generally no appeal lies from a verdict,[12] or from an order granting or denying a change of venue,[13] or from an order denying a motion for a continuance,[14] or from a decision ordering a mistrial.[15]

c. *Who May Appeal and When.* — **(I.) Defendant.** — The right of an accused to appeal is limited by some statutes to final judgments of conviction.[16] Some statutes authorize appeals or writs of error by an accused from a final judgment of conviction,[17] from an order denying a motion for a new trial,[18] and from any order made after judgment affecting his substantial rights.[19] But the accused cannot prosecute

may be appealed from. State *v.* Olsen, 180 Iowa 97, 162 N. W. 781.

[c] **In penal actions** an appeal does not lie except from a final order or judgment thereon. Com. *v.* American Exp. Co., 167 Ky. 685, 181 S. W. 353, Ann. Cas. 1916E, 875.

Review of judgment of insanity after conviction, see 13 STANDARD PROC. 556.

12. **Cal.**—People *v.* Ruiz, 144 Cal. 251, 77 Pac. 907; People *v.* Hartman, 23 Cal. App. 72, 137 Pac. 611; People *v.* Crosby, 17 Cal. App. 518, 120 Pac. 441. **Mont.**—State *v.* Gibbs, 10 Mont. 210, 25 Pac. 288. **N. J.**—State *v.* Hart, 88 N. J. L. 48, 95 Atl. 756.

13. **Cal.**—People *v.* Stillman, 7 Cal. 117. **Ga.**—Brannon *v.* State, 147 Ga. 499, 94 S. E. 759. **N. D.**—State *v.* Fortune, 29 N. D. 289, 150 N. W. 926.

14. People *v.* Buck, 151 Cal. 667, 91 Pac. 529.

15. State *v.* Twiggs, 90 N. C. 685; State *v.* Bailey, 65 N. C. 426. But see Com. *v.* Brand, 166 Ky. 753, 179 S. W. 844; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, under statute.

16. **Ala.**—Wright *v.* State, 12 Ala. App. 253, 67 So. 798. **Ind.**—Walther *v.* State, 179 Ind. 565, 101 N. E. 1005. **Ia.**—State *v.* Olsen, 180 Iowa 97, 162 N. W. 781. **Ky.**—Com. *v.* Brand, 166 Ky. 753, 179 S. W. 844; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333. **N. Y.**—People *ex rel.* Stabile *v.* Warden, 202 N. Y. 138, 152, 95 N. E. 729; People *v.* Lazersohn, 147 App. Div. 227, 131 N. Y. Supp. 1012. **Okla.** Merrill *v.* State, 11 Okla. Crim. 278, 145 Pac. 1109. **Tex.**—Darnell *v.* State, 24 Tex. App. 6, 5 S. W. 522.

[a] **The judgment must be rendered and entered** to authorize appeal. Darnell *v.* State, 24 Tex. App. 6, 5 S. W. 522.

[b] **Where sentence is suspended, there is not such a final judgment as** warrants an appeal. **Ind.**—Walther *v.* State, 179 Ind. 565, 101 N. E. 1005. **La.**—State *v.* O'Neal, 138 La. 977, 70 So. 1011; State *v.* Sharp, 138 La. 656, 70 So. 573. **N. C.**—See also State *v.* Tripp, 168 N. C. 150, 83 S. E. 630.

[c] **Sentence in compliance** with mandate of the appellate court is not appealable. Wright *v.* State, 12 Ala. App. 253, 67 So. 798.

[d] **Cross appeal by the defendant** when the commonwealth appeals is not permissible. Com. *v.* Brand, 166 Ky. 753, 179 S. W. 844.

17. People *v.* Simmons, 119 Cal. 1, 50 Pac. 844; Tyler *v.* Connolly, 65 Cal. 28, 2 Pac. 414; State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

[a] **A judgment on a plea of former conviction** is not a "final judgment of conviction." People *v.* Majors, 65 Cal. 100, 3 Pac. 401.

18. **Ala.**—Trice *v.* State (Ala. App.), 72 So. 601. **Cal.**—Smith *v.* McAllum (Cal. App.), 172 Pac. 408; People *v.* Hartman, 23 Cal. App. 72, 137 Pac. 611. **Me.**—State *v.* Perry, 115 Me. 203, 98 Atl. 634.

But see State *v.* Olsen, 180 Iowa 97, 162 N. W. 781; Merrill *v.* State, 11 Okla. Crim. 278, 145 Pac. 1109.

[a] **Though judgment is suspended,** an appeal lies from an order denying a motion for new trial. Smith *v.* McCallum (Cal. App.), 172 Pac. 408.

19. People *v.* Jackson, 138 Cal. 32, 70 Pac. 918; People *v.* Durrant, 119 Cal. 201, 209, 51 Pac. 185; People *v.* Hartman, 23 Cal. App. 72, 137 Pac. 611.

[a] **An order on a motion to set aside the judgment and withdraw a plea** of guilty is appealable under this section. People *v.* Perez, 9 Cal. App. 265, 98 Pac. 870.

[b] **An order fixing the date of execution** is appealable. People *v.* Durrant, 119 Cal. 201, 209, 51 Pac. 185,

an independent appeal from an order refusing to quash the indictment, or information,[20] or overruling a demurrer thereto,[21] or denying a motion in arrest of judgment.[22] Nor can he, as a general rule, appeal from a judgment properly entered on a plea of guilty.[23]

Waiver. — By a voluntary payment of the fine imposed, it has been held that the defendant deprives himself of a right to a hearing on appeal.[24]

(II.) State. — Though some statutes authorize appeals by the state,[25] the right of the state to appeal or sue out writ of error exists only when clearly conferred by statute.[26] Some statutes expressly provide

[c] **Order suspending judgment** and placing defendant on probation is not appealable. People *v.* Hartman, 23 Cal. App. 72, 137 Pac. 611.

[d] **Order refusing to settle bill of exceptions** is not appealable under this statute. People *v.* Jackson, 138 Cal. 32, 70 Pac. 918.

20. **Cal.**—People *v.* Simmons, 119 Cal. 1, 50 Pac 844. **La.**—State *v.* Jackson, 140 La. 680, 73 So. 770. **N. Y.** People *v.* Lazersohn, 147 App. Div. 227. 131 N. Y. Supp. 1012. **N. C.** State *v.* Burnett, 173 N. C. 750, 91 S. E. 597.

21. State *v.* Maguire (Idaho), 169 Pac. 175; People *v.* Canepi, 181 N. Y. 398, 74 N. E. 473.

22. People *v.* Bundy, 168 Cal. 777, 145 Pac. 537; People *v.* Ford, 138 Cal. 140, 70 Pac. 1075; People *v.* Hartman, 23 Cal. App. 72, 137 Pac. 611.

23. **Ark.**—Stokes *v.* State, 122 Ark. 56, 182 S. W. 521. **Md.**—State *v.* Darling, 130 Md. 251, 100 Atl. 91. **W. Va.**—Nicely *v.* Butcher, 81 W. Va. 247, 94 S. E. 147.

[a] **Rule only applies** when the judgment is properly entered, and where the plea has been made freely, voluntarily and with a full understanding of its nature and effect. State *v.* Darling, 130 Md. 251, 100 Atl. 91; Lowe *v.* State, 111 Md. 1, 73 Atl. 637, 24 L. R. A. (N. S.) 439, 18 Ann. Cas. 744. To similar effect State *v.* Thomas, 9 Ala. App. 1, 63 So. 688; Nicely *v.* Butcher, 81 W. Va. 247, 94 S. E. 147.

[b] Where the information states no offense, the defendant may appeal from judgment on plea of guilty. **Ark.** Stokes *v.* State, 122 Ark. 56, 182 S. W. 521. **Mo.**—State *v.* Siegel, 177 S. W. 353; State *v.* Rosenblatt, 185 Mo. 114, 83 S. W. 970. **N. C.**—State *v.* Warren, 113 N. C. 683, 18 S E. 498.

[c] **Where there are errors in the proceedings** in which the jury finds the grade of the offense on the evidence submitted, the defendant may appeal. State *v.* Blanck, 10 Wash. 292, 38 Pac. 1012.

[d] **Such Appeal Raises No Question of Fact.**—United States *v.* Tamarra, 21 Phil. Isl. 143.

24. **Ky.**—Eutsler *v.* Com., 154 Ky. 35, 156 S. W. 855. **Minn.**—State *v.* People's Ice Co., 127 Minn. 252, 149 N. W. 286, Ann. Cas. 1916C, 618. **Ore.** State *v.* Swikert, 65 Ore. 286, 132 Pac. 709.

But *compare* Com. *v.* Fleckner, 167 Mass. 13, 44 N. E. 1053.

Waiver by state, see *infra,* I, A, 2, c, (II).

25. **Conn.**—State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498, upon all questions of law. **Idaho.**—State *v.* Grady, 170 Pac. 85. **Ia.**—State *v.* Tait, 22 Iowa 140. **Ky.**—Com. *v.* Brand, 166 Ky. 753, 179 S. W. 844; Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, the state may appeal from any decision of the trial court, even thougm it is not final.

[a] **State's attorney** is only person authorized to prosecute the appeal. State *v.* Carter, 49 Md. 8.

[b] **The justice** cannot take an appeal. People *ex rel.* Breslin *v.* Lawrence, 107 N. Y. 607, 15 N. E. 187.

26. **U. S.**—United States *v.* Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L ed. 445. **Cal.**—People *v.* Knowles, 155 Pac. 140. **Conn.**—State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498. **Idaho.**—State *v.* Grady, 170 Pac. 85. **Ind.**—State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871. **Ia.**—State *v.* Ford, 161 Iowa 323, 142 N. W. 984. **Mo.**—State *v.* Ross, 119 Mo. App. 401, 94 S. W. 842. **Mont.**—Territory *v.* Laun, 8 Mont.

that the state has no right of appeal,[27] and in some states the right is limited to the obtaining of rulings on errors for future guidance of the courts.[28] Appeals by the state are expressly authorized by some statutes from orders quashing or setting aside indictments or informations,[29] from judgments for defendants on demurrers to indictments or informations,[30] from orders granting new trials,[31] or arresting judgments,[32] or from orders after judgment affecting the substantial rights of the people,[33] or upon questions reserved by the state,[34] or from a ruling adverse to the state where the defendant is convicted

322, 20 Pac. 652. **N. Y.**—People *v.* Snyder, 44 Hun 193, 7 N. Y. St. 842; People *v.* Beckwith, 42 Hun 366, 3 N. Y. St. 759. **Ohio.**—Mick *v.* State, 72 Ohio St. 388, 74 N. E. 284.

[a] **Order dismissing action for want of prosecution** is not appealable. People *v.* Hollis, 65 Cal. 78, 2 Pac. 893.

[b] **Judgment sustaining a plea of former acquittal** is not appealable. State *v.* Minnick, 33 Ore. 158, 54 Pac. 223.

[c] **An order denying a motion** to vacate an order sustaining a plea of once in jeopardy cannot be appealed by the state. State *v.* Grady (Idaho), 170 Pac. 85.

[d] **Discharge of defendant for insufficiency of proof** not appealable. State *v.* Brooks, 102 Miss. 661, 59 So. 860; State *v.* Willingham, 86 Miss. 203, 38 So. 334.

[e] **Order setting aside panel of grand jurors** and quashing indictment found by them is not appealable. People *v.* Dempsey, 31 Hun (N. Y.) 526, 2 N. Y. Crim. 117.

[f] **Cross-appeals** by the state are not permissible (Terrell *v.* Com., 13 Bush [Ky.] 246), unless authorized by statute. See *infra*, this section.

27. Prescott *v.* State, 52 Tex. Crim. 35, 105 S. W. 192.

28. **Ia.**—State *v.* Ford, 161 Iowa 323, 142 N. W. 984; State *v.* Mackey, 82 Iowa 393, 48 N. W. 918; State *v.* Kinney, 44 Iowa 444, statute applies to all appeals. **Ky.**—See Com. *v.* Fore, 158 Ky. 465, 165 S. W. 676; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333. **Ohio.**—State *v.* Ruedy, 57 Ohio St. 224, 48 N. E. 944, decision of common pleas reversing a sentence imposed by the justice of the peace may be reviewed to obtain a decision of law to govern in similar cases.

29. People *v.* Young, 31 Cal. 563; State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; State *v.* Evansville & T. H. R. Co., 107 Ind. 581, 8 N. E. 619. But see Com. *v.* Starrett, 175 Ky. 89, 193 S. W. 1044.

[a] **Only where whole indictment** is quashed, will the appeal lie. State *v.* Evansville & T. H. R. Co., 107 Ind. 581, 8 N. E. 619.

30. **Idaho.**—State *v.* Stafford, 26 Idaho 381, 143 Pac. 528. **Miss.**—State *v.* Wall, 98 Miss. 521, 54 So. 5. **N. M.** State *v.* Dallas, 22 N. M. 392, 163 Pac. 252. **N. Y.**—People *v.* Beckwith, 42 Hun 366, 3 N. Y. St. 759. **P. I.** United States *v.* Perez, 1 Phil. Isl. 203.

[a] **Order sustaining demurrer in part** is not appealable. State *v.* Dallas, 22 N. M. 392, 163 Pac. 252.

31. Com. *v.* Fore, 158 Ky. 465, 165 S. W. 676. But see **Ark.**—State *v.* Walker, 122 Ark. 574, 184 S. W. 38. **Miss.**—State *v.* Thompson, 86 Miss. 201, 38 So. 321. **N. Y.**—People *v.* Beckwith, 42 Hun 366, 3 N. Y. St. 759. **Okla.**—State *v.* Curley, 13 Okla. Crim. 25, 161 Pac. 831.

32. **Ind.**—State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; State *v.* Rousch, 60 Ind. 304. **N. Y.**—People *v.* Beckwith, 42 Hun 366, 3 N. Y. St. 759. **Wash.**—State *v.* Martin, 94 Wash. 313, 162 Pac. 356.

[a] **The phrase "arrest of judgment"** is not limited to causes in statute relating to motion in arrest. An arrest on other grounds is appealable. State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871.

[b] **Only when the motion was made by defendant** does the appeal lie. State *v.* Rousch, 60 Ind. 304.

33. See the statutes generally.

34. State *v.* Laughlin, 171 Ind. 66, 84 N. E. 756; State *v.* Hamilton, 62 Ind. 409 (only where there is an acquittal, see *infra*, this section); Territory *v.* Laun, 8 Mont. 322, 20 Pac. 652.

and appeals.[35] The state cannot appeal or prosecute a writ of error from an acquittal of an accused for the purpose of obtaining a reversal in felony cases,[36] though some statutes authorize an appeal, not to reverse the decision but to obtain a uniform rule for future guidance.[37]

Waiver. — The state under certain circumstances may waive its right to appeal.[38] But an acceptance of the fine imposed on the accused does not preclude an appeal by the state.[39]

(III.) Other Persons. — The sheriff,[40] or witnesses[41] cannot appeal from the taxation of costs or disallowance of witness fees. But in some states, a prosecutor may appeal from a taxation of costs against him.[42]

d. *Parties.* — Any one or more of several defendants tried jointly may appeal.[43]

e. *Time Within Which Appeal Must Be Taken.* — An appeal must be taken within the time limited in the statute,[44] or it will be dis-

35. State *v.* Wall, 98 Miss. 521, 54 So. 5; Thomas *v.* State, 73 Miss. 46, 19 So. 195.

36. **Ariz.**—State *v.* Miller, 14 Ariz. 440, 130 Pac. 891. **Cal.**—People *v.* Hill, 146 Cal. 145, 79 Pac. 845. **N. J.** State *v.* Hart, 88 N. J. L. 48. 95 Atl. 756, where the judge directed a verdict of acquittal. **N. Y.**—People *v.* Dempsey, 31 Hun 526, 2 N. Y. Crim. 117. **N. C.**—State *v.* Ballard, 122 N. C. 1024, 29 S. E. 899. **W. Va.**—*Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F, 1093.

But see State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; Com. *v.* Gritten, 180 Ky. 446, 202 S. W. 884 (state may appeal from acquittal in misdemeanor cases punishable by fine); Com. *v.* Prall, 146 Ky. 109, 142 S. W. 202, Ann. Cas. 1913C, 768.

See 14 STANDARD PROC. 585.

[a] **Statute conferring the right of appeal violates the constitution** as to (1) persons being twice put in jeopardy. People *ex rel.* Hodson *v.* Miner, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342, note; *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F, 1093. *Contra,* State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498. (2) This does not apply to misdemeanors where imprisonment is not a part of the punishment. Com. *v.* Prall, 146 Ky. 109, 142 S. W. 202, Ann. Cas. 1913C, 768.

37. State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871 (state may appeal on reserved points of law after an acquittal); State *v.* Hamilton, 62 Ind. 409; State *v.* Phillips, 25 Ind. App. 579, 58 N. E. 727; Jackson *v.* Harland, 112 Miss. 41, 72 So. 850; State *v.* Wall, 98 Miss. 521, 54 So. 5.

[a] **Questions of law only** reviewable. State *v.* Phillips, 25 Ind. App. 579, 58 N. E. 727.

38. People *v.* Wooster, 16 Cal. 435, by obtaining an order submitting the case to another grand jury after sustaining of a demurrer.

39. State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; State *v.* Tait, 22 Iowa 140.

Waiver by defendant, see *supra,* I, A, 2, c, (I).

40. Beverly *v.* State, 47 Tex. Crim. 498, 84 S. W. 589.

41. State *v.* Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

42. State *v.* Whitley, 123 N. C. 728, 31 S. E. 392.

[a] **Errors on the trial cannot be reviewed** on such an appeal. State *v.* Whitley, 123 N. C. 728, 31 S. E. 392.

43. Territory *v.* Ah Sing, 18 Hawaii 392; State *v.* Jolly, 20 N. C. 108, 32 Am. Dec. 656.

[a] **Where a writ of error is sued out by a defendant and others,** the words "and others" is surplusage. Territory *v.* Ah Sing, 18 Hawaii 392.

44. State *v.* Ross (Mo. App.), 200 S. W. 730; Gorman *v.* State, 9 Okla. Crim. 351, 131 Pac. 939.

[a] **Miscarriage of post-office** department does not excuse delay. Alexander *v.* State, 11 Okla. Crim. 110, 143 Pac. 205; Cannady *v.* State, 6 Okla. Crim. 634, 117 Pac. 653.

missed,[45] though some statutes authorize an extension of the time for good cause shown.[46]

f. *Successive Reviews.* — Having perfected an appeal, the defendant's right to appeal is exhausted, and a subsequent appeal from the same judgment or order cannot be taken,[47] unless the appeal is dismissed for informalities or defects in taking it.[48]

g. *Necessity for Objections and Exceptions in the Trial Court.* Except as to those matters which are jurisdictional[49] or fundamental,[50] to obtain a review of questions on appeal, it is necessary to make an objection in the trial court,[51] have a ruling thereon,[52] and save an exception thereto in the record,[53] except under statutes which have

45. **Ariz.**—Villalobo *v.* State, 17 Ariz. 261, 151 Pac. 946. **Cal.**—People *v.* Walker, 132 Cal. 137, 64 Pac. 133. **Mo.** State *v.* Wade, 253 Mo. 345, 161 S. W. 680. **Okla.**—Barks *v.* State, 11 Okla. Crim. 446, 147 Pac. 1055; Krivanek *v.* State, 11 Okla. Crim. 172, 144 Pac. 188; Gorman *v.* State, 9 Okla. Crim. 351, 131 Pac. 939.

46. Alexander *v.* State, 11 Okla. Crim. 110, 143 Pac. 205.

[a] **After expiration of time** for appealing, the court cannot extend the same. Scott *v.* State, 4 Okla. Crim. 657, 112 Pac. 763.

47. State *v.* Keeney, 81 Ore. 478, 159 Pac. 1165.

[a] **Parties cannot stipulate** for a new appeal. State *v.* Keeney, 81 Ore. 478, 159 Pac. 1165.

[b] **Successive writs of error** cannot be brought on the same judgment. Caviness *v.* People, 27 Colo. 283, 60 Pac. 565; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185.

48. Territory *v.* Harris, 7 Mont. 429, 17 Pac. 557.

[a] **If an appeal taken where no judgment was entered, is dismissed,** and a final judgment nunc pro tunc is entered, the defendant may again prosecute an appeal. Rios *v.* State, 79 Tex. Crim. 89, 183 S. W. 151; Madison *v.* State, 17 Tex. 479.

49. Dew *v.* State, 11 Okla. Crim. 581, 149 Pac. 917; *In re* Talley, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

50. People *v.* Ellis, 185 Ill. App. 417; May *v.* State, 12 Okla. Crim. 108, 152 Pac. 338; Stack *v.* State, 4 Okla. Crim. 1, 109 Pac. 126.

51. **Cal.**—People *v.* Miller, 170 Pac. 817; People *v.* Swist, 136 Cal. 520, 69 Pac. 223; People *v.* Pedone, 35 Cal. App. 452, 170 Pac. 170. **Ga.**—Hays *v.* State, 114 Ga. 25, 40 S. E. 13. **Ind.** Siberry *v.* State, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458. **Ia.**—State *v.* Nott, 168 Iowa 617, 149 N. W. 79. **Ky.** Hansford *v.* Com., 170 Ky. 700, 186 S. W. 498. **Mo.**—State *v.* Jackson, 186 S. W. 990. **Okla.**—McCarter *v.* State (Okla. Crim.), 170 Pac. 712; McGaugh *v.* State, 12 Okla. Crim. 96, 152 Pac. 140; Williams *v.* State, 11 Okla. Crim. 82, 142 Pac. 1181. **Tex.**—Terry *v.* State, 73 Tex. Crim. 79, 164 S. W. 2; Hirsch *v.* State (Tex. Crim.), 96 S. W. 40.

[a] **Objection to form of information not reviewed** (1) in the absence of a demurrer, motion to quash or in arrest. **U. S.**—Oesting *v.* United States, 234 Fed. 304, 148 C. C. A. 206. **Cal.** People *v.* Finley, 27 Cal. App. 291, 149 Pac. 779. **Ill.**—People *v.* Darr, 262 Ill. 202, 104 N. E. 389; People *v.* Scigliano, 194 Ill. App. 345. (2) But sufficiency of indictment may be questioned for the first time on appeal. **Ill.**—People *v.* Ellis, 185 Ill. App. 417. **Miss.**—Pitman *v.* State, 107 Miss. 154, 65 So. 123. **Mo.**—State *v.* Foley, 247 Mo. 607, 627, 153 S. W. 1010. **N. J.** State *v.* Pisaniello, 88 N. J. L. 262, 96 Atl. 89. **Ore.**—State *v.* Robinson, 74 Ore. 481, 145 Pac. 1057.

[b] **Where no objection is made to testimony and no motion to strike** it out was made, error in admitting it cannot be reviewed. Vick *v.* State, 112 Ark. 607, 165 S. W. 287. See also People *v.* Fodera, 33 Cal. App. 8, 164 Pac. 22.

Objection to instructions, see 13 STANDARD PROC. 986.

52. State *v.* Williams, 186 Mo. 128, 84 S. W. 924.

53. **Cal.**—People *v.* Lon Yeck, 123 Cal. 246, 55 Pac. 984; People *v.* Miller, 122 Cal. 84, 54 Pac. 523. **Idaho.**—State

made exceptions unnecessary.[54] In addition thereto it is generally necessary to present errors occurring at the trial, to the trial court for consideration by a motion for new trial,[55] unless, it has been held, the error is fundamental,[56] or appears on the face of the record proper.[57]

h. *Manner of Procuring Review.* — **(I.) Compliance With Statute.** The provisions of the statute regulating the manner of taking an appeal must be complied with.[58]

v. Maguire, 169 Pac. 175. **Ind.**—Robinson *v.* State, 185 Ind. 119, 113 N. E. 306; Cromer *v.* State, 21 Ind. App. 502, 52 N. E. 239. **Ky.**—Hansford *v.* Com., 170 Ky. 700, 186 S. W. 498. **Mo.** State *v.* Brashears, 186 S. W. 1061; State *v.* Shaffer, 253 Mo. 320, 161 S. W. 805. **Okla.**—May *v.* State, 12 Okla. Crim. 108, 152 Pac. 338; Dew *v.* State, 11 Okla. Crim. 581, 149 Pac. 917. **S. D.** State *v.* Korth, 38 S. D. 539, 162 N. W. 144.

54. See 13 STANDARD PROC. 992.

55. **Ark.**—Burris *v.* State, 73 Ark. 453, 84 S. W. 723. **Ariz.**—Shaffer *v.* Territory, 14 Ariz. 329, 127 Pac. 746. **Ill.**—Call *v.* People, 201 Ill. 499, 66 N. E. 243. **Kan.**—State *v.* Wellman, 102 Kan. 503, 170 Pac. 1052, Ann. Cas. 1918D, 1006, L. R. A. 1918D, 949. **Mo.** State *v.* Jackson, 186 S. W. 990; State *v.* Patton, 255 Mo. 245, 164 S. W. 223. **N. M.**—State *v.* Ellison, 19 N. M. 428, 144 Pac. 10. **Okla.**—Lee *v.* United States, 7 Okla. 558, 54 Pac. 792; May *v.* State, 12 Okla. Crim. 108, 152 Pac. 338; Dew *v.* State, 11 Okla. Crim. 581, 149 Pac. 917.

See 20 STANDARD PROC. 422, 425. But see State *v.* Langenstroer, 67 Ohio St. 7, 65 N. E. 152.

[a] **Mere general reference** to error complained of is not sufficient. State *v.* Gilbert (Mo.), 186 S. W. 1003.

[b] **Overruling of motion must be excepted** to. Britton *v.* State (Ala. App.), 74 So. 721; State *v.* Black (Mo.), 186 S. W. 1047.

[c] **Objections to admission of testimony** must be presented by a motion for new trial to be reviewed. **Ind.** White *v.* State, 182 Ind. 686, 107 N. E. 674; Siberry *v.* State, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458. **Kan.**—State *v.* Wellman, 102 Kan. 503, 170 Pac. 1052, Ann. Cas. 1918D, 1006, L. R. A. 1918D, 949. **N. M.**—State *v.* Lucero, 171 Pac. 785. **S. D.**—State *v.* Kirby, 34 S. D. 281, 148 N. W. 533.

[d] **Errors in Giving Instructions. Ky.**—Polk *v.* Com., 169 Ky. 613, 184 S. W. 1127. **Neb.**—Forbes *v.* State, 93 Neb. 574, 141 N. W. 197. **N. M.**—State *v.* Ellison, 19 N. M. 428, 144 Pac. 10. **Okla.**—Bebeistein *v.* Territory, 8 Okla. 467, 58 Pac. 641; Swaggart *v.* Territory, 6 Okla. 344, 50 Pac. 96, oral instructions. See also 20 STANDARD PROC. 432. But see Lee *v.* United States, 7 Okla. 558, 54 Pac. 792, holding written instructions constitute part of the record and may be reviewed though no motion for a new trial was made.

[e] **Error in Denying a Challenge to a Juror.**—State *v.* Morse, 35 S. D. 18, 150 N. W. 293, Ann. Cas. 1918C, 570.

[f] **But a refusal to direct a verdict** is reviewable if excepted to, although no motion for a new trial is made. Lawless *v.* State, 114 Wis. 189, 89 N. W. 891. But see 20 STANDARD PROC. 428.

56. Rea *v.* State, 3 Okla. Crim. 281, 105 Pac. 386, 106 Pac. 982. See 20 STANDARD PROC. 424.

[a] **"Fundamental errors"** are those which go to the foundation of a case or which take from a defendant a right essential to his defense. Rea *v.* State, 3 Okla. Crim. 281, 105 Pac. 386, 106 Pac. 982.

57. State *v.* Foley, 247 Mo. 607, 627, 153 S. W. 1010; Lee *v.* United States, 7 Okla. 558, 54 Pac. 792, record proper defined. See 20 STANDARD PROC. 423.

58. **Ind.**—Hizer *v.* State, 173 Ind. 192, 89 N. E. 844. **N. Y.**—People *v.* Green, 137 App. Div. 763, 122 N. Y. Supp. 571. **Okla.**—Pinchback *v.* State (Okla. Crim.), 170 Pac. 714. **P. R.** People *v.* Lorenzo, 18 P. R. 940.

[a] **Substantial Compliance Essential.**—State *v.* Gibbs, 10 Mont. 210, 25 Pac. 288; Territory *v.* Hanna, 5 Mont. 246, 5 Pac. 250.

Dismissal for noncompliance with statute, see *infra,* I, A, 2, k.

[b] **Statutes regulating civil appeals do not apply** to appeals in crim-

(II.) Review by Appeal. — Affidavits and Allowance of Appeal. — Some statutes require a defendant intending to appeal to file an affidavit that the appeal is not made for vexation or delay,[59] and to obtain an order granting an appeal.[60]

Written Notice of Appeal. — By some statutes, an appeal is taken by serving a written[61] notice of appeal,[62] on the clerk,[63] and upon the district attorney, if the defendant appeals,[64] or upon the defendant, if the prosecution appeals,[65] after the rendition of the judgment,[66]

inal cases unless statute so provides. State *v.* Smith, 190 Mo. 706, 90 S. W. 440.

59. Com. *v.* Hill, 185 Pa. 385, 39 Atl. 1055. See State *v.* Speritus, 191 Mo. 24, 90 S. W. 459; State *v.* Smith, 190 Mo. 706, 90 S. W. 440, and §5292, Rev. St. Mo. 1909.

60. State *v.* Smith, 190 Mo. 706, 716, 90 S. W. 440; State *v.* Roscoe, 93 Mo. 146, 6 S. W. 117.

[a] **There is no discretion** to refuse to grant an appeal where the statutory conditions are complied with. State *v.* Smith, 190 Mo. 706, 716, 90 S. W. 440.

61. Florez *v.* Territory, 14 Ariz. 343, 128 Pac. 49 (oral notice in open court insufficient); Clemmons *v.* State, 5 Okla. Crim. 119, 113 Pac. 238; Hughes *v.* State, 4 Okla. Crim. 333, 111 Pac. 964.

[a] **Knowledge** of the clerk and prosecuting attorney that an appeal is intended does not dispense with formal notice. Ensley *v.* State, 4 Okla. Crim. 49, 109 Pac. 250.

62. See *infra*, this note.

[a] **The notice is analogous** to a citation or summons in error. Clemmons *v.* State, 5 Okla. Crim. 119, 113 Pac. 238.

[b] **Notice should be addressed** to the adverse party. State *v.* Abbott (Iowa), 155 N. W. 270.

[c] **Although notice should state that the state appeals,** a notice stating that the prosecuting attorney appeals is sufficient. State *v.* Sutherlin, 165 Ind. 339, 75 N. E. 642.

[d] **Prosecuting attorney may subscribe his name** to the notice. State *v.* Sopher, 157 Ind. 360, 61 N. E. 785.

63. **Ala.**—Sherman *v.* State (Ala. App.), 72 So. 755, appeal may be taken by filing a statement to that effect, or by an entry of record at the time of sentence. **Ariz.**—Florez *v.* Territory, 14 Ariz. 343, 128 Pac. 49. **Ind.**—State *v.* Sutherlin, 165 Ind. 339, 343, 75 N. E. 642. **Kan.**—*In re* Chambers, 30 Kan. 450, 2 Pac. 646. **Mont.** Territory *v.* Hanna, 5 Mont. 246, 5 Pac. 250. **N. Y.**—People *v.* Green, 137 App. Div. 763, 122 N. Y. Supp. 571. **Okla.**—Means *v.* State, 10 Okla. Crim. 581, 139 Pac. 1155; State *v.* McDonald, 10 Okla. Crim. 413, 137 Pac. 362; Vian *v.* State, 8 Okla. Crim. 588, 128 Pac. 1103, 129 Pac. 450. **P. R.**—People *v.* Carrillo, 19 P. R. 335.

[a] **Prosecution, as well as the defendant,** must serve notice on the clerk. State *v.* Brown, 5 Okla. Crim. 579, 114 Pac. 340.

[b] **Service on county judge** as ex officio clerk is proper. Stewart *v.* State, 3 Okla. Crim. 618, 105 Pac. 374.

[c] **Motion for leave to perfect appeal** where notice was not filed with the clerk cannot be granted, the statute making no provision therefor. People *v.* Green, 137 App. Div. 763, 122 N. Y. Supp. 571.

[d] **Issuance of summons in error** under statute relating to case made prevents dismissal of appeal for want of notice of appeal. State *v.* McDonald, 10 Okla. Crim. 413, 137 Pac. 362.

64. **Ind.**—Hizer *v.* State, 173 Ind. 192, 89 N. E. 844. **Mont.**—Territory *v.* Hanna, 5 Mont. 246, 5 Pac. 250. **N. Y.** People *v.* Green, 137 App. Div. 763, 122 N. Y. Supp. 571. **Okla.**—Brown *v.* State, 12 Okla. Crim. 46, 151 Pac. 1018; State *v.* McDonald, 10 Okla. Crim. 413, 137 Pac. 362; Vian *v.* State, 8 Okla. Crim. 588, 128 Pac. 1103, 129 Pac. 450.

[a] **Notice to the deputy** is insufficient. Hizer *v.* State, 173 Ind. 192, 89 N. E. 844.

65. People *v.* Green, 137 App. Div. 763, 122 N. Y. Supp. 571; State *v.* McElroy (Okla. Crim.), 170 Pac. 915; State *v.* Richardson, 4 Okla. Crim. 373, 111 Pac. 687.

[a] **Publication of notice** when defendant cannot be found in the county. State *v.* Quick, 73 Ind. 147.

66. Jeffries *v.* State, 10 Okla. Crim. 587, 139 Pac. 1153 (notice before judg-

and before the expiration of the time prescribed by law.[67] It has been held that the notice may be waived where the attorney general enters a general appearance.[68]

Oral Notice. — Some statutes require the defendant at the time judgment or order is rendered to announce that he appeals,[69] which notice must be entered of record.[70] Within a specified time thereafter, he is sometimes required to file with the judge and serve on the prosecuting attorney a notice of appeal.[71]

(III.) Review by Writ of Error and Petition in Error. — By statute writs of error in criminal cases shall be issued and made returnable in the same manner as writs of error in civil cases,[72] and notice thereof is required to be served on the prosecuting attorney.[73] Under some statutes proceedings to review judgments shall be by petition[74]

ment is a nullity); Johnson *v.* State, 10 Okla. Crim. 306, 135 Pac. 1154; Thompson *v.* State, 7 Okla. Crim. 384, 123 Pac. 853.

67. Jeffries *v.* State, 10 Okla. Crim. 587, 139 Pac. 1153.

68. Blunt *v.* State, 3 Okla. Crim. 449, 106 Pac. 806; Brown *v.* State, 3 Okla. Crim. 442, 106 Pac. 808.

[a] **Mere waiver of issuance and service of notice** is insufficient to confer jurisdiction. Blunt *v.* State, 3 Okla. Crim. 449, 106 Pac. 806.

69. Cal.—People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37; People *v.* Crosby, 17 Cal. App. 518, 120 Pac. 441; People *v.* Reese, 13 Cal. App. 327, 109 Pac. 640, statute was amended in 1917 to allow appeal by announcing in open court or by filing written notice thereof on the clerk. **Idaho.**—State *v.* Leeper, 30 Idaho 534, 165 Pac. 997. **Tex.**—Dennis *v.* State (Tex. Crim.), 99 S. W. 1016.

70. Ala.—Sherman *v.* State (Ala. App.), 72 So. 755, appeal is taken by an entry of record that defendant appeals. **Cal.**—People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37. **Tex.**—Rios *v.* State, 76 Tex. Cr. 364, 174 S. W. 1050, dismissing appeal for lack of entry.

[a] **Cannot Be Entered of Record at Subsequent Term.**—Harkrider *v.* State, 48 Tex. Crim. 573, 90 S. W. 652.

[b] **Entry nunc pro tunc** is permitted by statute. Castoreno *v.* State (Tex. Crim.), 200 S. W. 1082. But *compare* Rios *v.* State, 76 Tex. Crim. 364, 174 S. W. 1050.

71. State *v.* Leeper, 30 Idaho 534, 165 Pac. 997, notice need not be signed.

[a] **In California,** the defendant is required to file a notice stating the grounds of appeal, the points on which he relies, and designating the portions of the reporter's notes to be transcribed. Smith *v.* McCallum (Cal. App.), 172 Pac. 408; People *v.* Measor, 20 Cal. App. 406, 129 Pac. 469 (failure of the record to show notice renders appeal ineffectual); People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37, no particular form of notice is required.

72. Simmons *v.* Florida, 40 Fla. 467, 25 So. 62; Browning *v.* State, 40 Fla. 466, 25 So. 62. See Anderson *v.* State (Fla.), 74 So. 6.

[a] **Order allowing issuance** of writ necessary. Wright *v.* State, 32 Fla. 472, 14 So. 43; State *v.* Mitchell, 29 Fla. 302, 10 So. 746; McIver *v.* Marshall, 24 Fla. 42, 4 So. 563; McCue's Case, 103 Va. 870, 1008, 49 S. E. 623.

[b] **Writ to be tested** in the name of the chief justice. Stewart *v.* State, 42 Fla. 196, 28 So. 56.

[c] **Subsequent petition for writ** cannot be made after a denial of one petition by statute. Morgan *v.* Com., 115 Va. 943, 79 S. E. 388.

[d] **An order for a writ** is not the writ. State *v.* Mitchell, 29 Fla. 302, 10 So. 746.

73. State *v.* Dunning, 11 S. D. 585, 79 N. W. 846, citation in error to be served.

74. Stanley *v.* State, 23 Ohio St. 581. See *infra*, I, A, 2, i.

[a] **Petition in error is filed upon good cause shown,** (1) on motion and notice to the prosecuting attorney general. Canfield *v.* Brobst, 71 Ohio St. 42, 72 N. E. 459. (2) But leave of court is not necessary where the petition in error is presented by the state. State *v.* Gaskins, 87 Ohio St. 128, 100 N. E. 324; State *v.* Hervey, 59 Ohio

in error on the filing of which a summons in error issues.[75]

(IV.) Recognizance, Bail and Security for Costs. — Statutes sometimes require that a defendant who appeals shall give an appeal bond,[76] or enter into a recognizance for his personal appearance to abide the judgment of the court unless he remains in jail.[77] And provision is generally made for release of the defendant on bail pending appeal.[78] Sometimes the appellant is required to deposit a sum of money sufficient to pay costs,[79] give security therefor,[80] or file an affidavit of inability to do so.[81]

St. 218, 52 N. E. 188. (3) Refusal of leave to file a petition in error is not reviewable on error in a higher court. Canfield *v.* Brobst, 71 Ohio St. 42, 72 N. E. 459.

75. Nichols *v.* State, 71 Ohio St. 335, 73 N. E. 220. See State *v.* McDonald, 10 Okla. Crim. 413, 137 Pac. 362.

[a] **Issuance and service of summons in error may be waived** by prosecuting attorney. Nichols *v.* State, 71 Ohio St. 335, 73 N. E. 220.

76. State *v.* Coletti, 102 Kan. 523, 170 Pac. 995, bond held not a "bail bond."

Stay bond, see *infra,* I, A, 2, h, (V).

77. Whitcomb *v.* State, 80 Tex. Crim. 446, 190 S. W. 484; Nunn *v.* State, 40 Tex. Crim. 435, 50 S. W. 713; McHenry *v.* State, 42 Tex. Crim. 469, 60 S. W. 880. See the title "**Recognizance and Bail.**"

[a] **Substantial compliance** with statute essential. Nunn *v.* State, 40 Tex. Crim. 435, 50 S. W. 713.

[b] **Tardy recognizance** insufficient. Knowlton *v.* State, 75 Tex. Crim. 8, 169 S. W. 674.

[c] **Recognizance to be entered of record** in final minutes of the court during the term. Bennett *v.* State, 80 Tex. Crim. 652, 194 S. W. 145, 148; Maxey *v.* State, 41 Tex. Crim. 556, 55 S. W. 823.

[d] **Appeal bond** does not answer purpose of recognizance. Mathis *v.* State (Tex. Crim.), 194 S. W. 159; Whitcomb *v.* State, 80 Tex. Crim. 446, 190 S. W. 484.

[e] **Form.**—See Wheat *v.* State, 78 Tex. Crim. 431, 181 S. W. 727; Horton *v.* State, 43 Tex. Crim. 600, 68 S. W. 172.

[f] **Punishment assessed** to be stated. Dorris *v.* State, 77 Tex. Crim. 620, 179 S. W. 718; Green *v.* State (Tex. Crim.), 70 S. W. 23.

[g] **A joint recognizance** by joint defendants is insufficient. Standifer *v.* State (Tex. Crim.), 66 S. W. 550; McHam *v.* State (Tex. Crim.), 65 S. W. 911.

[h] **Statute authorizes the appellate court to allow the filing of a new recognizance** (1) where that filed is defective. Moore *v.* State, 49 Tex. Crim. 43, 90 S. W. 499; Burton *v.* State, 48 Tex. Crim. 544, 90 S. W. 498. (2) This does not authorize filing of recognizance where an appeal bond only was filed. Bennett *v.* State, 80 Tex. Crim. 652, 194 S. W. 145, 148.

[i] **After dismissal of the appeal, the defendant cannot perfect** his recognizance and appeal again. Peterson *v.* State, 32 Tex. 477.

Dismissal of appeal, see *infra,* I, A, 2, k.

78. Laird *v.* State, 79 Tex. Crim. 129, 184 S. W. 810, Texas statute provides for both recognizances and bail bonds.

See the title "**Recognizance and Bail.**"

[a] **Bond to be approved** by court and sheriff. Chumley *v.* State (Tex. Crim.), 201 S. W. 176.

[b] **Bond To Be Signed.**—Laird *v.* State, 79 Tex. Crim. 129, 184 S. W. 810.

79. **Miss.**—Husbands *v.* State, 105 Miss. 513, 62 So. 278. **N. C.**—State *v.* Charles, 161 N. C. 286, 76 S. E. 715. **Okla.**—Wainwright *v.* State, 11 Okla. Crim. 547, 149 Pac. 914.

80. Husbands *v.* State, 105 Miss. 513, 62 So. 278.

81. **Miss.**—Husbands *v.* State, 105 Miss. 513, 62 So. 278. **N. C.**—State *v.* Harris, 114 N. C. 830, 19 S. E. 154. **Okla.**—Wainwright *v.* State, 11 Okla. Crim. 547, 149 Pac. 914; Claraday *v.* State, 9 Okla. Crim. 552, 132 Pac. 691. **Tex.**—Kelly *v.* State, 60 Tex. Crim. 550, 155 S. W. 225.

(V.) Effect of Appeal and Error, and Stay of Execution. — Jurisdiction of the cause is transferred from the trial court to the appellate court by the perfection of the appeal,[82] or the issuance of a writ of error,[83] but the judgment of the trial court is not vacated thereby.[84]

The effect of an appeal as a supersedeas or stay is elsewhere treated in the work.[85]

i. *Record.* — **(I.) Generally.** — It is necessary in criminal cases, as in civil cases, that one who would urge error must present a record of the facts upon which the trial court acted in making the ruling or order complained of.[86] Those matters which are not a part of the record proper must be incorporated therein by a bill of exceptions,[87] or under some statutes, a statement of facts,[88] or statement of the

[a] **That appeal is in good faith** must be stated in affidavit. State *v.* Martin, 172 N. C. 977, 90 S. E. 502.

82. **Ala.**—Sherman *v.* State (Ala. App.), 72 So. 755. **Ind.**—Benadum *v.* State, 182 Ind. 510, 107 N. E. 8. **Kan.** *In re* Chambers, 30 Kan. 450, 2 Pac. 646. **S. C.**—State *v.* Johnson, 52 S. C. 505, 30 S. E. 592, until filing of the "Return," the jurisdiction of the appellate court does not attach to the exclusion of the circuit court. **Tex.** Tores *v.* State, 74 Tex. Crim. 37, 166 S. W. 523, jurisdiction of the appellate court attaches when notice of appeal is given in open court and entered of record.

[a] **An appeal is not "properly perfected" until** required notices are given and the transcript and assignment of errors are filed in the appellate court. Flatter *v.* State, 182 Ind. 514, 107 N. E. 9; Benadum *v.* State, 182 Ind. 510, 107 N. E. 8; *In re* Chambers, 30 Kan. 450, 2 Pac. 646.

83. State *v.* Dunning, 11 S. D. 584, 79 N. W. 846, jurisdiction does not depend on citation in error.

84. **Ark.**—Morphis *v.* State, 113 Ark. 438, 170 S. W. 1165. **N. C.**—State *v.* Walters, 97 N. C. 489, 2 S. E. 539, 2 Am. St. Rep. 310 under express statute. **Ore.**—Whitley *v.* Murphy, 5 Ore. 328, 20 Am. Rep. 741.

85. See the title, "**Supersedeas and Stay of Proceedings.**"

86. **Cal.**—People *v.* Lytle, 34 Cal. App. 360, 167 Pac. 552. **Nev.**—State *v.* Bouton, 26 Nev. 34, 62 Pac. 595. **N. D.** State *v.* Scholfield, 13 N. D. 664, 102 N. W. 878.

87. See 4 STANDARD PROC. 297.

[a] **Bills of exceptions are dispensed** with in some states. People *v.* Fleming, 166 Cal. 357, 375, 136 Pac. 291, Ann. Cas. 1915 B, 881; People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37.

[b] **Though copied into the transcript,** matters which are not properly part of the record cannot be considered on repeal, when not incorporated in a bill of exceptions. People *v.* Ruiz, 144 Cal. 251, 77 Pac. 907; People *v.* McMahon, 124 Cal. 435, 57 Pac. 224. See also Henderson *v.* Murfreesboro, 119 Ark. 603, 178 S. W. 912.

88. **Ariz.**—Terr *v.* Flores, 3 Ariz. 215, 77 Pac. 491. **Tex.**—Wolf *v.* State (Tex. Crim.), 93 S. W. 742 supplemental statement may be filed. **Wash.** State *v.* Wood, 33 Wash. 290, 74 Pac. 380; State *v.* Jasper, 21 Wash. 707, 57 Pac. 796; State *v.* Tommy, 19 Wash. 270, 53 Pac. 157.

[a] **If there is no statement or facts** or bill of exceptions, (1) there is nothing presented for review. Clark *v.* State (Tex. Crim.), 177 S. W. 970; Lustress *v.* State, 77 Tex. Crim. 128, 177 S. W. 492. See Austin *v.* State (Tex. Crim.), 184 S. W. 192, there is no question in a motion for a new trial presented for review in the absence of a statement. (2) A bill of exceptions to the court's overruling a motion for second continance cannot be reviewed in the absence of a statement. Jones *v.* State, 77 Tex. Crim. 127, 177 S. W. 493. See Kuehn *v.* State, 47 Tex. Crim. 636, 85 S. W. 793.

[b] **To be prepared by the appellant.** Foster *v.* State, 79 Tex. Crim. 327, 185 S. W. 1.

[c] **Must be filed** within statutory time (1) to be considered by the appellate court. Todd *v.* State, 78 Tex. Crim. 221, 180 S. W. 116; Ridgeway *v.* State, 78 Tex. Crim. 81, 179 S. W. 1185. (2) If not so filed, statement will be stricken out on motion. Moon *v.* State

case,[89] or case,[90] or a reporter's transcript to be used in lieu thereof.[91] The entire record and the bill of exceptions must be returned to the appellate court with the writ of error.[92]

Transcript. — Some statutes require the trial clerk to transmit to the clerk of the appellate court, within a specified time, a transcript of

(Tex. Crim.), 177 S. W. 970. (3) Filing nunc pro tunc is not permitted. Spillman *v.* State, 39 Tex. Crim. 379, 45 S. W. 492, 46 S. W. 233.

[d] **Statement is made up and settled** in a manner similar to that in the case of a bill of exceptions. **Ariz.** Terr. *v.* Flores, 3 Ariz. 215, 77 Pac. 491. **Tex.**—Sorrell *v.* State, 79 Tex. Crim. 437, 186 S. W. 336; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725. **Wash.** State *v.* Hinchey, 5 Wash. 326, 31 Pac. 870, notice of settlement must be given.

[e] **Statement to Be in Narrative Form.**—Kitchens *v.* State (Tex. Crim.), 203 S. W. 768; Simmons *v.* State, 79 Tex. Crim. 492, 186 S. W. 325; Hawkins *v.* State, 77 Tex. Crim. 520, 179 S. W. 448.

[f] **Statement should state** (1) that it contains all the facts admitted, and the facts admitted to have been proven, and evidence of facts disputed. Terr. *v.* Flores, 3 Ariz. 215, 77 Pac. 491. (2) The argument of counsel on objections to testimony not to be included. Foster *v.* State, 79 Tex. Crim. 327, 185 S. W. 1.

[g] **To Be Signed by Counsel.** Jones *v.* State, 77 Tex. Crim. 127, 177 S. W. 493; Beattie *v.* State (Tex. Crim.), 38 S. W. 173.

[h] **Approval of judge** who tried the case necessary. Blake *v.* State (Tex. Crim.), 193 S. W. 1064; Longoria *v.* State, 80 Tex. Crim. 123, 188 S. W. 988; Morgan *v.* State, 79 Tex. Crim. 45, 182 S. W. 451.

[i] **Must Be Signed by the Judge.** Sorrell *v.* State, 79 Tex. Crim. 437, 186 S. W. 336; Kaufman *v.* State, 72 Tex. Crim. 455, 163 S. W. 74.

[j] **Not to be copied in transcript** but the original is to be sent up as part of record. Bateman *v.* State (Tex. Crim.), 193 S. W. 666. See Lynch *v.* State (Tex. Crim.), 193 S. W. 667.

89. **N. C.**—State *v.* Cameron, 121 N. C. 572, 28 S. E. 139, statement of case in criminal cases is the same as that in civil cases. **N. D.**—State *v.* Scholfield, 13 N. D. 664, 102 N. W. 878. **S. D.**—State *v.* Syverson, 37 S. D. 493, 159 N. W. 40.

See the title, "**Statement and Abstract of Case.**"

[a] **Where ground of exception appears in the record,** a statement is not required. State *v.* Byrd, 93 N. C. 624.

90. State *v.* Moore, 49 S. C. 438, 27 S. E. 454; State *v.* Hackney, 35 S. C. 592, 14 S. E. 110. See the title, "**Case on Appeal.**"

91. People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37; People *v.* Wilson, 20 Cal. App. 40, 127 Pac. 1056; State *v.* Maguire (Idaho), 169 Pac. 175.

[a] **Argument of counsel** should not be included in transcript. People *v.* Miller, 171 Cal. 649, 154 Pac. 468.

[b] **Time Within Which Transcript Must Be Filed May Be Extended.**—See People *v.* White, 28 Cal. App. 736, 153 Pac. 964.

[c] **To be certified to (1) by reporter under oath to be correct,** (People *v.* Brecker, 20 Cal. App. 205, 127 Pac. 666), unless (2) the reporter's transcript is incorporated in the bill of exceptions signed by the judge. Parker *v.* State, 183 Ind. 130, 108 N. E. 517.

[d] **To Be Corrected and Certified by the Judge.**—Talley *v.* State, 18 Ariz. 309, 159 Pac. 59; Stansbury *v.* State, 17 Ariz. 535, 155 Pac. 301; Smith *v.* McCallum (Cal. App.), 172 Pac. 408; People *v.* Brecker, 20 Cal. App. 205, 127 Pac. 666; People *v.* Boero, 13 Cal. App. 686, 110 Pac. 525.

[e] **Though not approved by the judge, the transcript will be considered** on appeal in capital cases. Talley *v.* State, 18 Ariz. 309, 159 Pac. 59.

[f] **To be transmitted to the appellate court** after approved and certified by the judge, upon which it becomes part of the appellate record. People *v.* Boero, 13 Cal. App. 686, 110 Pac. 525.

92. State *v.* Labriola, 75 N. J. L. 483, 67 Atl. 386; State *v.* Clark, 75 N. J. L. 473, 68 Atl. 114; State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398.

[a] **Form of Return.**—State *v.* Price, 11 N. J. L. 203.

the proceedings had in the trial court,[93] though in some states the transcript is to be attached to the petition in error.[94] The transcript must be a full, true and complete transcript of all the papers and proceedings in the case as they appear on file or of record,[95] certified

[b] **Record must be authenticated** by judge's certificate. State *v.* Webber, 77 N. J. L. 580, 72 Atl. 74; State *v.* Clark, 75 N. J. L. 473, 68 Atl. 114. See Territory *v.* Stone, 2 Dak. 155, 4 N. W. 697, certificate held sufficient.

[c] **Original papers** should not be sent up. Crilly *v.* State, 20 Wis. 231.

93. **Cal.**—People *v.* Fleming, 166 Cal. 357, 374, 136 Pac. 291, Ann. Cas. 1915B, 881; People *v.* Black, 120 Cal. 553, 52 Pac. 840; People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37. **Fla.** Melbourne *v.* State, 50 Fla. 113, 39 So. 593. **Ind.**—Benadum *v.* State, 182 Ind. 510, 107 N. E. 8; State *v.* Weil, 89 Ind. 286, certiorari to complete transcript. **Ia.**—State *v.* Blodgett, 143 Iowa 578, 589, 121 N. W. 685. **Kan.**—State *v.* Heth, 60 Kan. 560, 57 Pac. 108, transcript is filed when received by the clerk although not endorsed. **Mo.** State *v.* Eding, 141 Mo. 281, 42 S. W. 935. **Mont.**—State *ex rel.* Connors *v.* Foster, 36 Mont. 278, 92 Pac. 761. **Ore.** State *v.* Kenney, 81 Ore. 478, 159 Pac. 1165. **P. R.**—People *v.* Lorenzo, 18 P. R. 940. **Tex.**—Francis *v.* State, 70 Tex. Crim. 243, 156 S. W. 1167.

[a] **Failure to file transcript in time is fatal** to the appeal. Com. *v.* Barbour, 29 Ky. L. Rep. 622, 94 S. W. 634 (even though not objected to); State *v.* Barranger, 106 La. 352, 31 So. 13. *Compare* Freeman *v.* United States, 227 Fed. 732, 142 C. C. A. 256, holding the filing of transcript after time limited may be allowed.

[b] **If no transcript is filed,** judgment will be affirmed (People *v.* White, 28 Cal. App. 736, 153 Pac. 964), or the appeal dismissed. See *infra,* I, A, 2, k.

[c] **Defendant need not file a praecipe** indicating his desire that the clerk transmit the record. State *ex rel.* Connors *v.* Foster, 36 Mont. 278, 92 Pac. 761.

[d] **Delivery of transcript to attorney** to be by him filed in the appellate court is improper and ground for dismissal of the appeal. Dyer *v.* State, 44 Tex. Crim. 78, 68 S. W. 685. See Pilot *v.* State, 38 Tex. Crim. 515, 43 S. W. 112, 1024.

[e] **It is duty of appellant** to see that transcript contains necessary documents. Rowan *v.* State, 184 Ind. 399, 111 N. E. 431; People *v.* Lorenzo, 18 P. R. 940.

[f] **Service of transcript on opposite party** required by rule of court. State *v.* Miles, 11 Idaho 784, 83 Pac. 697.

[g] **Authentication by judge of the transcript** is not required. People *v.* Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881.

[h] **Case-Made as Transcript.**—Case-made, void because not served in time, cannot be treated as a transcript. Perky *v.* State, 4 Okla. Crim. 239, 111 Pac. 663.

[i] **Mandamus lies** to enforce duty of clerk. State *ex rel.* Connors *v.* Foster, 36 Mont. 278, 92 Pac. 761.

94. State *v.* Langenstroer, 67 Ohio St. 7, 65 N. E. 152.

[a] **But the court may allow it to be attached after filing** of the petition before the case is heard. State *v.* Langenstroer, 67 Ohio St. 7, 65 N. E. 152; State *v.* Ransick, 62 Ohio St. 283, 56 N. E. 1024; Stanley *v.* State, 23 Ohio St. 581; Bailey *v.* Territory, 9 Okla. 461, 60 Pac. 117; Lee *v.* United States, 7 Okla. 558, 54 Pac. 792, there are two methods of bringing a judgment to the appellate court, by petition in error with a case made or with a certified transcript of the record attached thereto.

95. State *v.* Sparks, 263 Mo. 609, 173 S. W. 1057; Perky *v.* State, 4 Okla. Crim. 239, 111 Pac. 663.

[a] **Transcript must show the bill of exceptions** was filed with the clerk of the trial court. State *v.* Smith, 21 N. M. 173, 153 Pac. 256.

[b] **A certificate of the notice of appeal** must be included. People *v.* Lorenzo, 18 P. R. 940.

[c] **Record of preliminary trial** before the magistrate not to be included. State *v.* Blodgett, 143 Iowa 578, 589, 121 N. W. 685; State *v.* Muir (Mo.), 186 S. W. 1047.

[d] **Evidence** not included. State *v.* Blodgett, 143 Iowa 578, 589, 121 N. W. 685.

by the clerk to be such,[96] in the manner prescribed by statute.

Case Made. — Under some statutes instead of a transcript the appellant may file with his petition in error,[97] a case-made settled by the judge,[98] and containing so much of the proceedings as is necessary to present the errors complained of to the appellate court.[99]

Abstract. — Under some statutes and rules of court, the appeal may be presented on printed abstracts of the record, instead of on a transcript.[1]

(II.) Record as Affecting Jurisdiction of the Appellate Court. — It is essential to the jurisdiction of the appellate court that the record show that the necessary steps essential to an appeal were taken.[2] And hence it must appear from the record that a judgment of conviction was rendered and sentence was imposed, where the defendant appeals,[3] and that notice of appeal was given, and entered of record, if required,[4] that an order granting an appeal was made, if required by

96. **Fla.**—Melbourne *v.* State, 50 Fla. 113, 39 So. 593. **Ind.**—Donovan *v.* State, 184 Ind. 15, 111 N. E. 433; Rowan *v.* State, 184 Ind. 399, 111 N. E. 431. **Okla.**—Perky *v.* State, 4 Okla. Crim. 239, 111 Pac. 663; Durant *v.* State, 3 Okla. Crim. 447, 106 Pac. 651.

[a] **Certificate May Be Amended.** State *v.* Bouton, 26 Nev. 34, 62 Pac. 595.

97. Bailey *v.* Territory, 9 Okla. 461, 60 Pac. 117.

98. State *v.* Coyle, 11 Okla. Crim. 637, 150 Pac. 80 (presence of defendant personally or by counsel necessary); Cohn *v.* State, 4 Okla. Crim. 498, 113 Pac. 216; Etter *v.* State, 4 Okla. Crim. 230, 111 Pac. 957.

[a] **Case must be served** on opposite party. Etter *v.* State, 4 Okla. Crim. 230, 111 Pac. 957.

[b] **Must Be Attested by Clerk.** Lewis *v.* State, 3 Okla. Crim. 448, 106 Pac. 647. See Stewart *v.* State, 3 Okla. Crim. 618, 105 Pac. 374, omission of attestation not fatal.

99. Sing *v.* State, 4 Okla. Crim. 544, 113 Pac. 204; Perky *v.* State, 4 Okla. Crim. 239, 111 Pac. 663. See *supra*, as to transcript.

[a] **Case made must show** (1) service of notice of the time and place of settlement of the case (Foral *v.* Bogle, 44 Okla. 805, 146 Pac. 706), (2) presence of defendant, or that he suggested amendments or had an opportunity to do so (Foral *v.* Bogle, 44 Okla. 805, 146 Pac. 706), (3) and service of notice of appeal. Brown *v* State, 12 Okla. Crim. 46, 151 Pac. 1018.

1. **Ariz.**—Baca *v.* State, 18 Ariz. 350, 161 Pac. 686. **Ill.**—Hobbs *v.* People, 183 Ill. 336, 55 N. E. 692, compliance with rules of court. **Ia.**—State *v.* Frutiger, 167 Iowa 550, 149 N. W. 634; State *v.* Blodgett, 143 Iowa 578, 589, 121 N. W. 685 (the appellate record may be an abstract or a transcript); State *v.* Miner, 107 Iowa 656, 78 N. W. 679. **Kan.**—State *v.* Dreiling, 95 Kan. 241, 147 Pac. 1108. **Mo.**—State *v.* Lane (Mo. App.), 180 S. W. 394.

[a] **Argumentative statements** have no place in an abstract. State *v.* Dreiling, 95 Kan. 241, 147 Pac. 1108.

2. People *v.* Measor, 20 Cal. App. 406, 129 Pac. 469 (giving of notice of grounds of appeal); Box *v.* State, 4 Okla. Crim. 371, 111 Pac. 655, service of case made.

3. **Ala.**—Holland *v.* State, 10 Ala. App. 238, 64 So. 649. **Cal.**—People *v.* Lenon, 77 Cal. 308, 19 Pac. 521; People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37. **Fla.**—Melbourne *v.* State, 50 Fla. 113, 39 So. 593. **La.**—State *v.* O'Neal, 138 La. 977, 70 So. 1011. **N. C.**—State *v.* Woodfin, 85 N. C. 598. **Okla.**—Loyu *v.* State, 12 Okla. Crim. 82, 151 Pac. 1190; Fowler *v.* State, 11 Okla. Crim. 157, 143 Pac. 658. **Tex.**—Austin *v.* State (Tex. Crim.), 200 S. W. 1082; Gilliard *v.* State, 79 Tex. Crim. 46, 182 S. W. 1136.

[a] **Whether the appeal is from the judgment or an order** or both. People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37.

4. **Ia.**—State *v.* Norman, 150 N. W. 606. **Okla.**—State *v.* McElroy (Okla. Crim.), 170 Pac. 915; Brown *v.* State,

statute,[5] and that the proper bond or recognizance was filed or was unnecessary.[6] But the issuance of a writ of error need not be shown as the appellate court takes notice of its own record.[7]

(III.) Record as Affecting Right To Review. — In case of a failure of the record to present the facts on which the trial court acted, a review of its rulings cannot be had,[8] unless the matter is such that judicial notice thereof can be taken.[9] Accordingly the appellate court cannot consider rulings on the indictment,[10] a demurrer,[11] evidence,[12] in-

12 Okla. Crim. 46, 151 Pac. 1018; Killebrew *v.* State, 11 Okla. Crim. 535, 148 Pac. 1058; Means *v.* State, 10 Okla. Crim. 581, 139 Pac. 1155. **P. R.**—People *v.* Lorenzo, 18 P. R. 952. **Tex.** Thompson *v.* State (Tex. Crim.), 202 S. W. 91; Baldwin *v.* State (Tex. Crim.), 199 S. W. 468; Parish *v.* State, 77 Tex. Crim. 19, 177 S. W. 93.

[a] But see State *v.* Sutherlin, 165 Ind. 339, 75 N. E. 642, notice is not necessary part of record but is to be filed with clerk of appellate court.

5. State *v.* Roscoe, 93 Mo. 146, 6 S. W. 117.

6. Crawford *v.* State (Tex. Crim.), 77 S. W. 8 (transcript must contain a recognizance or a statement that accused was continuously in jail since his conviction); McCrummen *v.* State (Tex. Crim.), 49 S. W. 370; Wilson *v.* State, 36 Tex. Crim. 452, 37 S. W. 738.

7. State *v.* Evans, 12 S. D. 473, 81 N. W. 893.

8. **Cal.**—People *v.* Brecker, 20 Cal. App. 205, 221, 127 Pac. 666. **D. C.** Falk *v.* United States, 15 App. Cas. 446, 461. **Fla.**—Carr *v.* State, 45 Fla. 11, 34 So. 892. **Idaho.**—State *v.* Maguire, 169 Pac. 175. **Ind.**—Dorsey *v.* State, 179 Ind. 531, 100 N. E. 369. **Kan.**—State *v.* Boyle, 10 Kan. 113. **Md.**—Hamilton *v.* State, 127 Md. 312, 96 Atl. 523. **Mo.**—State *v.* Goldman, 199 Mo. App. 416, 203 S. W. 471. **Okla.** Munson *v.* State, 13 Okla. Crim. 569, 165 Pac. 1162. **S. D.**—State *v.* Connelly, 34 S. D. 520, 149 N. W. 360. **Tex.**—Foster *v.* State, 79 Tex. Crim. 327, 185 S. W. 1, facts on which motion for change of venue is denied must be stated.

[a] **Though no abstract is filed,** the court is required by statute to examine the record. State *v.* Lane (Mo. App.), 180 S. W. 394.

[b] **Matters properly a part of the record without a bill of exceptions,** but which are only exhibited in the bill of exceptions copied in the transcript, will not be considered on appeal. Adams *v.* State, 179 Ind. 44, 99 N. E. 483; Vest *v.* State, 174 Ind. 556, 92 N. E. 227.

Objection and exception in the record, see *supra,* I, A, 2, g.

[c] **Irregularities in selecting the jury** (1) to be reviewed must appear in the record. Shank *v.* State, 183 Ind. 298, 108 N. E. 521. (2) The examination of a juror must be set forth to enable appellate court to pass on ruling on a challenge for cause. State *v.* Clark, 163 Iowa 1, 144 N. W. 596.

9. State *v.* Cotterel, 12 Idaho 572, 86 Pac. 527 (holding the adjournment of terms, not being judicially cognizable by the appellate court, must be presented by bill of exceptions); State *v.* Evans, 12 S. D. 473, 81 N. W. 893.

10. Turman *v.* State (Tex. Crim.), 196 S. W. 181.

11. Moss *v.* State (Ala. App.), 75 So. 179; Schave *v.* State, 4 Okla. Crim. 285, 111 Pac. 962.

[a] **Judgment on demurrer** must be in record. Ward *v.* State (Ala. App.), 74 So. 727; Yarbrough *v.* State (Ala. App.), 73 So. 830.

12. **Cal.**—People *v.* Clayton, 33 Cal. App. 357, 165 Pac. 37. **Ga.**—Hays *v.* State, 114 Ga. 25, 40 S. E. 13. **Ind.** Rowan *v.* State, 184 Ind. 399, 111 N. E. 431. **Ia.**—State *v.* Frutiger, 167 Iowa 550, 149 N. W. 634. **Ore.**—State *v.* Hing, 77 Ore. 462, 151 Pac. 706.

[a] **The statement or a bill of exceptions is necessary to obtain a review** of (1) rulings on the admissions of evidence (Parker *v.* State [Tex. Crim.], 165 S. W. 462), or (2) of the sufficiency of the evidence (Lewis *v.* State [Tex. Crim.), 203 S. W. 767; Jackson *v.* State [Tex. Crim.], 84 S. W. 827; Bailey *v.* State [Tex. Crim.], 84 S. W. 588), or (3) a review of the question whether the verdict or judgment is contrary to the evidence.

structions,[13] or argument,[14] or a motion to quash or set aside the indictment or information,[15] a motion for a continuance,[16] a motion for new trial,[17] or a motion in arrest of judgment,[18] unless the indictment, demurrer, motion, evidence, instructions or argument as the case may be, and such other matters as may be necessary to enable the court to rule thereon, appear in the appellate record.

Quentes *v.* State (Tex. Crim.), 151 S. W. 301.

[b] **All the evidence in the cause must be set forth** to enable the court to judge of the sufficiency of the evidence to justify the verdict. Morrow *v.* State, 48 Ind. 432.

[c] **What excluded evidence tended to prove** must be shown. **Ala.**—Lee *v.* State (Ala. App.), 75 So. 282. **Mo.** St. Louis *v.* Babcock, 156 Mo. 148, 56 S. W. 732. **Okla.**—Collingwood *v.* State, 13 Okla. Crim. 443, 164 Pac. 1154. **Tex.** Taylor *v.* State, 77 Tex. Crim. 632, 180 S. W. 242.

[d] **A review of errors in admitting testimony tending to prove other crimes** cannot be had unless the information or indictment is in the record. Riley *v.* State, 149 Ind. 48, 48 N. E. 345.

13. **U. S.**—Harless *v.* United States, 92 Fed. 353, 34 C. C. A. 400. **Ala.** De Bardeleben *v.* State (Ala. App.), 75 So. 629. **Cal.**—People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503. **Ga.**—Elder *v.* State, 143 Ga. 383, 85 S. E. 197. **Ind.**—Rowan *v.* State, 184 Ind. 399, 111 N. E. 431. **N. D.**—State *v.* Scholfield, 13 N. D. 664, 102 N. W. 878. **W. Va.** State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

[a] **Record must contain (1) testimony** or rulings on instructions cannot be reviewed, and judgment reversed therefor (**Cal.**—People *v.* Arlington, 131 Cal. 231, 63 Pac. 347. **Kan.**—State *v.* Heth, 60 Kan. 560, 57 Pac. 108. **Tex.** Flores *v.* State [Tex. Crim.], 81 S. W. 292; Chitwood *v.* State, 44 Tex. Crim. 439, 71 S. W. 973), unless (2) the instruction is erroneous in every conceivable state of the case. People *v.* Mendenhall, 135 Cal. 344, 67 Pac. 325. (3) Refusal of charges not reviewable in absence of statement of facts. Dorris *v.* State, 77 Tex. Crim. 620, 179 S. W. 718; Albertson *v.* State (Tex. Crim.), 177 S. W. 969.

[b] **Request** for refused instructions must appear of record. People *v.* Hettick, 126 Cal. 425, 58 Pac. 918; State *v.* Tomasitz, 144 Mo. 86, 45 S. W. 1106.

14. See 2 STANDARD PROC. 849.

[a] **Argument of counsel** must be included in statement to be reviewed. McAnally *v.* State (Tex. Crim.), 72 S. W. 842.

15. See *infra*, this note.

[a] **Grounds of Motion Must Be Stated.**—Thain *v.* State, 182 Ind. 345, 106 N. E. 690; Hamilton *v.* State, 127 Md. 312, 96 Atl. 523; State *v.* Williams, 85 Md. 231, 36 Atl. 823.

[b] **Affidavits on which motion is based** must be set forth in the record. People *v.* Lonnen, 139 Cal. 634, 73 Pac. 586.

16. Henderson *v.* Murfreesboro, 119 Ark. 603, 178 S. W. 912; State *v.* Nibarger, 255 Mo. 289, 164 S. W. 453.

[a] **Affidavits in support of motion** must be in record. State *v.* McPherson, 70 Ore. 371, 141 Pac. 1018.

17. **Ill.**—Call *v.* People, 201 Ill. 499, 66 N. E. 243; Graham *v.* People, 115 Ill. 566, 4 N. E. 790. **Kan.**—State *v.* Grinstead, 62 Kan. 868, 64 Pac. 55. **Mo.**—State *v.* Wray, 124 Mo. 542, 27 S. W. 1100. **Okla.**—Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072. **Tex.**—Williams *v.* State (Tex. Crim.), 202 S. W. 958.

[a] **Grounds of motion** must be stated. People *v.* McCoy, 71 Cal. 395, 12 Pac. 272.

[b] **Evidence in the record to support grounds** of a motion for new trial is essential to a review of a motion based on evidence. Webster *v.* State, 47 Fla. 108, 36 So. 584; Calandria *v.* State (Tex. Crim.), 54 S. W. 583; Black *v.* State (Tex. Crim.), 47 S. W. 992, where verdict was claimed to be excessive. (2) Evidence heard on the motion must be stated. Burgess *v.* State, 78 Tex. Crim. 469, 181 S. W. 465; Berry *v.* State, 73 Tex. Crim. 203, 163 S. W. 964.

[c] **Affidavits** referred to in the application for a new trial must appear in the record, to be considered. Fields *v.* State, 39 Tex. Crim. 488, 46 S. W. 814.

18. State *v.* Maguire (Idaho), 169 Pac. 175; State *v.* Frost, 95 Iowa 448,

(IV.) Correcting Defective Transcript or Record. — Omissions from the transcript may be supplied by amendment or by additional or supplemental transcript.[19] But it has been held that counsel cannot by stipulation import into a record matters omitted therefrom,[20] or supplement the record by stipulation as to newly discovered evidence.[21]

(V.) Conclusiveness of Record. — The record on appeal, when properly authenticated, imports absolute verity.[22]

j. *Assignments of Errors and Briefs.* — It is the duty of attorneys to file briefs setting forth the errors relied on,[23] and in some juris-

64 N. W. 401, grounds of motion to be stated.

19. **Cal.**—People *v.* Murback, 64 Cal. 369, 30 Pac. 608, trial court may amend. **Colo.**—Williams *v.* People, 25 Colo. 251, 53 Pac. 509. **Ill.**—People *v.* Mars, 185 Ill. App. 482. **Mich.**—People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225. **Mont.**—State *v.* Gibbs, 10 Mont. 212, 25 Pac. 289, allowing withdrawal of transcript for correction. See State *v.* Moffatt, 20 Mont. 371, 51 Pac. 823. **Neb.**—Morgan *v.* State, 51 Neb. 672, 688, 71 N. W. 788, remedy is by a proceeding to secure a correction in the trial court. **Okla.**—Means *v.* State, 10 Okla. Crim. 581, 139 Pac. 1155; Simerson *v.* State, 9 Okla. Crim. 119, 130 Pac. 1112, manner of proceeding stated. **Tex.**—Thompson *v.* State (Tex. Crim.), 202 S. W. 91; Scott *v.* State, 71 Tex. Crim. 41, 158 S. W. 814. **Wash.**—State *v.* Howard, 33 Wash. 250, 74 Pac. 382.

Certiorari to bring up record, see 4 STANDARD PROC. 889.

[a] **By suggesting a diminution** (1) of the record. Territory *v.* Harris, 7 Mont. 429, 17 Pac. 557. (2) With a motion suggesting a diminution of the record, a party should file certified copies of the entries or documents omitted. State *v.* Sparks, 263 Mo. 609, 173 S. W. 1057.

[b] **Remand of cause** to trial court for correction of clerical errors proper. Justus *v.* State, 130 Tenn. 540, 172 S. W. 279.

[c] **Appellate court cannot amend** record of trial court. People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225; State *v.* Gibbs, 10 Mont. 212, 25 Pac. 289.

[d] **The record cannot be changed without permission of the court** duly entered at the time, where the record is filed on appeal. State *v.* Feeley, 194 Mo. 300, 92 S. W. 663, 112 Am. St. Rep. 511, 3 L. R. A. (N. S.) 351.

20. Falk *v.* United States, 15 App. Cas. (D. C.) 446, 461. *Compare* Simerson *v.* State, 9 Okla. Crim. 119, 130 Pac. 1112, statute authorizes appellate court to ascertain jurisdictional facts "by affidavit or otherwise."

[a] **While counsel may be permitted to supply matters of fact** omitted from the record, they cannot agree as to questions of law decided below, or fix by agreement the grounds of the decision below. State *v.* Williams, 85 Md. 231, 36 Atl. 823.

21. People *v.* Mooney (Cal.), 167 Pac. 696.

22. **Fla.**—Bryan *v.* State, 41 Fla. 643, 26 So. 1022. **Ky.**—Farris *v.* Com., 14 Bush 362. **Minn.**—State *v.* O'Hagan, 124 Minn. 58, 144 N. W. 410. **Mo.** State *v.* Beedle, 180 S. W. 888. **Neb.** Morgan *v.* State, 51 Neb. 672, 688, 71 N. W. 788. **Tex.**—Villereal *v.* State (Tex. Crim.), 61 S. W. 715. **W. Va.** State *v.* Vest, 21 W. Va. 796.

[a] **But a recital in a bill of exceptions** that it contains all the evidence is not deemed true where it clearly shows the fact is otherwise. Morrow *v.* State, 48 Ind. 432.

[b] **Conflict in Record.**—(1) Where statement of fact in the bill of exceptions differs from that of the court, the latter controls. State *v.* Prade, 50 La. Ann. 914, 24 So. 642. (2) Where the record proper and the statement of the case conflict, the former governs. State *v.* Truesdale, 125 N. C. 696, 34 S. E. 646. (3) When the bill of exceptions and the statement of facts are contradictory, the former controls. Galan *v.* State, 76 Tex. Crim. 619, 177 S. W. 124; Hardy *v.* State, 31 Tex. Crim. 289, 20 S. W. 561.

23. See the title "**Briefs.**"

[a] **The appellate court must examine the record** for error though no brief is filed. State *v.* Fannin (Mo. App.), 186 S. W. 1186; Hays *v.* State, 11 Okla. Crim. 410, 146 Pac. 1085.

dictions it is necessary to file assignments of errors.[24]

k. *Dismissal and Reinstatement.* — Appeals in criminal cases may be dismissed in a proper case[25] on motion of the respondent,[26] or under certain circumstances, by the court on its own motion,[27] when

Compare People *v.* Measor, 20 Cal. App. 339, 128 Pac. 1016.

[b] **Oral argument will be confined** to calling attention to errors patent on the face of the record where briefs are not filed. Hawkins *v.* State, 7 Okla. Crim. 385, 123 Pac. 1024. See Starr *v.* State, 4 Okla. Crim. 128, 111 Pac. 668.

[c] **The judgment will be affirmed** or the appeal dismissed, where no brief is filed by appellant and no appearance is made by him and where an examination of the record shows the appeal to be without merit. People *v.* Wagner (Cal. App.), 171 Pac. 699 (attorney general could move for a dismissal or for a submission of the cause on the record); People *v.* Allison, 28 Cal. App. 126, 151 Pac. 550; Montgomery *v.* State (Okla. Crim.), 170 Pac. 519; Osborne *v.* State (Okla. Crim.), 169 Pac. 270; Dulaney *v.* State, 11 Okla. Crim. 280, 145 Pac. 1109.

24. See 8 STANDARD PROC. 524.

25. See *infra*, this note.

[a] **For Lack of Jurisdiction.**—Holman *v.* State, 73 Tex. Crim. 576, 166 S. W. 506.

[b] **When the Appeal Is Not Authorized by Law.** — **Ga.** — Brannon *v.* State, 147 Ga. 499, 94 S. E. 759. **Mont.** State *v.* Gibbs, 10 Mont. 210, 25 Pac. 288. **Okla.**—Oklahoma City *v.* Tucker, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984. **S. C.**—State *v.* Merriman, 34 S. C. 576, 13 S. E. 328, 898.

[c] **Where No Sentence Has Been Imposed.**—State *v.* O'Neal, 138 La. 977, 70 So. 1011.

[d] **Where the statutory steps in taking the appeal** have not been followed. Gibson *v.* State, 3 Okla. Crim. 594, 107 Pac. 739 (where case-made is not served); Bennett *v.* State, 80 Tex. Crim. 652, 194 S. W. 145, 148.

[e] **Where notice of appeal is not shown** by the record to have been given. Dennis *v.* State (Tex. Crim.), 99 S. W. 1016.

[f] **Where no recognizance** is filed. Mathis *v.* State (Tex. Crim.), 194 S. W. 159; Gallon *v.* State (Tex. Crim.), 194 S. W. 1116; Bloss *v.* State, 79 Tex. Crim. 617, 187 S. W. 487, where appeal bond instead of recognizance is given.

[g] **Where Recognizance Is Defective.**—Chumley *v.* State (Tex. Crim.), 201 S. W. 176; Zarafonetis *v.* State (Tex. Crim.), 198 S. W. 938; Tilley *v.* State (Tex. Crim.), 99 S. W. 994; Weber *v.* State (Tex. Crim.), 68 S. W. 269.

[h] **Where the transcript is not filed in time** unless the failure is due to the negligence of the clerk. **Ind.** Buell *v.* State, 69 Ind. 125. **Kan.** State *v.* Caton, 71 Kan. 855, 80 Pac. 938. **N. D.**—State *v.* Jensen, 32 N. D. 373, 155 N. W. 793. **Ore.**—State *v.* Keeney, 81 Ore. 478, 159 Pac. 1165.

[i] **Where Accused Has Escaped. Cal.**—People *v.* Elkins, 122 Cal. 654, 55 Pac. 599. **Ind.**—Sargent *v.* State, 96 Ind. 63. **Okla.**—Boswell *v.* State (Okla. Crim.), 170 Pac. 1175; Alexander *v.* Kingfisher, 12 Okla. Crim. 176, 153 P. 209; Williams *v.* State, 11 Okla. Crim. 35, 141 Pac. 453. **Tex.**—Clay *v.* State (Tex. Crim.), 197 S. W. 1106; Isom *v.* State (Tex. Crim.), 70 S. W. 23.

[j] **Where Accused Has Been Pardoned.**—Woodland *v.* State, 12 Okla. Crim. 163, 152 Pac. 810; Lack *v.* State, 11 Okla. Crim. 420, 149 Pac. 924; Stewart *v.* State, 11 Okla. Crim. 400, 146 Pac. 921.

[k] **Where accused has died** pending appeal. Harris *v.* State, 181 Ind. 503, 104 N. E. 969.

[l] **If the Appellant Refuses To Pay the Costs.**—Doan *v.* State, 12 Okla. Crim. 98, 152 Pac. 141; Wainwright *v.* State, 11 Okla. Crim. 547, 149 Pac. 914.

[m] **Frivolousness** is not a ground of dismissal. People *v.* McNulty, 95 Cal. 594, 30 Pac. 963.

26. People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

[a] **Motion taken as confessed** where appellant does not appear or file a correction of the record. Simerson *v.* State, 9 Okla. Crim. 119, 130 Pac. 1112.

27. People *v.* Walker, 132 Cal. 137, 64 Pac. 133 (on jurisdictional grounds); Walden *v.* State, 50 Fla. 151, 39 So. 151.

the appellate court has acquired jurisdiction of the case.[28] But statutes generally provide that appeals shall not be dismissed for mere informalities or defects in the taking thereof.[29] In some jurisdictions an appeal by the defendant may be withdrawn by him,[30] or dismissed on his own motion.[31]

Reinstatement. — An appeal which has been dismissed may be reinstated on motion in a proper case.[32]

1. *Hearing and Rehearing.* — The supreme court cannot try the case on appeal de novo.[33] The hearing on appeal may be advanced[34] or postponed in a proper case.[35] But public policy demands that appeals in criminal cases be speedily disposed of.[36] The defendant may appear on appeal by counsel,[37] his personal presence not being re-

[a] **Where appeal is taken after expiration of the time** therefor. People *v.* Conley, 27 Cal. App. 362, 150 Pac. 412, 413.

28. Rivers *v.* State, 13 Ala. App. 362, 380, 69 So. 387, where a certificate of appeal is before the court, an appeal may be dismissed though no transcript is filed.

[a] **A motion to dismiss is premature,** where no statement of facts is filed and the time which the law allows for extension of the time for filing has not expired. State *v.* Blanck, 10 Wash. 292, 38 Pac. 1012.

29. Cal.—People *v.* McNulty, 95 Cal. 594, 30 Pac. 963. **Idaho.**—State *v.* Wright, 12 Idaho 212, 85 Pac. 493. **Mont.**—Territory *v.* Harris, 7 Mont. 429, 17 Pac. 557.

30. See State *v.* Leak, 90 N. C. 655; Jennings *v.* State, 68 Tex. Crim. 613, 151 S. W. 1050; Rivera *v.* State (Tex. Crim.), 105 S. W. 193; Wartelsky *v.* State, 38 Tex. Crim. 629, 44 S. W. 510.

[a] **Defendant may withdraw his appeal** (1) whenever he deems it necessary or proper. Rivera *v.* State (Tex. Crim.), 105 S. W. 193. But see State *v.* Brewer, 98 N. C. 607, 3 S. E. 819 (the court may deny the application and will not grant it unless just cause be shown when opposed by the attorney general); State *v.* Leak, 90 N. C. 655, with the assent of the attorney general, a withdrawal will ordinarily be allowed. (2) After argument, the withdrawal of a writ of error rests in the discretion of the court. McNelis *v.* State, 4 Ga. App. 419, 61 S. E. 842.

[b] **The application** for withdrawal must be signed by the defendant in person and sworn to. Jennings *v.* State, 68 Tex. Crim. 613, 151 S. W. 1050.

31. Lasallas *v.* State, 6 Okla. Crim. 705, 124 Pac. 1132; Caudill *v.* State, 9 Okla. Crim. 66, 130 Pac. 812; Moon *v.* State, 8 Okla. Crim. 726, 126 Pac. 1135.

32. Mo.—State *v.* Graham (Mo. App.), 184 S. W. 1190. **N. C.**—State *v.* Charles, 161 N. C. 286, 76 S. E. 715. **Tex.**—Thompson *v.* State (Tex. Crim.), 202 S. W. 91; Clay *v.* State, 68 Tex. Crim. 250, 150 S. W. 430; White *v.* State, 68 Tex. Crim. 147, 151 S. W. 826.

[a] **Where appeal is devoid of merit,** reinstatement will not be ordered. People *v.* Busby, 113 Cal. 181, 45 Pac. 191.

33. State *v.* Hurst, 23 Mont. 484, 59 Pac. 911.

34. United States *v.* Norton, 91 U. S. 558, 23 L. ed. 250, motion should state reasons. See State *v.* Fortune, 29 N. D. 289, 150 N. W. 926.

35. Ga.—Calloway *v.* State, 91 Ga. 112, 16 S. E. 379, postponement not to be had except for providential cause even though counsel on both sides consent. **N. Y.**—People *v.* Skwirsky, 213 N. Y. 151, 107 N. E. 47, commitment to insane hospital is ground for postponement. **S. C.**—State *v.* Green, 46 S. C. 566, 27 S. E. 663, suspension of appeal to make motion for new trial on ground of newly discovered evidence.

[a] **Pendency of civil action** for same offense is not ground of continuance. State *v.* Mehaffey, 132 N. C. 1062, 44 S. E. 107.

36. People *v.* Measor, 20 Cal. App. 339, 128 Pac. 1016; Calloway *v.* State, 91 Ga. 112, 16 S. E. 379.

Argument on appeal, see the title "**Arguments.**"

37. Vowell *v.* State, 132 Tenn. **349,**

quired.[38] By statute the attorney general is the only person authorized to appear before the supreme court on behalf of the people.[39] **Rehearings** may be granted in criminal cases,[40] upon petition of the state,[41] as well as on the petition of the accused.[42]

m. *Review.* — The review on appeal in criminal cases is confined to errors which are preserved by a bill of exceptions or which are apparent of record unless statute provides otherwise.[43] It is the settled

178 S. W. 768, the appellate court will not permit the accused to be without counsel though he appears in person. See Howard *v.* State, 113 Wis. 248, 89 N. W. 110, holding appellate court cannot appoint counsel for indigent appellant.

38. **U. S.**—Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218. **Ia.**—See State *v.* Mackey, 82 Iowa 393, 48 N. W. 918, defendant does not appear in appeals by state. **N. J.**—Donnelly *v.* State, 26 N. J. L. 463. **N. C.** State *v.* Leak, 90 N. C. 655; State *v.* Overton, 77 N. C. 485. **Tenn.**—See Vowell *v.* State, 132 Tenn. 349, 178 S. W. 768, person accused of felony must be present when judgment is rendered on appeal. **Tex.**—Tooke *v.* State, 23 Tex. App. 10, 3 S. W. 782.

39. Soto *v.* People (Colo.), 173 Pac. 399; State *v.* Sopher, 157 Ind. 360, 61 N. E. 785.

40. **Ala.**—Tarrant *v.* State, 12 Ala. App. 172, 67 So. 626. **Fla.**—Carter *v.* State, 68 Fla. 143, 148, 66 So. 1000. **Ia.**—State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470. **Tex.**—See Robertson *v.* State, 77 Tex. Crim. 536, 179 S. W. 106.

[a] **Grounds** on which rehearing is asked to be particularly stated in the application. Jones *v.* State, 10 Okla. Crim. 216, 227, 136 Pac. 182, 137 Pac. 121.

[b] **Petition Must Be Verified.** Robertson *v.* State, 77 Tex. Crim. 536, 179 S. W. 106, petition setting up that judge retained statement of facts until after time for filing.

[c] **Ex parte affidavits as to matters dehors** the record cannot be considered on the motion. Parker *v.* State, 33 Tex. Crim. 111, 21 S. W. 604, 25 S. W. 967.

[d] **Rehearing grantable where a decisive question was overlooked** or where the decision conflicts with statute or a controlling decision. State *v.* Eaton, 6 Kan. App. 94, 49 Pac. 686.

[e] **Points expressly or tacitly waived** at argument cannot be relied on for a rehearing. People *v.* Northey, 77 Cal. 618, 635, 19 Pac. 865, 20 Pac. 129.

[f] **A new and original question** cannot be presented for the first time on rehearing. **N. M.**—State *v.* Williams, 22 N. M. 337, 161 Pac. 334; State *v.* McKnight, 21 N. M. 14, 153 Pac. 76. **Utah.**—People *v.* Tidwell, 5 Utah 88, 12 Pac. 638. **Wash.**—State *v.* Harding, 20 Wash. 556, 56 Pac. 399.

See generally the title "**Rehearing.**"

[g] **Fundamental errors may be raised for the first time** by petition for rehearing. **Cal.**—People *v.* Bruggy (Cal.), 26 Pac. 965. **N. D.**—State *v.* Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140, constitutionality of statute may be presented on rehearing. **Tex.**—Ferguson *v.* State, 80 Tex. Crim. 383, 189 S. W. 271; Dillard *v.* State, 77 Tex. Crim. 1, 177 S. W. 99.

[h] **Order on application for rehearing may be revised** or vacated during the term. Addington *v.* State (Ala. App.), 77 So. 993.

41. State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470; Drake *v.* State, 29 Tex. App. 265, 275, 15 S. W. 725.

42. State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470.

43. **U. S.**—Porter *v.* United States, 91 Fed. 494, 33 C. C. A. 652. **Cal.** People *v.* Brooks, 131 Cal. 311, 63 Pac. 464. **Idaho.**—State *v.* Yee Wee, 7 Idaho 188, 61 Pac. 588, review confined to the case made in the trial court. **Md.** State *v.* Williams, 85 Md. 231, 36 Atl. 823. **Neb.**—State *v.* Moore, 1 Neb. Unof. 213, 95 N. W. 334. **N. J.**—State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398.

See *supra*, I, A, 2, i.

[a] **Entries on trial docket** cannot be considered. Barker *v.* State, 54 Neb. 53, 74 N. W. 427.

[b] **Objection that verdict is against**

rule that error is not to be presumed but must affirmatively appear in the record.[44] And where the record is silent, regularity will be presumed.[45] All rulings of the court upon intermediate orders or proceedings forming a part of the judgment-roll are brought up for review on an appeal from a final judgment.[46] But as a general rule no errors can be considered except those committed against the appellant.[47] And errors invited by the defendant cannot be set up as

weight of evidence cannot be considered on writ of error. State *v.* Donohue (N. J. L.), 59 Atl. 12.

[c] **Evidence discovered since the bringing of the appeal** cannot be considered. State *v.* Yee Wee, 7 Idaho 188, 61 Pac. 588. See also People *v.* Mooney (Cal.), 167 Pac. 696.

[d] **Orders after judgment** not reviewable on writ of error. Roesel *v.* State, 62 N. J. L. 368, 41 Atl. 833.

44. **Cal.**—People *v.* Huff, 72 Cal. 117, 13 Pac. 168. **Mich.**—People *v.* Scott, 56 Mich. 154, 22 N. W. 274. **Neb.**—Coil *v.* State, 62 Neb. 15, 86 N. W. 925. **Okla.**—Robbins *v.* State, 12 Okla. Crim. 294, 155 Pac. 491; Smiley *v.* Territory, 15 Okla. 314, 81 Pac. 433. *Contra,* Hyde *v.* Territory, 8 Okla. 59, 56 Pac. 848, the case will be reversed unless it affirmatively appears all things required to be done were regularly done and recorded.

45. **Miss.**—McFarland *v.* State, 110 Miss. 482, 70 So. 563. **Mo.**—State *v.* Allen, 267 Mo. 49, 183 S. W. 329. **Tex.** Roberts *v.* State, 78 Tex. Crim. 317, 180 S. W. 1079; Jackson *v.* State, 78 Tex. Crim. 100, 180 S. W. 260.

[a] **When the record is silent as to presence or absence of the defendant,** he will be presumed to have been present. **Cal.**—People *v.* Rader, 136 Cal. 253, 68 Pac. 707. **Ill.**—Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842. **N. M.**—Territory *v.* Herrera, 11 N. M. 129, 66 Pac. 523. **Tenn.**—Griffin *v.* State, 109 Tenn. 17, 70 S. W. 61.

[b] **But if record does not show defendant was asked** whether he had anything to say why sentence should not be pronounced, a reversal follows. Territory *v.* Herrera, 11 N. M. 129, 66 Pac. 523.

46. People *v.* Ward, 145 Cal. 736, 79 Pac. 448; People *v.* Simmons, 119 Cal. 1, 50 Pac. 844; People *v.* Canepi, 181 N. Y. 398, 74 N. E. 473.

[a] **Rulings on the Demurrer.**—People *v.* Canepi, 181 N. Y. 398, 74 N. E. 473.

[b] **Ruling on a Motion To Dismiss.** People *ex rel.* Hummel *v.* Trial Term, 184 N. Y. 30, 76 N. E. 732, where statute did not include it in judgment roll.

Rulings on motion to quash or in arrest, see *supra,* I, A, 2, c, (I).

[c] **Failure to bring defendant to trial** within two terms is separate from the trial and is not reviewable on appeal from a conviction. The remedy is habeas corpus. Com. *v.* Fisher, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009.

47. State *v.* Willis, 130 Tenn. 403, 170 S. W. 1030.

[a] *Compare* Terrell *v.* Com., 13 Bush (Ky.) 246, holding it the duty of the appellate court, when reversing a judgment on the appeal of the accused, and remanding for new trial, to pass upon all questions decided adversely to the state and properly excepted to.

[b] **Appellant Cannot Complain of Errors in His Favor.**—**Cal.**—People *v.* Donaldson, 70 Cal. 116, 11 Pac. 681. **Ga.**—Simms *v.* State, 60 Ga. 145. **Wis.** Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

[c] **Errors committed against a defendant who is acquitted** cannot be complained of by his codefendant. **Ala.** Segars *v.* State, 88 Ala. 144, 7 So. 46. **Fla.**—Richard *v.* State, 42 Fla. 528, 29 So. 413. **Mo.**—State *v.* Hopper, 71 Mo. 425. **N. C.**—State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721. **Wash.**—State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

[d] **Respondent cannot allege errors** in favor of appellant. **Cal.**—People *v.* Moregea, 48 Cal. 123. **Mo.** State *v.* Ferrell, 246 Mo. 322, 337, 152 S. W. 33. **Tenn.**—State *v.* Willis, 130 Tenn. 403, 170 S. W. 1030.

[e] **Whether sentence is too light** cannot be raised by the state on the defendant's appeal. State *v.* McDowell, 61 Wash. 398, 112 Pac. 521, Ann.

a ground for reversal,[48] unless injury to him is manifest.[49]

Matters within the discretion of the trial court will not be reviewed or interfered with except for an abuse of discretion.[50]

Questions of fact will not be considered by the appellate court,[51] and a verdict supported by substantial evidence will not be disturbed on appeal for lack of evidence.[52] Nor will a verdict on conflicting evidence be disturbed if there is evidence to support it.[53]

n. *Disposition.*[54] — The appellate court may affirm,[55] or reverse,[56]

Cas. 1912C, 782, 32 L. R. A. (N. S.) 414.

48. **Ark.**—Rose *v.* State, 122 Ark. 509, 184 S. W. 60. **Ga.**—Partee *v.* State, 19 Ga. App. 752, 92 S. E. 306. **Ia.**—State *v.* Chambers, 179 Iowa 436, 161 N. W. 470. **Mo.**—State *v.* Shearon, 183 S. W. 293.

[a] **Admission of a line of testimony opened** by the defendant is invited error. State *v.* Shearon (Mo.), 183 S. W. 293.

[b] **Instructions given at defendant's request** cannot be complained of by him. **Ala.**—Day *v.* State, 74 So. 352. **Mo.**—State *v.* Jenkins (Mo. App.), 193 S. W. 604. **Ohio.**—State *v.* Kollar, 93 Ohio St. 89, 112 N. E. 196. **Tex.** McBride *v.* State (Tex. Crim.), 194 S. W. 825; Debth *v.* State, 80 Tex. Crim. 4, 187 S. W. 341. See 13 STANDARD PROC. 986.

49. State *v.* Britton (Mo.), 183 S. W. 295.

50. **Ariz.**—Priestly *v.* State, 171 Pac. 137. **Cal.**—People *v.* Wong Hing, 28 Cal. App. 230, 151 Pac. 1159. **Fla.** Carter *v.* State, 68 Fla. 143, 66 So. 1000. **Ia.**—State *v.* Miner, 107 Iowa 656, 78 N. W. 679. **N. M.**—State *v.* Calhoun, 170 Pac. 750; State *v.* Riddle, 170 Pac. 62. **Okla.**—Smith *v.* State (Okla. Crim.), 171 Pac. 341; Roebuck *v.* State (Okla. Crim.), 170 Pac. 277; Buxton *v.* State, 11 Okla. Crim. 85, 143 Pac. 58. **S. D.**—State *v.* Morse, 35 S. D. 18, 150 N. W. 293, Ann. Cas. 1918C, 570.

51. State *v.* Bordelon, 141 La. 611, 75 So. 429.

52. **Mo.**—State *v.* Murray, 193 S. W. 830. **N. M.**—State *v.* Romero, 171 Pac. 787; State *v.* Riddle, 170 Pac. 62; State *v.* McGee, 170 Pac. 739. **Okla.**—Hall *v.* State (Okla. Crim.), 171 Pac. 347; Owens *v.* State, 11 Okla. Crim. 113, 143 Pac. 204.

53. **U. S.**—Towe *v.* United States, 238 Fed. 557, 151 C. C. A. 493. **Cal.** People *v.* Ah Leo, 28 Cal. App. 164, 151 Pac. 748. **Ill.**—People *v.* Bond, 281 Ill. 490, 118 N. E. 14. **Ind.**—Mason *v.* State, 171 Ind. 78, 85 N. E. 776. **Mont.**—State *v.* Brodock, 53 Mont. 463, 164 Pac. 658. **Okla.**—Wilson *v.* State, 13 Okla. Crim. 470, 165 Pac. 618. **Tex.** Summerville *v.* State, 79 Tex. Crim. 184, 183 S. W. 439; Smith *v.* State, 73 Tex. Crim. 521, 165 S. W. 574.

54. **Mandate or remittitur,** see the title "**Mandate and Proceedings Thereafter.**"

55. Ciprian *v.* State (Fla.), 74 So. 980; Nolan *v.* State (Tex. Crim.), 194 S. W. 825. See *supra*, I, A, 2, j.

[a] **Rule requiring inquiry of defendant, before passing of judgment,** whether he has any reasons why sentence should not be passed, does not apply to the appellate court in affirming a judgment. Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218.

[b] **Where appellate court is evenly divided,** the judgment below stands affirmed by operation of law. Davis *v.* State, 110 Ga. 291, 34 S. E. 1015; State *v.* Hart, 87 N. J. L. 329, 94 Atl. 50. See State *v.* Hani, 36 Ind. App. 138, 74 N. E. 1107 (rejecting appeal where court is evenly divided as to jurisdiction); 6 STANDARD PROC. 79, 82.

[c] **Day of execution may be appointed** on affirmance. Russell *v.* State, 33 Ala. 366.

56. See *infra*, this note.

[a] **Except where appeal is taken by the state** under some statutes. See State *v.* Kinney, 44 Iowa 444. See *supra*, I, A, 2, c, (II).

[b] **Unless error affirmatively appears** in the record, a reversal will not be ordered. State *v.* Beatty, 51 W. Va. 232, 239, 41 S. E. 434; State *v.* Cobbs, 40 W. Va. 718, 22 S. E. 310.

[c] **Reversal** (1) **in part. U. S.** Ballew *v.* United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. ed. 388. **Ind.** Dorsey *v.* State, 179 Ind. 531, 100 N. E. 369. **Ohio.**—Lougee *v.* State, 11 Ohio 68. (2) Reversal as to one of several

or modify,[57] the judgment of the trial court, under the modern practice. On reversal it may award a new trial,[58] or direct the trial court to enter a proper judgment and sentence,[59] depending upon the errors requiring the reversal.[60] Or it may under some stat-

defendants. State *v.* MacQueen, 69 N. J. L. 522, 55 Atl. 1006.

[d] **Where party is deprived of a statement of facts** without his fault, judgment will be reversed. Archer *v.* State, 74 Tex. Crim. 524, 168 S. W. 857; Lyster *v.* State, 68 Tex. Crim. 257, 151 S. W. 302.

[e] **If there is no evidence to sustain a conviction,** judgment will be reversed. State *v.* Britton (Mo.), 183 S. W. 295.

57. State *v.* Jefferson, 88 N. J. L. 447, 97 Atl. 162; Chandler *v.* State, 79 Tex. Crim. 244, 184 S. W. 192; Robison *v.* State, 68 Tex. Crim. 115, 150 S. W. 912, changing sentence to conform to verdict.

[a] **If the sentence is excessive,** the appellate court (1) may reduce it. **Ark.**—Russell *v.* State, 112 Ark. 282, 166 Pac. 540. **Ia.**—State *v.* Baughman, 20 Iowa 497. **N. D.**—State *v.* Wisnewski, 13 N. D. 649, 102 N. W. 883. **Okla.** Maddox *v.* State, 12 Okla. Crim. 462, 158 Pac. 883; Lyon *v.* State, 11 Okla. Crim. 407, 146 Pac. 1084. **Tenn.**—Pressly *v.* State, 114 Tenn. 534, 86 S. W. 378, 108 Am. St. Rep. 921, 69 L. R. A. 291. (2) But power will be exercised only when legal data on which it can act is before the court. State *v.* Baughman, 20 Iowa 497.

[b] **May Modify Judgment To Conform to Verdict.**—McDonald *v.* State, 14 Tex. App. 504.

[c] **Sentence not in conformity to law** will be modified. Chandler *v.* State, 79 Tex. Crim. 244, 184 S. W. 192.

[d] **Increase of punishment** permitted. Ocampo *v.* United States, 234 U. S. 91, 34 Sup. Ct. 712, 58 L. ed. 1231 (under the Philippine practice); Trono *v.* United States, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. ed. 292.

58. **U. S.**—Ballew *v.* United States, 160 U. S. 187, 199, 16 Sup. Ct. 263, 40 L. ed. 388. **Ga.**—Harrison *v.* State, 20 Ga. App. 157, 92 S. E. 970. **Mo.** State *v.* Winer, 263 Mo. 356, 172 S. W. 355. **Mont.**—State *v.* Thomas, 46 Mont. 468, 128 Pac. 588. **N. Y.**—People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189, statute does not refer to court of appeals. **Ohio.—Fox *v.* State,** 34 Ohio State 377. **P. R.**—People *v.* Vidal, 7 P. R. 512. **Wis.**—Abaly *v.* State, 163 Wis. 609, 158 N. W. 308.

[a] **Where merely technical errors** have been committed, a new trial will not be granted. Steils *v.* State, 7 Okla. Crim. 391, 124 Pac. 76.

[b] **Although there is an absence of proof,** a new trial will be awarded where guilt is indicated. State *v.* Winer, 263 Mo. 356, 172 S. W. 355.

59. **U. S.**—Ballew *v.* United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. ed. 388. **Ark.**—Routt *v.* State, 61 Ark. 594, 34 S. W. 262. **Haw.**—Territory *v.* Armstrong, 22 Haw. 526. **Minn.**—State *v.* Framness, 43 Minn. 490, 45 N. W. 1098; State *v.* Bilansky, 3 Minn. 246. **Miss.**—Haynes *v.* State, 22 So. 871. **N. M.**—Territory *v.* Herrera, 11 N. M. 129, 66 Pac. 523, remanding case because defendant was not asked if he had any reasons why sentence should not be passed. *Contra,* Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81. **Utah.** State *v.* Carmen, 44 Utah 353, 140 Pac. 670.

[a] **Otherwise at Common Law.** Ballew *v.* United States, 160 U. S. 187, 198, 16 Sup. Ct. 263, 40 L. ed. 388.

[b] **On reversal of an order granting a new trial,** the order will direct the rendition of judgment on the verdict. People *v.* Cavala, 35 Cal. App. 154, 169 Pac. 420.

[c] **Reversal as to sentence** and remand for proper sentence, where there is error in sentence. *Ex parte* Adams, 187 Ala. 10, 65 So. 514; *Ex parte* Robinson, 183 Ala. 30, 63 So. 177; People *v.* Elliott, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918B, 391.

[d] **Where evidence would sustain a verdict for a lower degree** than that returned, the case may, with the consent of the attorney general, remand the cause with directions to sentence in the lower degree. Harris *v.* State, 119 Ark. 85, 177 S. W. 421.

60. *Ex parte* Robinson, 183 Ala. 30, 63 So. 177, the object of remandment is to place the case before the trial court at the point of his erroneous departure.

utes enter such judgment as, under the facts, it deems just.[61]

Reversible Error. — As a general rule, criminal cases may be reversed only where the record affirmatively shows error prejudicial to some substantial right of a defendant.[62] But where error appears, some courts hold that it will be presumed prejudicial to the accused,[63] though other courts reject this presumption.[64] And it is sometimes provided by constitution or statute that the judgment shall not be reversed or a new trial granted for error of pleading or procedure, unless the court from an inspection of the whole cause is of the opinion a miscarriage of justice resulted.[65]

Confession of Error. — The appellate court uniformly acts affirmative-

61. Routt *v.* State, 61 Ark. 594, 598, 34 S. W. 262; Mims *v.* State, 26 Minn. 494, 5 N. W. 369; State *v.* Bilansky, 3 Minn. 246. But see Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81; State *v.* Carmen, 44 Utah 353, 140 Pac. 670.

[a] **Otherwise at Common Law.** Ballew *v.* United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. ed. 388.

62. **Ariz.**—Birch *v.* State, 171 Pac. 135. **Cal.**—People *v.* Murback, 64 Cal. 369, 30 Pac. 608; People *v.* Donaldson (Cal. App.), 171 Pac. 442. **Haw.** Queen *v.* Haumea, 8 Haw. 280. **Ill.** People *v.* Osborne, 278 Ill. 104, 115 N. E. 890. **Ind.**—Siberry *v.* State, 149 Ind. 684, 702, 39 N. E. 936, 47 N. E. 458. **Kan.**—State *v.* Peterson, 102 Kan. 900, 171 Pac. 1153; State *v.* Fleeman, 102 Kan. 670, 171 Pac. 618. **Mont.** State *v.* Kanakaris, 54 Mont. 180, 169 Pac. 42. **Neb.**—Carter *v.* State, 98 Neb. 742, 154 N. W. 252; Black *v.* State, 97 Neb. 273, 149 N. W. 785. **Okla.**—Robbins *v.* State, 12 Okla. Crim. 294, 155 Pac. 491; Warren *v.* State, 6 Okla. Crim. 1, 115 Pac. 812, 34 L. R. A. (N. S.) 1121; Jolly *v.* State, 5 Okla. Crim. 301, 115 Pac. 124. **Ore.**—State *v.* Merlo, 173 Pac. 317. **Tex.**—Williams *v.* State, 75 Tex. Crim. 56, 170 S. W. 708. **Wis.**—Oborn *v.* State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

[a] **An error affecting the substantial rights** of the accused is prejudicial. Gipe *v.* State, 165 Ind. 433, 75 N. E. 881, 112 Am. St. Rep. 238, 1 L. R. A. (N. S.) 419.

[b] **Mere technical irregularities** do not warrant reversal. State *v.* Kanakaris, 54 Mont. 180, 169 Pac. 42.

63. **U. S.**—Ayer *v.* New Mexico, 201 Fed. 497, 119 C. C. A. 589; Pettine *v.* New Mexico, 201 Fed. 489, 119 C. C. A. 581. **Cal.**—People *v.* Richards, 136 Cal. 127, 68 Pac. 477; People *v.* Murphy, 47 Cal. 103. **Ind.**—Rock *v.* State, 185 Ind. 51, 110 N. E. 212, improper evidence presumed prejudicial. **Kan.** State *v.* McCormick, 57 Kan. 440, 446, 46 Pac. 777, 57 Am. St. Rep. 341, improper statements of jurors when in jury room presumed prejudicial. **Mo.** State *v.* Shipley, 174 Mo. 512, 74 S. W. 612.

[a] **Rule Stated.**—(1) "The legal presumption is that error produces prejudice, and it is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal." Pettine *v.* New Mexico, 201 Fed. 489, 119 C. C. A. 581. (2) A presumption of injury conclusively arises whenever it is apparent that an erroneous ruling may have affected the verdict. People *v.* Bonier, 179 N. Y. 315, 324, 72 N. E. 226, 103 Am. St. Rep. 880.

64. Oborn *v.* State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966. See Perry *v.* State, 177 Ala. 1, 59 So. 150.

[a] **Ruling excusing a juror** not presumed prejudicial. State *v.* Pray, 126 Iowa 249, 99 N. W. 1065. See State *v.* Foster, 136 Iowa 527, 114 N. W. 36.

65. Vallejo & N. R. Co. *v.* Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; People *v.* Fleming, 166 Cal. 357, 371, 136 Pac. 291, Ann. Cas. 1915B, 881.

[a] **Effect on Scope of Review.** Though the court has jurisdiction of questions of law alone, it must consider the entire cause to determine whether the error resulted in a miscarriage of justice. People *v.* Fleming, 166 Cal. 357, 371, 136 Pac. 291, Ann. Cas. 1915B, 881.

[b] **The words "entire cause"**

ly on a confession of error by the attorney general,[66] without investigating the correctness of his conclusions.[67]

Custody and Discharge of Accused. — Some statutes provide that if the judgment is reversed without ordering a new trial, the appellate court must direct that the defendant be discharged.[68] If a new trial is ordered the defendant must be remanded to the custody of the sheriff.[69]

Effect of Judgment on Appeal. — A judgment of affirmance determines the law of the case as to all questions arising on the record.[70] The effect of a reversal depends on the error on which it is based.[71] A reversal and dismissal of a cause for insufficiency of the information does not prevent a subsequent arrest and trial on a sufficient information.[72]

B. REVIEW OF SUMMARY TRIALS. — **1. Generally.** — Statutes authorize appeals to superior courts from final judgments of justices of the peace, police judges and the like, in criminal cases.[73] Appeals by the

mean the cause as it is presented by the record on appeal. People *v.* Mooney (Cal.), 167 Pac. 696.

66. Soto *v.* People (Colo.), 173 Pac. 399; Richardson *v.* People (Colo.), 170 Pac. 189; Zancannelli *v.* People (Colo.), 165 Pac. 612; State *v.* Ward, 36 S. D. 415, 155 N. W. 185. See State *v.* Goddard, 146 Mo. 177, 180, 48 S. W. 82; State *v.* Richardson, 4 Okla. Crim. 373, 111 Pac. 687.

But see People *v.* Mooney (Cal.), 167 Pac. 696. *Compare* People *v.* Durrant, 119 Cal. 201, 206, 51 Pac. 185.

67. Richardson *v.* People (Colo.), 170 Pac. 189.

[a] **Where previous attorney general filed a brief, some of his assignments of error will be reviewed** notwithstanding a confession of error by the incumbent. Lawson *v.* People (Colo.), 165 Pac. 771.

68. State *v.* Gardner, 96 Minn. 318, 104 N. W. 971, 2 L. R. A. (N. S.) 49; Mims *v.* State, 26 Minn. 494, 5 N. W. 369 (this statute does not prevent a modification of the judgment under §9249, Gen. St.); Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81.

[a] **If there is a valid indictment** and nothing amounting to an acquittal has happened, a discharge will not be directed. Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81.

69. *Ex parte* Roberts, 9 Nev. 44, 16 Am. Rep. 1.

70. McDonald *v.* State, 80 Wis. 407, 50 N. W. 185. See Smith *v.* Foster, 85 Iowa 705, 50 N. W. 220, and the title **"Law of the Case."**

71. See *infra*, this note, and the title **"Mandate and Proceedings Thereafter."**

[a] **A reversal because of error in the judgment** or its rendition leaves the verdict and precedent proceedings in full force. State *v.* McClain, 156 Mo. 99, 56 S. W. 731.

[b] **On a reversal because the verdict and judgment is not sustained by the evidence,** a new trial is to be had though not expressly ordered. State *v.* Ames, 93 Minn. 187, 100 N. W. 889.

[c] **Reversal and remand for new trial** places accused in the same position as if no trial had been had. *Ex parte* Bradley, 48 Ind. 548.

72. State *v.* George, 84 Wash. 113, 146 Pac. 378. And see generally the title **"Jeopardy."**

73. **N. Y.**—Cohen *v.* Workhouse, 150 N. Y. Supp. 596. **Tex.**—Golson *v.* State, 77 Tex. Crim. 572, 179 S. W. 560. **W. Va.**—Emsweller *v.* Wallace, 88 S. E. 787.

[a] **Jurisdiction of Appellate Court Is Statutory.**—People *v.* Parsons, 91 Miss. 649, 155 N. Y. Supp. 820.

[b] **Appeal direct to supreme court** not allowed. State *v.* Harpster, 15 Kan. 322.

[c] **Void judgment** may be appealed. State *v.* Haas, 52 Wis. 407, 9 N. W. 9.

[d] **Judgment on Plea of Guilty Appealable.**—(1) State *v.* Hedges, 67 Kan. 176, 72 Pac. 528, under statute authorizing appeal from "any judgment." *Contra*, Holsclaw *v.* State, 114 Ind. 506, 17 N. E. 112. (2) If ac-

defendant are allowed as a matter of right,[74] and some statutes authorize appeals by the state also.[75]

A review by certiorari is sometimes authorized in accordance with general rules elsewhere discussed.[76]

2. Manner of Taking Appeal. — The manner of taking appeals from judgments in this class of cases is regulated by statute.[77] Under some statutes the procedure is the same as in the case of appeals from superior courts in criminal cases,[78] whereas under other statutes, the appeal is taken by giving the justice written notice thereof,[79] or by giving notice thereof in open court and having the same entered of record,[80] by serving notice on the county attorney, upon which the justice shall allow the appeal,[81] or by filing an affidavit stating that the defendant is aggrieved by the judgment, and does not make his appeal for delay,[82] or by presenting an affidavit to the justice and applying thereon for an allowance of an appeal.[83]

cused had no intention of pleading guilty, an appeal from a judgment rendered thereon lies. Nicely *v.* Butcher, 81 W. Va. 247, 94 S. E. 147.

[e] **Peace warrant proceedings** not appealable. State *v.* Gregory, 118 N. C. 1199, 24 S. E. 712.

[f] **Mayor whose judgment is appealed can not act as counsel** for prosecution on appeal. Holliman *v.* Hawkinsville, 109 Ga. 107, 34 S. E. 214.

74. State *v.* Tharp, 81 W. Va. 194, 94 S. E. 119; Gilbert *v.* Johnson, 78 W. Va. 658, 90 S. E. 111, and see cases in next preceding note.

75. State *v.* Tait, 22 Iowa 140; People *v.* Fontana, 16 P. R. 626, from order setting aside information.

[a] **State Cannot Appeal From an Acquittal.**—State *v.* Powell, 86 N. C. 640.

76. **Minn.**—Tierney *v.* Dodge, 9 Minn. 166. **N. J.**—State *v.* Britton, 47 N. J. L. 251. **Pa.**—Com. *v.* Long, 40 Pa. Co. Ct. 339; Humphries *v.* Com., 37 Pa. Co. Ct. 553.

See the title "**Certiorari.**"

[a] **Appeal and Certiorari Cannot Be Prosecuted Concurrently.**—Com. *v.* Long, 40 Pa. Co. Ct. 339.

77. See generally the statutes.

[a] **Reasons of appeal** to be filed. Denneny *v.* Webster, 16 R. I. 6, 11 Atl. 295.

[b] **Appearance of defendant before justice in person** to demand an appeal, is not required. State *v.* Tharp, 81 W. Va. 194, 94 S. E. 119.

78. Brown *v.* Superior Court, 72 Cal. 14, 13 Pac. 70. See *supra*, I, A, 2, h.

79. Chipman *v.* Dist. Ct., 44 Utah 201, 138 Pac. 1194; State *ex rel.* Kassner *v.* Momsen, 153 Wis. 203, 140 N. W. 1117; Cowles *v.* Neillsville, 137 Wis. 384, 119 N. W. 91.

[a] **Designating plaintiff as "state" instead of the "city"** in the title does not invalidate appeal. Cowles *v.* Neillsville, 137 Wis. 384, 119 N. W. 91.

80. McDougall *v.* State, 32 Tex. Crim. 174, 22 S. W. 593; Ball *v.* State, 31 Tex. Crim. 214, 20 S. W. 363; Parker *v.* State (Tex. Crim.), 21 S. W. 370.

81. State *v.* Jones, 55 Minn. 329, 56 N. W. 1068, recognizance must be entered into also.

82. St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788; Elden *v.* Phillips (Mo. App.), 180 S. W. 418, affidavit held sufficient.

[a] **Affidavit to be signed by accused,** not by counsel. State *v.* Sexton (Mo. App.), 189 S. W. 605; State *v.* Meed, 124 Mo. App. 413, 101 S. W. 714.

[b] **To be filed immediately** after (1) judgment rendered (State *v.* Anderson, 84 Mo. 524), unless (2) satisfactory reason for delay appear. St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788.

[c] **Amendment in circuit court** not permissible. State *v.* Meed, 124 Mo. App. 413, 101 S. W. 714.

83. People *v.* Parsons, 91 Misc. 649, 155 N. Y. Supp. 820; People *v.* Maher, 92 Misc. 50, 155 N. Y. Supp. 279.

[a] **Affidavit must show errors appearing on the face** of the proceedings and must not set forth extraneous mat-

Bond. — By statute, a convicted person desiring to appeal shall be committed unless he give a bond or recognizance conditioned as provided by the statute,[84] or make an affidavit in forma pauperis.[85] But a failure to give a recognizance does not prevent the appeal if the defendant is in custody.[86]

3. Effect of Appeal. — Statutes sometimes provide that the appeal by the defendant shall stay all proceedings on the judgment,[87] whereas under other statutes execution is stayed only on certificate of probable cause.[88]

4. Record. — Statutes sometimes provide that the appeal is heard on a statement of the case settled by the justice and embodying the rulings excepted to.[89] Under some statutes the justice is required to certify to the appellate court the judgment and all the proceedings had in the case,[90] or file the affidavit and his return to all matters stated in the affidavit.[91]

5. Dismissal of Appeal. — The defendant cannot dismiss his appeal as a matter of right, where the case is to be heard on appeal.[92]

ter. People *v.* Parsons, 91 Misc. 649, 155 N. Y. Supp. 820.

[b] **Service of a copy of the affidavit and notice** of allowance of the appeal is necessary. People *v.* Cimini, 53 Misc. 525, 105 N. Y. Supp. 476. *Compare* People *v.* Mulkins, 25 Misc. 599, 54 N. Y. Supp. 414, 13 N. Y. Crim. 359.

[c] **Affidavit and allowance to be delivered to magistrate** within five days after the allowance of the appeal, upon which the appeal is deemed taken. People *v.* Mulkins, 25 Misc. 599, 54 N. Y. Supp. 414, 13 N. Y. Crim. 359.

84. **Ga.**—Ruffin *v.* Millen, 18 Ga. App. 784, 90 S. E. 654. **Minn.**—State *v.* Jones, 55 Minn. 329, 56 N. W. 1068. **Mo.**—Tarkio *v.* Loyd, 109 Mo. App. 171, 82 S. W. 1127. **N. Y.**—People *v.* Cimini, 53 Misc. 525, 105 N. Y. Supp. 476. **Tex.**—Burt *v.* State, 79 Tex. Crim. 556, 186 S. W. 770; Bunton *v.* State, 52 Tex. Crim. 618, 108 S. W. 373; Guenzel *v.* State, 47 Tex. Crim. 111, 80 S. W. 371. **Wis.**—State *ex rel.* Kassner *v.* Momsen, 153 Wis. 203, 140 N. W. 1117.

85. Ruffin *v.* Millen, 18 Ga. App. 784, 90 S. E. 654. See generally the title "**Paupers.**"

86. **Mo.**—Tarkio *v.* Loyd, 109 Mo. App. 171, 82 S. W. 1127. **Tex.**—Burt *v.* State, 79 Tex. Crim. 556, 186 S. W. 770. **W. Va.**—State *v.* Tharp, 81 W. Va. 194, 94 S. E. 119.

87. **Ind.**—Wiseheart *v.* State, 104 Ind. 407, 4 N. E. 156. **Kan.**—Miltonvale *v.* Lanoue, 35 Kan. 603, 12 Pac. 12. **Miss.**—*Ex parte* Caldwell, 62 Miss. 774, appeal supersedes judgment.

88. *Ex parte* Whitty, 65 Cal. 168, 3 Pac. 660.

89. People *v.* Maguire, 26 Cal. 635.

[a] **Where record discloses errors relied on,** statement is unnecessary. People *v.* Maguire, 26 Cal. 635.

90. State *v.* Durein, 65 Kan. 700, 70 Pac. 601 (the justice must certify the complaint, warrant and recognizance); State *v.* Anderson, 34 Kan. 116, 8 Pac. 275; Board of Health *v.* Cohen, 88 N. J. L. 369, 95 Atl. 609.

[a] **Clerical errors and omissions** in the transcript and record on appeal may be corrected by the justice after appeal. **Ind.**—Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210. **Kan.**—State *v.* Durein, 65 Kan. 700, 70 Pac. 601; State *v.* Anderson, 34 Kan. 116, 8 Pac. 275, where complaint was not certified. **Pa.**—Com. *v.* Long, 40 Pa. Co. Ct. 339. **Utah.**—See Chipman *v.* Dist. Ct., 44 Utah 201, 138 Pac. 1194.

91. People *ex rel.* Comrs. *v.* Benson, 63 App. Div. 142, 71 N. Y. Supp. 274; People *v.* McGann, 43 Hun 57, 6 N. Y. St. 541; People *v.* Parsons, 91 Misc. 649, 155 N. Y. Supp. 820.

[a] **Defendant to serve a copy of return** on district attorney. People *v.* Cimini, 53 Misc. 525, 105 N. Y. Supp. 476.

[b] **Amended return** may be required. People *v.* Fuchs, 71 Misc. 67, 129 N. Y. Supp. 1011.

92. Wiseheart *v.* State, 104 Ind. 407, 4 N. E. 156.

6. Proceedings in the Appellate Court. — Under some statutes on appeal a trial de novo is had, the same as if it had been brought originally in the appellate court;[93] whereas in other jurisdictions, the cause is argued, and the appellate court may render such a judgment as the justice should have rendered, or may affirm, modify or reverse the judgment rendered below, or may order a new trial.[94]

The trial de novo is based on the complaint and warrant.[95] The defendant need not plead anew, if he has pleaded to the complaint before the justice.[96] The complaint cannot be amended on the new

93. **Ark.**—Jones *v.* State, 111 Ark. 51, 163 S. W. 177. **Idaho.**—State *v.* Stafford, 26 Idaho 381, 143 Pac. 528. **Ind.**—Wiseheart *v.* State, 104 Ind. 407, 4 N. E. 156. **Kan.**—State *v.* Coulter, 40 Kan. 87, 19 Pac. 368. **Minn.**—State *v.* Tiner, 13 Minn. 520, on appeal on questions of law and fact. **Miss.**—Wilson *v.* State, 113 Miss. 748, 74 So. 657. **Mo.**—Eldon *v.* Phillips (Mo. App.), 180 S. W. 418. **N. J.**—Terhune *v.* Reed, 75 N. J. L. 77, 67 Atl. 180. **N. C.**—State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032. **Pa.**—Com. *v.* Clark, 3 Pa. Super. 141. **P. R.**—People *v.* Sanchez, 16 P. R. 682. **Tex.**—Burt *v.* State, 79 Tex. Crim. 556, 186 S. W. 770; Golson *v.* State, 77 Tex. Crim. 572, 179 S. W. 560. **Wash.** Seattle *v.* Molin, 99 Wash. 210, 169 Pac. 318. **Wis.**—State *v.* Haas, 52 Wis. 407, 9 N. W. 9.

[a] **Demurrers and motions** decided by the justice must be heard by the district court if presented. And the defendant may first demur to the complaint in the district court. State *v.* Stafford, 26 Idaho 381, 143 Pac. 528.

[b] **A separate trial** may be denied to one charged jointly with another who is acquitted on one count of the complaint. Com. *v.* Miller, 150 Mass. 69, 22 N. E. 434.

[c] **On failure to prosecute appeal,** (1) judgment is affirmed. (State *v.* Thevenin, 19 Mo. 237. See Batchelder *v.* Com., 109 Mass. 361), or (2) appeal is dismissed and procedendo directed. Henning *v.* Greenville, 69 Miss. 214, 12 So. 559.

[d] **Sentence is awarded** without regard to the judgment of the justice. State *v.* Haas, 52 Wis. 407, 412, 9 N. W. 9.

94. *Ex parte* Peacock, 25 Fla. 478, 490, 6 So. 473; People *ex rel.* Comrs. *v.* Benson, 63 App. Div. 142, 71 N. Y. Supp. 274; People *v.* Maher, 92 Misc. 50, 155 N. Y. Supp. 279.

[a] **Appeal to be heard on return of** magistrate. But the affidavit, though technically not part of the return, is to be considered. People *v.* Parsons, 91 Misc. 649, 155 N. Y. Supp. 820.

[b] **Court cannot suspend sentence** and place defendant on probation. People *v.* Maher, 92 Misc. 50, 155 N. Y. Supp. 279.

[c] **If the appeal is dismissed or judgment affirmed,** some statutes require that a copy of the order or judgment must be remitted to the court below. *Ex parte* Jones, 41 Cal. 209. See the title "**Mandate and Proceedings Thereafter.**"

[d] **If a new trial is ordered,** it may be had in the county or superior court. Brown *v.* Superior Court, 72 Cal. 14, 13 Pac. 70; People *v.* Maguire, 26 Cal. 635; People *v.* Luhrs, 79 Hun 415, 29 N. Y. Supp. 789, 9 N. Y. Crim. 266, 61 N. Y. St. 348. See People *v.* Mullen, 66 Misc. 476, 124 N. Y. Supp. 158.

[e] **But the superior court cannot try the case if there has not been a trial** in the justice's court. Brown *v.* Superior Court, 72 Cal. 14, 16, 13 Pac. 70.

95. People *v.* Sanchez, 16 P. R. 682. But see Com. *v.* Clark, 3 Pa. Super. 141, on appeal the defendant is indicted and the case is tried de novo.

[a] **If complaint is not certified** by the justice, the defendant cannot be arraigned or tried. State *v.* Durein, 65 Kan. 700, 70 Pac. 601.

[b] **Filing of new complaint** or information may be allowed. State *v.* Bryant, 90 Wash. 20, 155 Pac. 420; State *v.* Hamshaw, 61 Wash. 390, 112 Pac. 379.

96. People *v.* McKenzie, 190 Ill. App. 430; Kinsley *v.* State, 184 Ind. 396, 111 N. E. 418; Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210.

[a] **If a new complaint is filed,** the defendant must be given an opportunity to plead. State ex rel. Adams *v.* Grimes, 80 Wash. 14, 141 Pac. 184.

trial,[97] unless the statute authorizes it.[98] Objections going merely to matters of form and procedure in the justice's court cannot be made for the first time on appeal.[99]

7. Review of Judgment on Appeal. — Some statutes allow appeals from the judgment rendered on appeal,[1] though in some states the judgment rendered on appeal is final.[2]

II. WRIT OF REVIEW. — A. ORIGIN AND NATURE OF PROCEEDING.[3] — Statutes in some states provide for a review of judgments by a writ of review,[4] the granting of which rests in the discretion of the court,[5] except when the judgment was rendered on the default

See State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032.

97. State *v.* Kanaman, 94 Mo. 71, 6 S. W. 704; State *v.* Hamshaw, 61 Wash. 390, 112 Pac. 379.

98. **Ala.**—Blankenshire *v.* State, 70 Ala. 10. **Alaska**—United States *v.* Smith, 4 Alaska 396. **Miss.**—Garman *v.* State, 66 Miss. 196, 5 So. 385. **Ore.** State *v.* Jones, 18 Ore. 256, 22 Pac. 840.

See State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032, not referring to statute.

[a] **But a complaint which does not state an offense** cannot be amended. United States *v.* Smith, 4 Alaska 396.

99. **Ala.**—Edmunds *v.* State, 74 So. 965, all objections including that of jurisdiction must be made before the justice. **Ark.**—Martin *v.* State, 46 Ark. 38, objection to jurisdiction over person of defendant cannot be made. **Colo.**—McCausland *v.* People, 58 Colo. 303, 145 Pac. 685. **Mass.**—Com. *v.* Murphy, 155 Mass. 284, 29 N. E. 469.

[a] **Sufficiency of complaint may be objected** to before trial on appeal. Steuer *v.* State, 59 Wis. 472, 18 N. W. 433.

1. **N. Y.**—People *v.* Snyder, 44 Hun 193, 7 N. Y. St. 842, the defendant may but the state cannot appeal. **N. C.**—See State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032; State *v.* Scanlan, 85 N. C. 601. But an appeal from an order granting a new trial on appeal does not lie. **Ohio.**—State *v.* Ruedy, 57 Ohio St. 224, 48 N. E. 944, prosecution may except to a reversal. **Tex.**—Parker *v.* State (Tex. Crim.), 21 S. W. 370, appeal from dismissal of appeal.

See Burlington *v.* James, 17 Kan. 221.

[a] **From an order sustaining demurrer to complaint** or its equivalent, made on appeal, the state may appeal. State *v.* Stafford, 26 Idaho 381, 143 Pac. 528.

2. Hall *v.* Terr., 8 Ariz. 409, 76 Pac. 476.

3. **Action of review,** see 15 STANDARD PROC. 356, et seq.

4. **Me.**—Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683. **Mass.**—Agel *v.* Steuer, 226 Mass. 126, 115 N. E. 242; Karrick *v.* Wetmore, 210 Mass. 578, 97 N. E. 92. **N. H.**—Rowell *v.* Boston & M. R. Co., 59 N. H. 35. **Wyo.**—Kelsey *v.* District Court, 22 Wyo. 297, 139 Pac. 433, the provision of the constitution conferring power to issue writ of review is inactive in the absence of statute prescribing the procedure.

[a] **Remedy Unknown at Common Law.**—Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143; Colebrook *v.* Merrill, 49 N. H. 213; Barron *v.* Jackson, 42 N. H. 419.

[b] **The proceedings on the writ constitute a new** and independent action. Bradstreet *v.* Partridge, 59 Me. 155; Barron *v.* Jackson, 42 N. H. 419; Knox *v.* Knox, 12 N. H. 352.

[c] **Certorari is called a writ of review** by some statutes and codes. **N. Y.**—People ex rel. Manning *v.* Hagan, 34 Misc. 24, 69 N. Y. Supp. 451, 15 N. Y. Crim. 363. **Ore.**—Coos Bay Times Pub. Co. *v.* Coos Co., 81 Ore. 626, 160 Pac. 532; Dayton *v.* Board of Equalization, 33 Ore. 131, 139, 50 Pac. 1009. **Wash.**—State ex rel. Barnes *v.* Superior Court, 96 Wash. 581, 165 Pac. 493. See the title, "**Certiorari.**"

5. **Me.**—Taylor *v.* Morgan & Co., 107 Me. 334, 78 Atl. 377; Sherman *v.* Ward, 73 Me. 29; Bradstreet *v.* Partridge, 59 Me. 155. **Mass.**—Watson *v.* Wenz, 223 Mass. 341, 111 N. E. 856; Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177; Winthrop *v.* Athol, 216 Mass. 79, 102 N. E. 900. **N. H.**—Barron *v.* Jackson, 42 N. H. 419.

of an absent defendant, when the writ is a matter of right.[6] This writ is in effect a motion for new trial after judgment,[7] the case being entered, heard and determined on the writ,[8] and a new judgment rendered.[9] The former judgment is not vacated or disturbed,[10] and execution thereon is not stayed,[11] though it may be.[12] The writ is not in the nature of a writ of error to reverse a judgment for errors in the record,[13] and cannot serve the purpose of rehearing.[14] And indeed, the writ will not be granted where there is an adequate remedy by appeal or writ of error.[15]

B. DECISIONS REVIEWABLE. — A writ of review may be granted to review final judgments in civil actions rendered by any judicial tribunal subject to any limitations prescribed by the statute.[16]

C. GROUNDS OF REVIEW. — A review can be had only upon the grounds numerated in the statute,[17] some of which are newly dis-

6. Sherman *v.* Ward, 73 Me. 29.

7. Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177; Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469.

8. Bradstreet *v.* Partridge, 59 Me. 155.

9. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89; Bradstreet *v.* Partridge, 59 Me. 155.

10. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89; Whittaker *v.* Berry, 64 Me. 236; Bradstreet *v.* Partridge, 59 Me. 155; Barron *v.* Jackson, 42 N. H. 419; Knox *v.* Knox, 12 N. H. 352.

11. Swett *v.* Sullivan, 7 Mass. 342; Knox *v.* Knox, 12 N. H. 352.

12. **Bond to stay execution,** see *infra,* II, B, 2.

13. Bradstreet *v.* Partridge, 59 Me. 155; Curtis *v.* Curtis, 47 Me. 525.

14. Booth Bros. & H. I. G. Co. *v.* Smith, 115 Me. 89, 97 Atl. 826.

15. Keene *v.* White, 136 Mass. 23; Hart *v.* Huckins, 5 Mass. 260.

[a] **Though where this remedy is lost** without fault, a review may be granted on good cause shown. Keene *v.* White, 136 Mass. 23. But *compare* Elden *v.* Cole, 8 Greenl. (Me.) 211.

16. **Me.**—Gooding *v.* Baker, 60 Me. 52. **Mass.**—Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640; Lucas *v.* Lucas, 3 Gray 136. **N. H.** Solomons *v.* Chesley, 57 N. H. 163, judgments in civil actions on issue joined may be reviewed under statute.

[a] **Action need not be commenced by writ** to authorize review of judgment therein. Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640, holding previous decisions to be dictum.

[b] **Whether upon verdict or award,** the judgment may be reviewed. Gooding *v.* Baker, 60 Me. 52.

[c] **A judgment on a referee's report** may be reviewed. Gooding *v.* Baker, 60 Me. 52. *Compare* Bennett *v.* Atwood, 57 N. H. 216, where reference was had by stipulation.

[d] **Final judgment on petition to enforce mechanic's lien** may be reviewed. Hubon *v.* Bousley, 123 Mass. 368.

[e] **Decree in partition** may be reviewed by statute. Dyer *v.* Wilbur, 48 Me. 287; Elwell *v.* Sylvester, 27 Me. 536. But see Nichols *v.* Nichols, 28 Vt. 228, 67 Am. Dec. 699, under statute allowing review in "civil causes."

[f] **Divorce decrees** cannot be reviewed. Lucas *v.* Lucas, 3 Gray (Mass.) 136; Sheafe *v.* Sheafe, 29 N. H. 269.

[g] **Decrees in equity** cannot be reviewed by writ of review. Brooks *v.* Howard, 55 N. H. 69.

[h] **Probate decrees** cannot be reviewed. Barnes *v.* Abbott, 55 N. H. 147.

[i] **Default judgments obtained on trustee process** may be reviewed. Allen *v.* Seaver, 38 Vt. 673.

[j] **Criminal judgments** cannot be reviewed. Gooding *v.* Baker, 60 Me. 52; Wells' Case, 2 Me. 322, 11 Am. Dec. 101.

17. Booth Bros. & H. I. G. Co. *v.* Smith, 115 Me. 89, 97 Atl. 826; Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

[a] **A party in interest** not a party of record may obtain a review on filing

covered evidence,[18] fraud, accident or mistake preventing the doing of justice,[19] false testimony of a witness as to material facts taking a party by surprise,[20] the making of a material amendment to the declaration without notice,[21] and the rendition of a default judgment against a party without appearance.[22]

D. Proceedings To Procure Issuance of Writ. — The proceedings to procure a writ of review must be in conformity to the statute.[23] A writ of review is granted by an order,[24] of the court applied to,[25] after a hearing,[26] on notice[27] upon a petition therefor[28] filed by either party or a person succeeding to his interest,[29] except where the writ

a petition showing such interest and on filing a bond. Johnson *v.* Johnson, 81 Me. 202, 16 Atl. 661.

[b] **A review cannot be had for correction errors of record** for which a writ of error is the proper remedy. Elden *v.* Cole, 8 Greenl. (Me.) 211.

18. Trask *v.* Unity, 74 Me. 208.

[a] **Evidence Must Be Such That It Will Probably Change the Result.** Trask *v.* Unity, 74 Me. 208.

[b] **Evidence must not be collateral** merely. Trask *v.* Unity, 74 Me. 208.

19. Farnsworth *v.* Kimball, 112 Me. 238, 91 Atl. 954; Taylor *v.* Morgan & Co., 107 Me. 334, 78 Atl. 377; Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143; Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683; Barron *v.* Jackson, 42 N. H. 419.

[a] **Unless Due to Party's Own Negligence.** — Farnsworth *v.* Kimball, 112 Me. 238, 91 Atl. 954; Taylor *v.* Morgan & Co., 107 Me. 334, 78 Atl. 377.

[b] **Negligence of counsel,** see Parke *v.* Murdock, 177 Mass. 453, 59 N. E. 80; Sylvester *v.* Hubley, 157 Mass. 306, 32 N. E. 166.

20. Sturtevant *v.* Randall, 49 Me. 446.

21. Fogg *v.* Merrill, 74 Me. 523.

22. McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856; Manning *v.* Nettleton, 140 Mass. 421, 4 N. E. 802; Smith *v.* Brown, 136 Mass. 416.

23. See Kelsey *v.* District Court, 22 Wyo. 297, 139 Pac. 433.

[a] **Issuance of Writ of Review on an Appeal Is Erroneous.**—Clarke *v.* Bacall, 171 Mass. 292, 50 N. E. 614.

24. Bradstreet *v.* Partridge, 59 Me. 155; Hopkins *v.* Benson, 21 Me. 399.

[a] **Amendment of order** permissible. Parke *v.* Murdock, 177 Mass. 453, 59 N. E. 80.

25. Hopkins *v.* Benson, 21 Me. 399; Barron *v.* Jackson, 42 N. H. 419.

[a] **Where the judgment was rendered by a justice's court,** application should be made to the court of common pleas. Merrill *v.* Crockett, 6 Greenl. (Me.) 412.

[b] **Supreme judicial court** may grant review of judgment of superior court. Gooding *v.* Baker, 60 Me. 52.

26. Hopkins *v.* Benson, 21 Me. 399.

27. Colby *v.* Dennis, 36 Me. 9.

28. Bradstreet *v.* Partridge, 59 Me. 155, petition praying for liberty to sue out writ.

[a] **The names of witnesses** by whom the facts are to be proved, and a statement of facts expected to be proved by each must be allege. Haskell *v.* Hazard, 33 Me. 585; Thompson *v.* Hinds, 33 Me. 584.

[b] **The petition must be served and entered** as a separate action. Bradstreet *v.* Partridge, 59 Me. 155.

[c] **The Petition May Be Amended.** Haskell *v.* Hazard, 33 Me. 585; Winch *v.* Hosmer, 122 Mass. 438; Davenport *v.* Holland, 2 Cush. (Mass.) 1.

[d] **A cause of review newly discovered** since the filing of the petition may be inserted by amendment. Davenport *v.* Holland, 2 Cush. (Mass.) 1.

[e] **Substitution of another party petitioner** not permitted. Elwell *v.* Sylvester, 27 Me. 536. *Compare* Winch *v.* Hosmer, 122 Mass. 438.

29. Me.—Elwell *v.* Sylvester, 27 Me. 536. **Mass.**—Winch *v.* Hosmer, 122 Mass. 438; Fuller *v.* Storer, 111 Mass. 281. **N. H.**—Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469 (assignee of bankrupt may petition for review); Knox *v.* Knox, 12 N. H. 352.

[a] **Stranger** to suit cannot have review. Elwell *v.* Sylvester, 27 Me. 536; Manning *v.* Nettleton, 140 Mass. 421, 4 N. E. 802.

[b] **Use plaintiff** may obtain review. Winch *v.* Hosmer, 122 Mass. 438.

[c] **Administrator Cannot Petition**

is a matter of right, when no petition is required.[30] The petitioner cannot require the respondent to answer the petition,[31] although probably the court may order the filing of an answer.[32]

Bond. — Before execution is stayed or superseded, the petitioner for a writ of review must give a bond conditioned as prescribed by statute.[33]

E. THE WRIT. — If the petition is granted, the petitioner sues out his writ of review,[34] which should be entered as a new action,[35] after service or attachment made.[36] The writ of review issues under the seal of the court,[37] with the teste of a justice of the court,[38] but it need not be endorsed.[39] It is required to recite briefly the former proceedings,[40] and to contain a summons to the defendant to appear and answer,[41] although sometimes it is issued in the form of a capias and attachment.[42] The writ may be amended.[43]

F. PROCEEDINGS AFTER ISSUANCE OF THE WRIT. — Upon a review the case is to be tried substantially as if no judgment had been rendered previously.[44] The case is to be heard on the original pleadings,[45] unless the judgment in the original action was rendered without a joinder of issue, in which case the parties shall plead or answer as they might have done originally.[46] The court may allow the original pleadings to be amended.[47]

for Review in His Own Name.—Skillings· *v.* Massachusetts B. Assn., 155 Mass. 581, 30 N. E. 367.

[d] **Each of several defendants** may separately petition for writ. Parke *v.* Murdock, 177 Mass. 453, 59 N. E. 80. See Nowell *v.* Sanborn, 44 Me. 80.

30. See the statute.

31. Hastings *v.* Parker, 168 Mass. 445, 47 N. E. 194.

[a] **Default for failure to answer** is not permissible. Hastings *v.* Parker, 168 Mass. 445, 47 N. E. 194.

32. Hastings *v.* Parker, 168 Mass. 445, 47 N. E. 194, query.

33. **Me.**—McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89; Whittaker *v.* Berry, 64 Me. 236. **Mass.**—Quinn *v.* Brennan, 148 Mass. 562, 20 N. E. 184; Swett *v.* Sullivan, 7 Mass. 342. **Vt.**—Brown *v.* Clark, 28 Vt. 690.

34. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89; Bradstreet *v.* Partridge, 59 Me. 155.

[a] **Writ will be quashed on motion** if petitioner is not entitled to it. Hall *v.* Wolcott, 10 Mass. 218.

35. Bradstreet *v.* Partridge, 59 Me. 155, the case cannot be heard under the entry of the petition for review.

36. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89, may be served as other writs.

37. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89.

38. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89.

39. Tracy *v.* Perry, 5 N. H. 172, not being an original writ.

40. Knox *v.* Knox, 12 N. H. 352.

41. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89.

42. Burrell *v.* Burrell, 10 Mass. 221.

43. Burrell *v.* Burrell, 10 Mass. 221.

[a] **Person suing it out may change the return day** of the writ before service. Plumer *v.* Fogg, 18 N. H. 559.

44. Johnson *v.* Atlantic & S. L. R. R., 43 N. H. 410.

[a] **All issues of fact or law** tried in the original action or which were omitted to be raised through no fault of the petitioner may be retried. Fuller *v.* Storer, 111 Mass. 281.

[b] **Objection to improper issuance** of writ made at trial is timely. Smith *v.* Brown, 136 Mass. 416.

[c] **Findings of Fact.** — Sturtevant *v.* Randall, 49 Me. 446.

45. **Me.**—Bradstreet *v.* Partridge, 59 Me. 155; Elwell *v.* Sylvester, 27 Me. 536. **Mass.**—Fuller *v.* Storer, 111 Mass. 281. **N. H.**—Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469; Knox *v.* Knox, 12 N. H. 352.

46. Nowell *v.* Sanborn, 44 Me. 80; Fuller *v.* Storer, 111 Mass. 281.

47. Fuller *v.* Storer, 111 Mass. 281; Zollar *v.* Janvrin, 49 N. H. 114, 6 Am.

The judgment is rendered without regard to the former judgment,[48] except that if the plaintiff's recovery exceeds the former judgment he has judgment for the excess,[49] and if his recovery is less, the defendant has judgment for the difference.[50] The latter judgment may be set off against the original judgment,[51] or if that has been paid, it may be collected as any original judgment.[52]

Review. — The order of the court granting or denying a petition for a writ of review being discretionary cannot be reviewed on exceptions,[53] except for erroneous rulings in matters of law.[54] But a judgment rendered after a trial on a review may be appealed from.[55]

Costs. — The costs on the petition for review have been held to be within the court's discretion.[56] But the costs on the trial of the review are generally allowed to the prevailing party,[57] unless the court otherwise orders.[58]

G. SUCCESSIVE WRITS. — A judgment on a petition of review upon the merits is a bar to a subsequent review, but a judgment not on the merits is not.[59]

Rep. 469; Knox *v.* Knox, 12 N. H. 352.

[a] **New ground of action** cannot be added. Edgerly *v.* Emerson, 4 N. H. 147. See the title "**New Cause of Action or Defense.**"

[b] **Filing of demurrer to original declaration** is allowable in court's discretion. Colebrook *v.* Merrill, 49 N. H. 213.

48. Whittaker *v.* Berry, 64 Me. 236; Curtis *v.* Curtis, 47 Me. 525.

[a] **Court not limited as to form** of judgment. Fuller *v.* Storer, 111 Mass. 281.

[b] **Former Judgment Cannot Be Reversed.**—Curtis *v.* Curtis, 47 Me. 525.

[c] **If the former judgment is right,** judgment for costs only will be rendered. Dyer *v.* Wilbur, 48 Me. 287.

49. Whittaker *v.* Berry, 64 Me. 236; Dunlap *v.* Burnham, 38 Me. 112.

50. Whittaker *v.* Berry, 64 Me. 236.

51. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89; Bradstreet *v.* Partridge, 59 Me. 155; Curtis *v.* Curtis, 47 Me. 525.

52. McDonough *v.* Blossom, 111 Me. 66, 88 Atl. 89; Bradstreet *v.* Partridge, 59 Me. 155.

53. Berry *v.* Titus, 76 Me. 285; Sherman *v.* Ward, 73 Me. 29; Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177; Stillman *v.* Donovan, 170 Mass. 360, 49 N. E. 628; Boston *v.* Robbins, 116 Mass. 313.

[a] **Not Reviewable on Writ of Error.**—Parke *v.* Murdock, 177 Mass. 453, 59 N. E. 80.

54. Stillman *v.* Donovan, 170 Mass. 360, 49 N. W. 628; Hayes *v.* Collins, 114 Mass. 54.

[a] **Where Petition Is Granted Without Statutory Showing Being Made.** — Grant *v.* Spear, 105 Me. 508, 74 Atl. 1130; Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

[b] **Erroneous Rulings on Admissibility of Evidence.**—Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177.

[c] **Erroneous Rulings as to Jurisdiction of Court.**—Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177.

[d] **Erroneous Rulings as to Law Applicable to Case.**—Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177.

55. Tay *v.* Piage, 37 N. H. 468.

56. Hopkins *v.* Benson, 21 Me. 399, holding application is included in statute regulating matter of costs on application for certiorari, mandamus and "like process."

[a] **A petition for review is not an action** within the meaning of a statute allowing costs to the prevailing party in all actions. Hopkins *v.* Benson, 21 Me. 399.

57. **Me.**—Curtis *v.* Curtis, 47 Me. 525; Dodge *v.* Reed, 40 Me. 331. **Mass.** Pasche *v.* Graham, 180 Mass. 157, 61 N. E. 883; Durgin *v.* Leighton, 10 Mass. 56. **N. H.**—Knox *v.* Knox, 12 N. H. 352.

58. Woodbury *v.* Parshley, 10 N. H. 392, court may limit costs where damages are reduced a small amount only.

59. Hayes *v.* Collins, 114 Mass. 54;

III. INJUNCTION AGAINST REVIEW BY APPEAL. — In a proper case equity may enjoin a party from appealing.[60]

Frost *v.* Philbrook, 28 Vt. 736. See generally the title "**Judgments.**"

[a] **A review commenced and discontinued** is not a bar to another review in the same action. Burrell *v.* Burrell, 10 Mass. 221.

60. Perkins *v.* Woodfolk, 8 Baxt. (Tenn.) 411. See **Ill.**—Chapman *v.* American Sur. Co., 261 Ill. 594, 104 N. E. 247. **Miss.**—Ford *v.* Weir, 24 Miss. 563. **N. Y.**—Kilmer *v.* Bradley, 13 Jones & S. 585.

Injunction against suits, see the title "**Suits and Actions.**"

[a] **Where right to appeal is clear,** an injunction will not be granted. State *v.* Jacksonville, P. & M. R. Co., 15 Fla. 201.

REVIVAL OF JUDGMENTS AND DECREES. — See **Judgments and Decrees, Revival of.**

REVIVOR

By the Editorial Staff.

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CROSS-REFERENCES:

Appeals;
Judgments and Decrees, Revival of;
Survival.

Abatement or revival of particular actions or proceedings, see the specific titles.

Against personal representative, presentation of claim as prerequisite, see 6 STANDARD PROC. 528; against representative of garnishee, see 10 STANDARD PROC. 487.

Of judgments generally, see the title "Judgments and Decrees, Revival of;" of judgments of justice of peace, see 18 STANDARD PROC. 149.

Of action by landlord to recover leased premises, see 18 STANDARD PROC. 567.

Of third party claim, see 16 STANDARD PROC. 147.

On appeal, see 2 STANDARD PROC. 233.

Representation of infant defendant in revivor proceedings, see 10 STANDARD PROC. 716.

Recovery of costs where action abates, see 5 STANDARD PROC. 843.

For forms, see 9 STANDARD PROC. 1090, et seq.

For further references and cross-references, see the index to this work and cross-references throughout this article.

I. DEFINITION. — A revivor of a cause is a proceeding having for its purpose the restoration of an action and the substitution of the representative or successor in interest of a party where the cause has abated or become defective by reason of his death or marriage or by the transfer of his interest.[1]

II. RIGHT TO REVIVE ACTIONS AND SUITS GENERALLY.

A. GENERALLY. — There was no revival of actions at common law, on the death of a party, even though the action was originally maintainable for or against the representative of the deceased party. It was necessary to bring a new suit,[2] except where death occurred between interlocutory and final judgment.[3] But in equity, although the suit abated on the death of a party, it could always be revived if it survived.[4] And statutes have generally provided for revivor of actions at law if the cause of action survives; many of these statutes apply both to actions at law and proceedings in equity.[5] Statutes relating to revivor of original actions have been held applicable to proceedings in error and on appeal,[6] and to actions before justices of the peace.[7]

B. IN THE FEDERAL COURTS. — Suits may be revived in the federal courts where the causes of action upon which they are founded[8]

1. See *infra* this note and article.

[a] **An order substituting the personal representatives** of a deceased plaintiff operates as a revivor. Webster *v.* Hitchcock, 11 Mich. 56.

[b] **So long as the personal representative fails to become a party,** the suit remains unrevived. Holman *v.* Clark, 11 Ala. App. 238, 65 So. 913.

[c] **The proceeding under a statute providing that the death of a party may be suggested** on the record and the action proceed in the name of or against the survivor is in no sense a revivor. Phoenix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

As to revivor of judgments, see the title, "**Judgments and Decrees, Revival of.**"

2. See Booth's Admrs. *v.* Northrop, 27 Conn. 325; Reid's Admr. *v.* Strider's Admr., 7 Gratt. (48 Va.) 76, 83, 54 Am. Dec. 120, and the title, "**Survival.**"

3. See *infra,* III, F, 4, g.

4. Reid's Admr. *v.* Strider's Admr., 7 Gratt. (48 Va.) 76, 54 Am. Dec. 120. See *infra,* III, F, 3.

5. See generally the statutes and the following cases: **U. S.**—Green *v.* Watkins, 6 Wheat. 260, 5 L. ed. 256. **Ala.**—State *ex rel.* King *v.* Pearce, 14 Ala. App. 628, 71 So. 656; State *ex rel.* Townley *v.* Pugh, 14 Ala. App. 585, 70 So. 973. **D. C.**—Welch *v.* Lynch, 30 App. Cas. 122. **Fla.**—Gould *v.* Carr, 33 Fla. 523, 537, 15 So. 259, 24 L. R. A. 130. **Kan.**—Reaves & Co. *v.* Long, 63 Kan. 700, 66 Pac. 1030. **Mass.**—Electric Welding Co. *v.* Prince, 195 Mass. 242, 81 N. E. 306. **Okla.**—Glazier *v.* Heneybuss, 19 Okla. 316, 91 Pac. 872. **Vt.**—Benson *v.* Crain, 91 Vt. 44, 99 Atl. 255.

[a] **That the proceedings do not disclose facts showing that the action survives** does not destroy the right to continue the action if the cause of action in fact survives. Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

6. Hayden *v.* Huff, 62 Neb. 375, 87 N. W. 184; Foresman *v.* Haag, 37 Ohio St. 143; Black *v.* Hill, 29 Ohio St. 86. And see 2 STANDARD PROC. 234.

7. Miller *v.* Curry, 17 Neb. 321, 22 N. W. 559; People *ex rel.* Egan *v.* Justices of Marine Court, 81 N. Y. 500, 8 Abb. N. C. 377, 59 How. Pr. 413.

8. Warren *v.* Furstenheim, 35 Fed. 691, 1 L. R. A. 40.

As to what causes of action survive in the federal court, see the title "**Survival.**"

[a] **The right does not depend upon** the right of revivor which would have existed had the suit been brought in a state court. Warren *v.* Furstenheim, 35 Fed. 691, 1 L. R. A. 40.

[b] **Law Governing.—The mode of**

survive. The right to revive an action is not lost by the removal of the cause into a federal court.[9]

III. REVIVOR IN CASE OF DEATH OF A PARTY. — A. NECESSITY OF AND WAIVER.[10] — **1. Generally.** — Where pending an action a party dies and there is no person before the court by or against whom the action can proceed, a revivor or continuation is necessary before further proceedings can be had,[11] except where one[12] of several

reviving a suit in a federal court is governed by the law of the state, except so far as congress has regulated the subject. Gerling *v.* Baltimore & O. R. Co., 153 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311.

9. Baltimore & O. R. Co. *v.* Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. ed. 677. See *In re* Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. ed. 1134.

10. **Necessity for revivor where defendant dies after decree,** see 6 STANDARD PROC. 788.

11. **U. S.**—Kennedy *v.* Bank of Georgia, 8 How. 586, 610, 12 L. ed. 1209. **Ala.**—Long *v.* Kansas City, M. & B. R. Co., 170 Ala. 635, 54 So. 62; Holman *v.* Clark, 11 Ala. App. 238, 65 So. 913. **Ark.**—*Ex parte* Gilbert, 93 Ark. 307, 124 S. W. 762. **Cal.**—Judson *v.* Love, 35 Cal. 463. **Ga.**—Ellard *v.* Coleman, 145 Ga. 18, 88 S. E. 554. **Ill.**—Mitchell *v.* King, 187 Ill. 452, 457, 55 N. E. 637, 58 N. E. 310. **Ky.** Sackett *v.* Grinstead, 176 Ky. 91, 195 S. W. 103; Croan *v.* Maraman's Guardian, 148 Ky. 135, 146 S. W. 398; Grove *v.* Grove's Admrs., 18 Ky. L. Rep. 807, 18 S. W. 456. **La.**—Ansley *v.* Stuart, 121 La. 629, 46 So. 675. **Mo.** Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; Murphy *v.* Redmond, 46 Mo. 317. **Neb.**—Fox *v.* Abbott, 12 Neb. 328, 11 N. W. 303. **N. Y.**—Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863; Ullman-Einstein Co. *v.* Crimmins, 166 App. Div. 731, 152 N. Y. Supp. 251. **N. C.**—Burnett *v.* Lyman, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691. **Tenn.** Morrison *v.* Deaderick, 10 Humph. 342. **Va.**—Wilson *v.* Smith, 22 Gratt. (63 Va.) 493, 503.

[a] **On death of a necessary party,** a revivor is required. Ansley *v.* Stuart, 121 La. 629, 46 So. 675.

[b] **On death after judgment,** before further proceedings can be had a revivor is necessary unless statute provides otherwise. Buchanan *v.* Boyd's Exr., 131 Ky. 433, 115 S. W. 222, 120 S. W. 295. See Tipton *v.* Tipton, 118 Tenn. 691, 104 S. W. 237, as to procedure where party dies after decree. *Compare* Stone *v.* Ringer, 4 Heisk. (Tenn.) 265, holding that an appeal may be taken without a revivor where the plaintiff dies after judgment and before the end of the term.

Revivor as a condition precedent to the issuance of execution, See 15 STANDARD PROC. 764.

Necessity of scire facias to authorize sale on execution where party dies after issuance of execution, see 16 STANDARD PROC. 180.

[c] **On death after confirmation of sale** on judgment and deed ordered, a revivor is not necessary to perfect the title, by virtue of statute. Likens *v.* Pate, 160 Ky. 319, 169 S. W. 734; Garrison *v.* Clark, 151 Ky. 565, 152 S. W. 581. *Contra,* Croan *v.* Maraman's Guardian, 148 Ky. 135, 146 S. W. 398, decided before the statute.

[d] **But in a proceeding to establish the validity of a will,** no revivor is necessary on the death of the proponent as all parties defendants are practically, though not nominally, aligned as plaintiffs and defendants as they respectively seek to sustain or destroy the will. Carolan *v.* O'Donnell, 141 App. Div. 463, 126 N. Y. Supp. 551.

As to revivor on appeal, see 2 STANDARD PROC. 233.

12. Moses *v.* Wooster, 115 U. S. 285, 6 Sup. Ct. 38, 29 L. ed. 391; Burrows *v.* Pickens, 129 Ala. 648, 29 So. 694; Davis *v.* Davis, 93 Ala. 173, 9 So. 736; Phoenix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108. *Compare* Chapman *v.* Chapman, 194 Ala. 518, 70 So. 121. See also the title, "**Survival.**"

[a] **In equity,** on the death of a defendant the suit abates so far as proceedings against him are concerned, and if he is an indispensable party, all proceedings must be suspended till his representatives are brought in. But no revivor is necessary if his interest wholly ceases or survives to one

parties die, and except where a party dies after verdict or decision.[13] In the former case, on suggestion of the death, the action proceeds in the name of or against the survivors,[14] and in the latter case, judgment is rendered as if the party were alive.[15] A revivor, or rather a continuation, is necessary, even where statute provides that an action shall not abate.[16]

Without a revivor, except where it is waived, a suit abates on the death of a party,[17] and subsequent proceedings are void or voidable.[18]

On the death of a mere formal party, the suit may proceed without a revivor.[19]

Waiver. — A formal revivor of an action may be waived by conduct of the parties.[20]

2. As to Cross Petitions. — On revivor of the action, no revivor as to cross petitions is necessary, as the revivor applies to the whole case.[21]

3. On Death of Nominal Party. — Under statute no revivor is necessary on the death of a nominal plaintiff.[22]

4. On Death of Next Friend. — No revivor is necessary on the substitution of a new next friend on the death of the one who had previously acted.[23]

B. PENDING ACTIONS ONLY CAN BE REVIVED. — The statutes relat-

of the parties. Worley *v.* Dade County Sec. Co., 52 Fla. 666, 42 So. 527.

13. See the title, "**Survival**" and 14 STANDARD PROC. 785.

14. See the title, "**Survival.**"

15. See 14 STANDARD PROC. 785, and the title, "**Survival.**"

16. **Colo.**—First Nat. Bank *v.* Hotchkiss, 49 Colo. 593, 114 Pac. 310. **N. Y.**—Holsman *v.* St. John, 90 N. Y. 461 (a revivor is not necessary. It is only a question of bringing in proper parties to continue the action). Carolan *v.* O'Donnell, 141 App. Div. 463, 126 N. Y. Supp. 551. **N. C.**—Burnett *v.* Lyman, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691.

17. Glenn *v.* Payne, 48 Okla. 196, 149 Pac. 1151.

18. Croan *v.* Maraman's Guardian, 148 Ky. 135, 146 S. W. 398; Fishback *v.* Green, 87 Ky. 107, 7 S. W. 881.

[a] **A verdict rendered after death of party** without revivor is unauthorized and it is erroneous to refuse to grant a new trial. Ellard *v.* Coleman, 145 Ga. 18, 88 S. E. 554.

Validity of judgments rendered after the death of a party, see 14 STANDARD PROC. 782.

19. Dennis *v.* Green, 8 Ga. 197; Hancock *v.* Hancock, 22 N. Y. 568.

20. **U. S.**—McNeil *v.* McNeil, 170 Fed. 289, 95 C. C. A. 485. **Ala.**—E. E. Forbes Piano Co. *v.* Hay, 75 So. 408; Parker's Admr. *v.* Abrams, 50 Ala. 35. **Ark.**—Keffer *v.* Stuart, 127 Ark. 498, 193 S. W. 83. **Kan.**—Reed *v.* Sexton's Admrs., 20 Kan. 195. **Ky.**—Spalding *v.* Wathen, 7 Bush 659.

As to revival by consent, see *infra,* III, F, 4, f.

[a] **By answering and going to trial** without raising the question concerning the revivor of an action, a formal revivor is waived. Reed *v.* Sexton's Admrs., 20 Kan. 195.

[b] **By taking an order or decree** in a suit without a revivor, a party is estopped to object to a want of revivor. McNeil *v.* McNeil, 170 Fed. 289, 95 C. C. A. 485.

As to waiver of process, see *infra,* III, F, 4, d, (II).

21. Brown *v.* Kuhn, 40 Ohio St. 468.

22. See the statute and Chambers *v.* Porter, 5 Coldw. (Tenn.) 273; Moore *v.* Rice, 51 Tex. 289.

As to abatement after death of nominal party, see the title, "**Survival.**"

23. Missouri Pac. Ry. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343; Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555.

Abatement on death of next friend, see the title, "**Survival.**"

ing to revivor of actions contemplate the existence and pendency of an action at the time of the death of the party.[24]

Where Defendant Is Not Served. — An action may be revived against the representatives of the defendant even though the defendant has not been served, if the action is regarded as commenced,[25] but it is otherwise if the action is not deemed commenced until service of process.[26]

After Attachment. — By the allowance of an attachment, the court has jurisdiction to continue the action in the name of the representative of a deceased party.[27]

C. In What Court Action Must Be Revived. — The action must be revived in the court in which the action is pending at the time of the death of the party.[28]

24. Daykin *v.* Emery, 10 Ohio Cir. Ct. 652, 5 Ohio Cir. Dec. 121; Robinson *v.* Scott, 81 Ore. 20, 158 Pac. 268.

25. **U. S.**—*In re* Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. ed. 1134. **Me.**—Hubbard *v.* Johnson, 77 Me. 139. **Mich.**—Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580; Gordon *v.* Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70. **Mont.**—Lavell *v.* Frost, 16 Mont. 93, 40 Pac. 146.

26. **Minn.**—Auerbach *v.* Maynard, 26 Minn. 421, 4 N. W. 816. **Ohio.** Daykin *v.* Emery, 10 Ohio C. C. 652, 5 Ohio Cir. Dec. 121. **Ore.**—White *v.* Johnson, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[a] **Where the defendant dies pending publication of summons,** the suit cannot be revived against his representatives. Auerbach *v.* Maynard, 26 Minn. 421, 4 N. W. 816.

As to what constitutes commencement of action, see title "**Suits and Actions.**"

27. **N. H.**—Buswell *v.* Babbitt, 65 N. H. 168, 18 Atl. 748. **N. Y.**—Logan *v.* Greenwich Trust Co., 144 App. Div. 372, 129 N. Y. Supp. 577; Moore *v.* Thayer, 10 Barb. 258, 6 How. Pr. 47, 3 Code Rep. 176. **Ore.**—White *v.* Johnson, 27 Ore. 282, 291, 40 Pac. 511, 50 Am. St. Rep. 726.

28. Zahn *v.* Obert (Okla.), 159 Pac. 298.

[a] **Where death is suggested before trial** or judgment, the revivor should be made in the trial court, not in the appellate court. Wilkinson *v.* Vordermark, 32 Ind. App. 633, 70 N. E. 538.

[b] **On death before docketing of appeal,** the trial court or the supreme court may revive the action, under statute. Martin *v.* Martin, 162 N. C. 41, 77 S. E. 1104.

[c] **On death after judgment and before the taking of an appeal,** (1) the appellant must "either have an order for substitution in the court below and present such order as a part of the transcript, or must present the facts by which he claims the right so to substitute and appeal to this court in such a way that this court will not be left to conjecture or doubt as to why he has undertaken to exercise said right of substitution." Waldrip *v.* McConnell, 42 Ind. App. 54, 84 N. E. 517. (2) Where the plaintiff dies after recovery of judgment, the defendant must file a copy of the judgment and have an appeal granted and within one year revive the suit in the appellate court. Buchanan *v.* Boyd's Exr., 131 Ky. 433, 115 S. W. 222, 120 S. W. 295. See also Chatfield *v.* Jarratt, 108 Ark. 523, 158 S. W. 146 (holding the chancery court cannot revive an action after judgment. The party should appeal and move for a revivor in the appellate court); Riley *v.* Gitterman, 55 Hun 605, 10 N. Y. Supp. 38.

[d] **The mere taking of an appeal** from an order granting a new trial and filing a short transcript in the appellate court does not preclude the trial court from permitting a revivor in order to let the administrator file a bill of exceptions. Crawford *v.* Chicago R. I. & P. R. Co., 171 Mo. 68, 66 S. W. 350.

[e] **After perfection of an appeal,** the trial court cannot revive the action. Lasseter *v.* Deas, 9 Ala. App. 564, 63 So. 735.

D. WHO MAY APPLY FOR REVIVOR. — It is the primary duty of the plaintiff to cause a revivor to be made on the death of a party.[29] The defendant cannot procure a revivor after the death of a sole plaintiff,[30] unless the statute authorizes an application by him,[31] or, under the equity practice, when he has acquired some rights in the suit.[32] Some statutes allow him to move for a dismissal unless the plaintiff revives the suit within a specified time.[33]

In Equity. — Where the plaintiff in an equity suit has a right to abandon his cause at pleasure, his heirs or personal representatives alone can revive the suit.[34] But when the defendant has acquired such an interest in the cause that the plaintiff should not be allowed to abandon it, defendant may revive it.[35]

E. IN WHOSE NAME ACTION IS REVIVED. — **1. Generally.** — The code provides that on the death of the plaintiff or defendant, the action may be continued against his representative, or, under some codes, personal representative or successor in interest.[36] When the right of a deceased plaintiff or defendant has passed to his personal

29. **Cal.**—Judson *v.* Love, 35 Cal. 463. **Ind.**—Wilkinson *v.* Vordermark, 32 Ind. App. 633, 637, 70 N. E. 538. **N. Y.**—Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863. **N. C.**—Lynn *v.* Lowe, 88 N. C. 478.

[a] **The filing of a plea or account of set-offs** does not make the original plaintiff a defendant so as to prevent a revivor by him or his representatives. Kinzie *v.* Riely's Exr., 100 Va. 709, 42 S. E. 872.

30. Brown *v.* Fletcher, 140 Fed. 639; Reid *v.* Stuart's Exr., 20 W. Va. 382.

31. **Ark.**—Anglin *v.* Cravens, 76 Ark. 122, 88 S. W. 833. **Ill.**—Strauss *v.* Merchants L. & T. Co., 119 Ill. App. 588. **N. Y.**—Citizens' Nat. Bank *v.* Bang, 112 App. Div. 748, 99 N. Y. Supp. 76. **Ore.**—Stivers *v.* Byrkett, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386, the party desiring to proceed should make the motion. **R. I.** Sprague *v.* Greene, 20 R. I. 153, 37 Atl. 699.

32. See *infra*, this section.

[a] **The code has not changed the equity rule** that the defendant cannot revive the action unless he has acquired some rights in it. Livermore *v.* Bainbridge, 49 N. Y. 125.

33. **Compelling plaintiff to revive,** see *infra*, III, F, 4, 8.

34. **Md.**—Griffith *v.* Bronaugh, 1 Bland 547. **N. Y.**—McDermott *v.* Mc. Gown, 4 Edw. Ch. 592. **W. Va.**—Reid *v.* Stuart's Exr., 20 W. Va. 382, 392.

35. **Md.**—Griffith *v.* Bronaugh, 1 Bland 547. **N. J.**—Peer *v.* Cookerow, 13 N. J. Eq. 136. **N. Y.**—McDermott *v.* McGown, 4 Edw. Ch. 592. **Tenn.** Thompson *v.* Hill, 5 Yerg. 418. **W. Va.** Reid *v.* Stuart's Exr., 20 W. Va. 382, 392. **Eng.** — Whitehear *v.* Hughes, Dick. 283, 21 Eng. Reprint 277.

[a] **After a decretal order** by which the defendant becomes entitled to an interest in the further continuance of the suit, the defendant may revive it. McDermott *v.* McGown, 4 Edw. Ch. (N. J.) 592; Souillard *v.* Dias, 9 Paige (N. Y.) 393.

[b] **Where there has been such an order of reference** that if a balance should be found in favor of the defendant, a judgment therefor may be rendered in his favor, and where in that stage of the case the plaintiff dies, the defendant may revive the suit. Reid *v.* Stuart's Exr., 20 W. Va. 382, 392.

[c] **Where defendant files a cross-bill** asking affirmative relief, his representatives may file a bill of revivor. Woolsey *v.* Livingston, 5 Johns. Ch. (N. Y.) 265.

36. See generally the codes.

[a] **The word "representatives"** includes not only executors and administrators but all who occupy the position held by the deceased, succeeding to his rights and liabilities. State Fair Assn. *v.* Townsend, 69 Ark. 215, 63 S. W. 65; Willoughby *v.* St. Paul German Ins. Co., 80 Minn. 432, 83 N. W. 377.

[b] **The word "personal representatives"** does not include those suc-

representative, the revivor should be in their names.[37] Where the right has passed to the heirs or devisees, who could support the action if brought anew, the revivor may be in their names.[38]

2. **Where There Is No Personal Representative.** — Statutes sometimes authorize a revivor in the names of the heirs if there is no administration and no necessity therefor,[39] or if no person will administer on the estate of a deceased plaintiff or defendant.[40] And in the absence of such statute, it has been held that the heirs are the representatives of a party defendant where the administration of the estate is closed and the executor discharged.[41] Statutes sometimes authorize the appointment of a special administrator and a revival in his name, where there is no general administration.[42]

3. **Foreign Executors.** — In the absence of statute permitting it, an action cannot be revived in the name of a foreign executor,[43] unless

ceeding to the estate, but is limited to executors and administrators. Murphy *v.* Tillson, 64 Ore. 558, 130 Pac. 637.

[c] **The word "successor in interest"** includes (1) a sole legatee (Murray *v.* Murray, 6 Ore. 26, 31), or (2) the heirs at law claiming title under him (Waldorph *v.* Bortle, 4 How. Pr. [N. Y.] 358), as well as (3) the grantee of an heir. Cheney *v.* Rankin, 27 Misc. 609, 58 N. Y. Supp. 263, *overruling* Rogers *v.* Adriance, 22 How. Pr. (N. Y.) 97. (4) But the people of the state claiming by escheat, the real estate involved in a suit, are not successors within the statute. St. John *v.* West, 4 How. Pr. (N. Y.) 329, as they do not derive their title from the owner.

37. See the statutes and State Fair Assn. *v.* Townsend, 69 Ark. 215, 63 S. W. 65; Martin *v.* Tyree, 41 Ark. 314; Grace *v.* Neel, 41 Ark. 165; Burnett *v.* Layman, 130 Tenn. 423, 171 S. W. 76.

38. **U. S.**—Wilhite *v.* Skelton, 149 Fed. 67, 78 C. C. A. 635. **Ark.**—Keffer *v.* Stuart, 127 Ark. 498, 193 S. W. 83; State Fair Assn. *v.* Townsend, 69 Ark. 215, 63 S. W. 65. **Kan.**—Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008. **Ky.**—Buchanan *v.* Boyd's Exr., 131 Ky. 433, 115 S. W. 222, 120 S. W. 295.

[a] **As a general test,** a suit can not be revived in the name of a personal representative unless he was in a condition to bring the suit if commenced after the death of the plaintiff. Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008; Ferrin *v.* Kenney, 10 Metc. (Mass.) 294.

39. Low *v.* Felton, 84 Tex. 378, 19 S. W. 693; McCampbell *v.* Henderson, 50 Tex. 601, 611; Western Union Tel. Co. *v.* Kauffman (Tex. Civ. App.), 107 S. W. 630 (the heir's petition must show these facts); Galveston H. & S. A. Ry. Co. *v.* Kelley, (Tex. Civ. App.), 26 S. W. 470.

[a] **A suit cannot be revived against the heir of a debtor** unless the plaintiff might have brought the original action against him. McCampbell *v.* Henderson, 50 Tex. 601.

40. Hagan *v.* Patterson, 10 Bush (Ky.) 441 (the suit must be transferred to equity, the remedy against the heir being equitable); Preston *v.* Golde, 12 Lea (Tenn.) 267; Campbell *v.* Hubbard, 11 Lea (Tenn.) 6; Edgington *v.* Jamison, 2 Lea (Tenn.) 569.

[a] **Statute applies to replevin suits.** Edgington *v.* Jamison, 2 Lea (Tenn.) 569.

41. Willoughby *v.* St. Paul German Ins. Co., 80 Minn. 432, 83 N. W. 377.

42. Aetna L. Ins. Co. *v.* Taylor, 128 Ark. 155, 193 S. W. 540, Ann. Cas. 1918B, 1122; Brotherhood of Locomotive F. & E. *v.* Cole's Est., 113 Ark. 400, 168 S. W. 1073; Anglin *v.* Cravens, 76 Ark. 122, 88 S. W. 833.

[a] **The statute contemplates the death of the party in interest** and does not apply where the guardian dies. Missouri O. & G. R. Co. *v.* Gentry, 31 Okla. 579, 122 Pac. 537.

43. **U. S.**—Stromeyer Co. *v.* Aldrich, 227 Fed. 960; Kropff *v.* Poth, 19 Fed. 200. **Ala.**—Branch Bank *v.* McDonald, 22 Ala. 474. **Ark.**—Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966. **Colo.**—Williams *v.* Carr, 4 Colo. App. 363, 36 Pac. 644. **Ga.**—Isbell *v.* Blan-

he takes out ancillary letters.[44] Statutes, however, authorize the revivor of actions by[45] and against[46] foreign executors.

4. Executor De Son Tort. — An action against a defendant cannot be revived against an executor de son tort,[47] but there are cases to the contrary.[48]

5. Where Adverse Party Is Personal Representative of Deceased. A suit may be revived in the name of an adverse party who is the personal representative of the decedent.[49]

6. Rules Applied to Particular Actions. — a. *Personal Actions.* All personal actions,[50] including also actions concerning personal

chard, 94 Ga. 678, 21 S. E. 720; Jones *v.* Lamar, 77 Ga. 149.

[a] **The fact that the foreign executor of the defendant appeared** and defended the action does not give the court jurisdiction. Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966.

44. McNulta *v.* Huntington, 62 App. Div. 257, 70 N. Y. Supp. 897.

45. See the statutes.

[a] **Under Statute Authorizing Foreign Executors To Sue.**—Norman *v.* Goode, 113 Ga. 121, 38 S. E. 317; Hendrix *v.* Rieman, 6 Neb. 516.

[b] **The foreign executor will be substituted in preference to a temporary administrator** appointed in the state. Norman *v.* Goode, 113 Ga. 121, 38 S. E. 317.

46. See the statutes.

[a] **Under statute authorizing actions against** foreign executors. German-American Coffee Co. *v.* Johnston, 168 App. Div. 31, 153 N. Y. Supp. 866; Logan *v.* Greenwich Trust Co., 144 App. Div. 372, 129 N. Y. Supp. 577.

[b] **A statute authorizing suit** by a foreign executor does not authorize a revivor against him. Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966. *Contra*, Brown *v.* Brown, 35 Minn. 191, 28 N. W. 238.

47. Irwin *v.* Sterling, 27 Ga. 563, because the executor *de son tort* is liable for meddling with the assets of the estate.

48. Norfolk's Exr. *v.* Gantt, 2 Har. & J. (Md.) 435.

49. **Kan.**—Rice *v.* Hodge, 26 Kan. 164. **Miss.**—Smith *v.* Pattison, 45 Miss. 619, where one of the defendants who was plaintiff's administrator revived the suit in his name. **N. Y.** McGregor *v.* McGregor, 35 N. Y. 218, where co-executor revived suit against defendant who was appointed executor of plaintiff.

50. **Ala.**—State *ex rel.* King *v.* Pearce, 14 Ala. App. 628, 71 So. 656. **Ill.**—Wetherell *v.* Chicago City R. Co., 104 Ill. App. 357. **Ky.**—Meek's Heirs *v.* Ealy's Heirs, 2 J. J. Marsh 329. **Mass.**—Von Arnin *v.* American Tube Works, 188 Mass. 515, 74 N. E. 680. **Tenn.**—Burnett *v.* Layman, 130 Tenn. 423, 171 S. W. 76.

[a] **Actions for Damages for Injury to the Person or Character.**—**U. S.**—Martin *v.* Wabash R. Co., 142 Fed. 650, 73 C. C. A. 646. **Miss.** Hamel *v.* Southern R. Co., 108 Miss. 172, 66 So. 426, 809. **Pa.**—McCafferty *v.* Pennsylvania R. Co., 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690. **Tenn.**—McDonald *v.* Nashville, 114 Tenn. 540, 86 S. W. 317; Daniel *v.* East Tennessee Coal Co., 105 Tenn. 470, 58 S. W. 859; Akers *v.* Akers, 16 Lea 7, 10, 57 Am. Rep. 207.

[b] **Actions for Damages for Injury to Real Property.**—**Ala.**—Southern R. Co. *v.* Cowan, 129 Ala. 577, 29 So. 985. **Ind.**—Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126. **Mass.**—Nelson Theatre Co. *v.* Nelson, 216 Mass. 30, 102 N. E. 926. **Mo.** Musick *v.* Kansas City, S. & M. Ry. Co., 114 Mo. 309, 21 S. W. 491. **N. C.** Mast *v.* Sapp, 140 N. C. 533, 53 S. E. 350, 111 Am. St. Rep. 864, 5 L. R. A. (N. S.) 379; Rowe *v.* Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830; Fellow *v.* Fulgham, 7 N. C. 254. **Ohio.**—Union Sav. B. & T. Co. *v.* Western Union Tel. Co., 79 Ohio St. 89, 86 N. E. 478, 128 Am. St. Rep. 675.

[c] **Actions Ex Contractu for Money.**—**Ala.**—State *ex rel.* King *v.* Pearce, 14 Ala. App. 628, 71 So. 656. **Ark.**—Keffer *v.* Stuart, 127 Ark. 498, 193 S. W. 83, action on note. **Ill.**—Phillips *v.* Wilson, 25 Ill. App. 427. **Ind.** Columbian Relief Fund Assn. *v.* Walker, 26 Ind. App. 25, 59 N. E. 36, action on sick benefit policy. **Kan.**—Illinois T. & T. Co. *v.* McCoy, 86 Kan. 588,

estate,[51] must be revived in the name of the personal representative of the deceased, unless, under statute, there is no administration and no necessity therefor.[52]

b. *Actions Concerning Real Estate.* — Revivor of real actions and actions concerning realty,[53] including actions involving the title to

121 Pac. 1090, action on note. **N. Y.** Daniels *v.* Brodie, 3 Edw. Ch. 275. **S. C.**—Lorick *v.* Palmetto Nat. Bank, 76 S. C. 500, 57 S. E. 527. **Tex.**—Price *v.* Wiley, 19 Tex. 142, 70 Am. Dec. 323, action on note. **W. Va.**—Straight *v.* Ice, 56 W. Va. 60, 48 S. E. 837.

[d] **Action on Judgment.**—McLain *v.* Parker, 88 Kan. 717, 129 Pac. 1140.

[e] **An action for mesne profits** should be revived in the name of the administrator. Roberts *v.* Nelson, 86 Mo. 21.

51. Ind.—Wilkinson *v.* Vordermark, 32 Ind. App. 633, 70 N. E. 538. **Kan.** Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008. **Mo.**—Brewington *v.* Stephens' Admrs., 31 Mo. 38. **N. Y.** Matthews *v.* Delaware & H. Canal Co., 20 Hun 427. **Okla.**—Zahn *v.* Obert, 159 Pac. 298. **Tex.**—Low *v.* Felton, 84 Tex. 378, 19 S. W. 693; McCampbell *v.* Henderson, 50 Tex. 601. **Va.**—Upper Appomattox Co. *v.* Hardings, 11 Gratt. (52 Va.) 1.

[a] **A Revivor in the Names of the Heirs Is a Nullity.**—Zahn *v.* Obert (Okla.), 159 Pac. 298.

[b] **Action To Recover Personalty.** Barrielle *v.* Bettman, 199 Fed. 838.

52. See *supra*, III, E, 2.

53. U. S.—Barrielle *v.* Bettman, 199 Fed. 838, 845. **Ala.**—Jenkins *v.* Bramlett, 131 Ala. 597, 32 So. 575. **Ark.** *Ex parte* Gilbert, 93 Ark. 307, 124 S. W. 762; Grace *v.* Neel, 41 Ark. 165, action to have deed declared a mortgage and for reconveyance. **D. C.**—Webb *v.* Janney, 9 App. Cas. 41, suit to rescind conveyance. **Fla.** — Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265 (partition); Gould *v.* Carr, 33 Fla. 523, 538, 15 So. 259, 24 L. R. A. 130. **Ill.** Watson *v.* White, 152 Ill. 364, 38 N. E. 902, action for specific performance of contract for sale of realty. **Ky.** Burchett *v.* Clarke, 33 Ky. L. Rep. 240, 109 S. W. 888; Croan *v.* Maraman's Guardian, 148 Ky. 135, 146 S. W. 398, action to compel sale of realty. **Mich.** McLaulin *v.* Wayne Circ. Judge, 180 Mich. 96, 146 N. W. 274. **Mo.**—State *ex rel.* Bauer *v.* Edwards, 136 Mo. 360, 38 S. W. 73; Brewington *v.* Stephens' Admrs., 31 Mo. 38. **N. Y.**—Quackenbush *v.* Leonard, 9 Paige 334. **Ohio.** Valley Ry. Co. *v.* Bohm, 29 Ohio St. 633. **Pa.**—Ballantine *v.* Negley, 158 Pa. 475, 27 Atl. 1051. **Tenn.**—Matthews *v.* Crofford, 129 Tenn. 541, 167 S. W. 695, unlawful detainer. **Va.** Wilson *v.* Smith, 22 Gratt. (63 Va.) 493. **Eng.**—Dunn *v.* Allen, 1 Vern. 426, 23 Eng. Reprint 563.

[a] **A revivor in a part of the plaintiff's heirs** (1) is permissible under statute. Funk *v.* Stubblefield, 62 Ill. 405. (2) The heirs may revive a partition suit so far as the suit relates to partition and rents subsequent to the descent but not as to rents which previously accrued. Hoffman *v.* Tredwell, 6 Paige (N. Y.) 308. (3) On the death of the party after partition made, the suit may be revived as to the rents and profits in the name of the personal representative. Ruffners *v.* Lewis' Exrs., 7 Leigh (34 Va.) 720, 30 Am. Dec. 513.

[b] **Condemnation Proceedings.** Valley Ry. Co. *v.* Bohm, 29 Ohio St. 633.

[c] **Partition. — Fla.** — Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265. **Mass.** See Brown *v.* Wells, 12 Metc. 501, under statute heirs only can be cited in. **N. H.**—Osgood *v.* Taggard, 18 N. H. 318. But a money award in a partition suit does not partake of the nature of realty and therefore on plaintiff's death in a suit to enforce the decree, the revivor must be in the name of the personal representative. Martin *v.* Tyree, 41 Ark. 314.

[d] **The grantee of an heir** is a "successor in interest" to a party in a partition suit. Cheney *v.* Rankin, 27 Misc. 609, 58 N. Y. Supp. 263, *overruling* Rogers *v.* Adriance, 22 How. Pr. (N. Y.) 97.

[e] **Actions to rescind a contract to convey** real property. Preston *v.* Golde, 12 Lea (Tenn.) 267. See Kamman *v.* D'Heur & Swain Lumb. Co., 43 Ind. App. 672, 88 N. E. 348 (suit for cancellation of deed); Roberts *v.* Hoskins' Admr., 9 Ky. L. Rep. 85, 4 S. W. 35, holding cross petition should

land,[54] and actions to subject land to charges and debts,[55] should be in the names of the heirs or devisees of a party, not in the name of his personal representative, unless by statute[56] or by will,[57] the personal representative is invested with and authorized to represent the title. Perhaps the suit may be revived in the name of the personal representatives if the land is needed to pay debts against the estate.[58] Under some statutes the action may be revived in the name of either.[59]

c. *Actions Concerning Real and Personal Estate.* — If an action relates to both real and personal estate, it survives against both heirs and personal representatives and should be revived against them, i. the suit is revived as to the whole case.[60]

d. *Suits Concerning Liens on Realty.* — A suit to foreclose a lien on real estate should be revived in the name of the plaintiff's personal representative on his death.[61] On the death of the defendant the

be revived in names of heirs as well as administrator.

[f] **Action to compel specific performance of a contract to convey** real estate should be (1) revived in the name of the heirs or devisees (Watson *v.* White, 152 Ill. 364, 38 N. E. 902; Quackenbush *v.* Leonard, 9 Paige [N. Y.] 334), unless (2) the statute gives the executor the right to possession. Subera *v.* Jones, 20 S. D. 628, 108 N. W. 26.

[g] **But a bill to redeem land** from a tax sale may be revived in the name of the personal representative. Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034. But *compare* Putnam *v.* Putnam, 4 Pick. (Mass.) 139, which is a bill to redeem mortgaged premises.

Action for damages for injury to real property, see *supra,* III, E, 6, a.

54. Mayers *v.* Lark, 113 Ark. 207, 168 S. W. 1093, Ann. Cas. 1915 C, 1094; McLaulin *v.* Wayne Circ. Judge, 180 Mich. 96, 146 N. W. 274.

[a] **A quiet title suit** (1) should be revived in the name of the heirs or devisees (Miller *v.* Ahrens, 150 Fed. 644; Rakes *v.* Brown, 34 Neb. 304, 312, 51 N. W. 848), unless (2) perhaps in a case where the land is needed to pay the debts against the estate. Rakes *v.* Brown, 34 Neb. 304, 51 N. W. 848.

55. Haley *v.* Taylor, 39 Ark. 104 (suit to subject land to payment of notes); Rich Grove *v.* Emmett, 163 Ind. 560, 72 N. E. 543, to charge realty with expense of a drain across it.

[a] **A suit to establish a trust in** land should be revived in the names of the defendants' heirs. Mayers *v.* Lark, 113 Ark. 207, 168 S. W. 1093, Ann. Cas. 1915C, 1094.

56. Subera *v.* Jones, 20 S. D. 628, 108 N. W. 26. See Williams *v.* Savannah F. & W. Ry. Co., 94 Ga. 540, 20 S. E. 487.

57. **D. C.**—Webb *v.* Janney, 9 App. Cas. 41. **Fla.**—Nelson *v.* Haisley, 39 Fla. 145, 22 So. 265. **N. J.**—Ball *v.* Ward, 73 N. J. Eq. 440, 68 Atl. 343.

58. Rakes *v.* Brown, 34 Neb. 304, 51 N. W. 848.

59. Chapman *v.* Chapman, 194 Ala. 518, 70 So. 121; Wilson *v.* Kirkland, 172 Ala. 72, 55 So. 174; Evans *v.* Welch, 63 Ala. 250; State *ex rel.* King *v.* Pearce, 14 Ala. App. 628, 71 So. 656.

[a] **If possession and a recovery of damages** accruing prior and subsequent to the death of the plaintiff are sought, the revivor must be in the name of the personal representative or in his name jointly with the heirs or devisees. Evans *v.* Welch, 63 Ala. 250.

60. Owings' Case, 1 Bland (Md.) 370, 409, 17 Am. Dec. 311; Brewington *v.* Stephens' Admrs., 31 Mo. 38. See Roberts *v.* Nelson, 86 Mo. 21.

Revivor as to part of an action, see *supra,* III, F, 2.

[a] **An action for possession of realty and damages** should be continued against both heirs and personal representatives. Brewington *v.* Stephens' Admrs., 31 Mo. 38, forcible entry and detainer.

[b] **But if the heirs have no interest in the premises,** they may disclaim and the suit can proceed against the administrator alone. Brewington *v.* Stephens' Admrs., 31 Mo. 38.

61. Batre *v.* Auze's Heirs, 5 Ala. 173; Meek's Heirs *v.* Ealy's Heirs, 2

revivor should be in the names of his heirs and devisees.[62] But a mortgage foreclosure suit should be revived in the name of the personal representative whether the deceased is plaintiff or defendant.[63] A bill to redeem mortgage premises may be revived in the name of the heirs or devisees of the mortgagor.[64] But a suit to have a deed of trust declared a prior lien should be revived in the name of the personal representative of the plaintiff.[65]

e. *In Will Contest.* — On the death of the contestant in a will contest, the suit should not be revived in the name of his administrator,[66] but his devisee may file an original bill in the nature of a bill of revivor and supplement.[67]

f. *Suit of Personal Representative.* — If, in a suit by or against a personal representative, his powers cease before judgment the action may be revived in the name of his successor,[68] unless he sues or is sued in his individual capacity.[69]

g. *Suit of Guardian.* — On the death of the guardian, pending an action by him as such, the suit should be prosecuted by a next friend if he has no successor.[70] If the suit is against him on a debt due by him for the ward, his personal representative may be substituted.[71]

h. *Suit by Nominal Party.* — On death of a nominal plaintiff the action may be continued in the name of his representatives,[72] and statutes sometimes authorize the suit to proceed without a revivor as if the death had not occurred,[73] and sometimes provide that, on

J. J. Marsh. (Ky.) 329, the suit is for money, for which the personal representative must sue.

62. **Ala.**—Batre *v.* Auze's Heirs, 5 Ala. 173, vendor's lien. **Ky.**—Louisville *v.* Hexagon Tile Walk Co., 103 Ky. 552, 45 S. W. 667, lien for sidewalk improvement. **Mo.**—State *ex rel.* Bauer *v.* Edwards, 136 Mo. 360, 38 S. W. 73, tax lien.

63. **Cal.**—Union Sav. Bank *v.* Barrett, 132 Cal. 453, 64 Pac. 713, 1071. **Ind.**—Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075. **Neb.**—Street *v.* Smith, 75 Neb. 434, 106 N. W. 472. **N. Y.** McGregor *v.* McGregor, 35 N. Y. 218.

See generally the title, "**Mortgages.**"

64. **Mass.**—Putnam *v.* Putnam, 4 Pick. 139. **Neb.**—Morrow *v.* Jones, 41 Neb. 867, 60 N. W. 369, citing cases. **N. Y.**—See Sutherland *v.* Rose, 47 Barb. 144.

65. Rogers *v.* Tucker, 94 Mo. 346, 7 S. W. 414.

66. Braeuel *v.* Reuther, 270 Mo. 603, 610, 193 S. W. 283, Ann. Cas. 1918 B, 533, L. R. A. 1918A, 444.

67. Brady *v.* McCosker, 1 N. Y. 214, 3 Denio 610, 4 How. Pr. 291.

68. **Ala.**—Wells *v.* American Mtg Co., 109 Ala. 430, 20 So. 136. **Ark.** Hill *v.* Bryant, 61 Ark. 203, 32 S. W. 506. **Miss.**—Clopton *v.* Haughton, 57 Miss. 787. **S. D.**—Bunker *v.* Taylor, 13 S. D. 433, 83 N. W. 555. **Tenn.** See Wood *v.* Tomlin, 92 Tenn. 514, 22 S. W. 206, holding the suit may be revived in the name of the administrator of the deceased or his successor.

69. Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

[a] **Where Action Is Against Representative for Maladministration.** Clopton *v.* Haughton, 57 Miss. 787; Leonard *v.* Cameron, 39 Miss. 419.

70. Missouri O. & G. R. Co. *v.* Gentry, 31 Okla. 579, 122 Pac. 537. See Rittenhouse *v.* Porter (Ky.), 128 S. W. 288. See 10 STANDARD PROC. 866.

[a] **The appointment of a special administrator of the guardian** and revivor in his name is not permissible. Missouri O. & G. R. Co. *v.* Gentry, 31 Okla. 579, 122 Pac. 537.

71. Lewis *v.* Allen, 68 Ga. 398.

72. Smolikowski *v.* Laibe, 170 Ill. App. 181; Phillips *v.* Wilson, 25 Ill. App. 427.

73. Chambers *v.* Porter, 5 Coldw. (Tenn.) 273.

the suggestion of death, the use plaintiff may prosecute the suit in his own name,[74] unless the fact that the suit is brought for the use of another does not appear on the face of the petition, in which case a revivor is necessary.[75]

i. *Where There Has Been an Assignment.* — On death of a plaintiff after assignment of his cause of action, the action may be revived in some states in the name of the plaintiff's personal representative,[76] or in the name of the assignee.[77] An assignee of the administrator is a successor in interest within the statute, and a suit may be revived in his name without first reviving the suit in the names of the administrator.[78]

j. *Stockholders' Suit.* — A stockholder's suit may be revived in the name of another stockholder,[79] or in the name of the stockholder's representatives if his shares of stock descend to them.[80]

k. *Objections and Waiver.* — If an action is revived in the name of wrong persons and is not revived in the name of the proper parties within the prescribed time, the action may be abated on motion,[81] but a nonsuit cannot be granted on this ground.[82] An irregularity in reviving a suit in the names of the wrong persons may be waived by a failure to make timely objection,[83] and a party may be estopped from objecting thereto by consenting to the revivor.[84] A failure to revive in the names of the heirs is immaterial if they are parties to the suit.[85] The fact that the person filing the petition to revive was not appointed

74. Phillips *v.* Wilson, 25 Ill. App. 427; Moore *v.* Rice, 51 Tex. 289; McFadin *v.* MacGreal, 25 Tex. 73, 80; Price *v.* Wiley, 19 Tex. 142, 70 Am. Dec. 323.

[a] **Statute is not mandatory,** and does not prevent a revivor in the name of the personal representative. Phillips *v.* Wilson, 25 Ill. App. 427.

75. Moore *v.* Rice, 51 Tex. 289; Price *v.* Wiley, 19 Tex. 142, 70 Am. Dec. 323.

76. **N. Y.**—Betts *v.* De Selding, 81 App. Div. 161, 80 N. Y. Supp. 799; Wing *v.* Ketcham, 3 How. Pr. 385, 2 Code Rep. 3. **Okla.**—Schuber *v.* McDuffee, 158 Pac. 895. **Pa.**—McCafferty *v.* Pennsylvania R. Co., 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690.

Contra, Reynolds *v.* Quaely, 18 Kan. 361.

[a] **Conflicting Applications for Revivor.**—Where a plaintiff in error seeks a revivor in the name of the judgment creditor's administrator, the court will not on the application of the assignee of the judgment revive the suit in his name, but it will allow him to interplead. Schuber *v.* McDuffee (Okla.), 158 Pac. 895.

77. **Kan.**—Reynolds *v.* Quaely, 18 Kan. 361. **Mo.**—Overall *v.* St. Louis Traction Co., 112 Mo. App. 224, 90 S. W. 402. **N. Y.**—Schell *v.* Devlin, 82 N. Y. 333; Betts *v.* De Selding, 81 App. Div. 161, 80 N. Y. Supp. 799; Riley *v.* Gitterman, 55 Hun 605, 10 N. Y. Supp. 38.

78. McNulta *v.* Huntington, 62 App. Div. 257, 70 N. Y. Supp. 897.

79. Spring *v.* Webb, 227 Fed. 481.

80. Spring *v.* Webb, 227 Fed. 481.

81. McDonald *v.* Nashville, 114 Tenn. 540, 86 S. W. 317, where a personal injury action was revived in the names of the administrator and heirs.

82. Williams *v.* Savannah F. & W. Ry. Co., 94 Ga. 540, 20 S. E. 487, where ejectment suit was revived in name of plaintiff's heirs instead of representative.

83. Rogers *v.* Tucker, 94 Mo. 346, 7 S. W. 414.

[a] **Objection made on appeal** comes too late. Lawrence *v.* La Cade, 46 Ark. 378, where cause was revived in names of widow and children instead of the widow only.

84. McLain *v.* Parker, 88 Kan. 717, 129 Pac. 1140; Tompkins *v.* Vintroux, 3 W. Va. 148, 100 Am. Dec. 735.

85. Mayers *v.* Lark, 113 Ark. 207, 168 S. W. 1093, Ann. Cas. 1915C, 1094.

personal representative at that time is immaterial where he afterwards qualified and the adverse party entered his appearance to the petition.[86]

F. Procedure in Reviving and Continuing Actions. — **1. Generally.** — The revival of actions at law being purely statutory,[87] the mode provided by the statute is exclusive,[88] and must be followed.[89] Some statutes provide for concurrent and cumulative methods of revivor,[90] and statutory methods of revivor in equity cases have been held not to preclude revivor by bill of revivor.[91]

2. Revival in Part. — If any of the causes of action stated in the complaint survive, the action may be revived as to them if the action is divisible although none of the other causes of action survive.[92] But an action which is in its nature indivisible cannot be revived in part. It must be revived as an entirety.[93]

3. Revivor in Equity. — a. *On Bill of Revivor, Bill in the Nature of a Bill of Revivor, and Bill of Revivor and Supplement.* — (I.) **Generally.** — On abatement of an equity suit, a revivor is had by bill of revivor, by original bill in the nature of a bill of revivor and by a bill of revivor and supplement.[94] An ordinary bill of revivor is

86. Fishback *v.* Green, 87 Ky. 107, 7 S. W. 881.

87. See *supra*, II.

88. Benson *v.* Crain, 91 Vt. 44, 99 Atl. 255.

89. **U. S.**—Spaeth *v.* Sells, 176 Fed. 797. **Kan.**—Reaves & Co. *v.* Long, 63 Kan. 700, 66 Pac. 1030. **Ky.**—Thomson's Admr. *v.* Williams, 86 Ky. 15, 4 S. W. 914. **Vt.**—Benson *v.* Crain, 91 Vt. 44, 99 Atl. 255.

[a] **Statute Construed.**—(1) The Alabama statute provides that no action abates by the death of the plaintiff or defendant if the cause of action survive but the same must be revived on motion, or the death of such party may be suggested on the record and the action proceed in the name of or against the survivor. This statute applies to two cases, first for a revivor on the death of a sole plaintiff or defendant or on death of all the plaintiffs or defendants; and second for a prosecution of the action in the name of the survivor when one of several plaintiffs or defendants die. The second is not a revivor. Phoenix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108. (2) Where one of several plaintiffs dies, the action may be revived, or upon suggestion of death, it may proceed in the name of the survivor. Southern Ry. Co. *v.* Hayes (Ala.), 73 So. 945.

90. See *infra*, III, F, 4, a.

[a] The proceeding by scire facias **and by rule to show cause** are cumulative in Georgia. Ham *v.* Robinson Co., 146 Ga. 442, 91 S. E. 483.

91. See *infra*, III, F, 3, a, (I).

92. Booth's Admrs. *v.* Northrop, 27 Conn. 325; Hoffman *v.* Tredwell, 6 Paige (N. Y.) 308 (where heir revived partition suit as to the land but not as to the rents); Matthews *v.* Delaware & H. Canal Co., 20 Hun (N. Y.) 427, 437, where the administrator revived an injunction suit to prevent interference with easement as to the damages claimed.

93. Wade *v.* Kalbfleisch, 58 N. Y. 282, 286, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250.

94. **U. S.**—Miller *v.* Wattier, 165 Fed. 359; Dillard's Admr. *v.* Central Virginia Iron Co., 125 Fed. 157. **Ohio.** See Carter *v.* Jennings, 24 Ohio St. 182. **W. Va.**—Moore *v.* Moore, 81 W. Va. 17, 93 S. E. 937.

[a] **The difference** between an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill is that in the former the benefit of the former proceedings is obtained so that the pleadings in the first cause and the depositions of the witnesses, if any, may be used in the same manner as if filed or taken in the second cause and if any decree has been made in the first cause it shall be made in

proper where the person to be brought in is an heir or the personal representative of the deceased party, succeeding to the title of the decedent by operation of law,[95] or the husband of a feme covert. Where upon the death of a party, his interest is transmitted to another in such a manner that the newly acquired interest may be litigated, as where it is transmitted to a devisee, an original bill in the nature of a bill of revivor is required.[96] A bill of revivor and supplement is required to revive a suit when it is necessary to supply defects in the original bill arising from subsequent events.[97]

Statutes sometimes provide other methods of revival in equity,[98] which have largely superseded the revivor by bill,[99] but they do not prevent a revival in this manner,[1] except where the statute provides

the second. But in the latter a new defense may be made, and the pleadings cannot be used in the same manner as under the former. The decree is of no advantage except as an inducement to the making of a similar decree. Fulton *v.* Graecen, 44 N. J. Eq. 443, 15 Atl. 827.

95. **U. S.**—Miller *v.* Wattier, 165 Fed. 359; Sharon *v.* Terry, 36 Fed. 337, 353, 1 L. R. A. 572. **Ala.**—Floyd *v.* Ritter's Admr., 65 Ala. 501; Bowie *v.* Minter, 2 Ala. 406. **Ky.**—Hall *v.* Johnston's Admx., 5 J. J. Marsh. 284. **Mich.**—Haines *v.* Kent Circ. Judge, 155 Mich. 417, 119 N. W. 439. **N. J.** Ball *v.* Ward, 73 N. J. Eq. 440, 68 Atl. 343. **R. I.**—Manchester *v.* Mathewson, 2 R. I. 416. **S. C.**—See Dunham *v.* Carson, 42 S. C. 383, 388, 20 S. E. 197.

96. **U. S.**—Miller *v.* Wattier, 165 Fed. 359; Brown *v.* Fletcher, 140 Fed. 639; Slack *v.* Walcott, 3 Mason 508, 22 Fed. Cas. No. 12,932. **Ky.**—Russell's Heirs *v.* Craig's Devisee, 3 Bibb 377. **Mass.** Pingree *v.* Coffin, 12 Gray 288. **Mich.** Haines *v.* Kent Circ. Judge, 155 Mich. 417, 119 N. W. 439. **N. J.**—Ball *v.* Ward, 73 N. J. Eq. 440, 68 Atl. 343; Lyons *v.* Van Riper, 26 N. J. Eq. 337; Peer *v.* Cookerow, 14 N. J. Eq. 361. **N. Y.**—See Douglass *v.* Sherman, 2 Paige 358, original bill in the nature of a bill of revivor and supplement must be filed. **R. I.**—See Manchester *v.* Mathewson, 2 R. I. 416, original bill in the nature of a bill of revivor and supplement. **S. C.**—See Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197. **Tenn.**—Northman *v.* Liverpool, L. & G. Ins. Co., 1 Tenn. Ch. 312, 317.

[a] **Where an executor is empowered to sell real estate** by will of the deceased party, a revivor of an action respecting the land against him should be by bill in the nature of a bill of revivor. Ball *v.* Ward, 73 N. J. Eq. 440, 68 Atl. 343.

97. Miller *v.* Wattier, 165 Fed. 359; Manchester *v.* Mathewson, 2 R. I. 416. See *infra*, III, F, 3, a, (V).

[a] **Illustration.**—Where the plaintiff transfers his interest to his daughter and heir after suit brought and before his death, and where the defendant has died and his heirs must be substituted, a bill of revivor and supplement is appropriate. Miller *v.* Wattier, 165 Fed. 359.

[b] **The assignee of the personal representative** must file an original bill in the nature of a bill of revivor and supplement. Webster *v.* Hitchcock, 11 Mich. 56.

[c] **Where a third person purchases the interest of the heirs** after death of a party and before revival against them, the revivor must be by bill of revivor and supplement. Harrington *v.* Becker, 2 Barb. Ch. (N. Y.) 75.

98. See the statutes and Brown *v.* Thompson, 29 Mich. 72 (the court may by order direct the cause to stand revived upon the petition of the complainant); Reid *v.* Stuart's Exr., 20 W. Va. 382.

As to revivor by petition, see *infra*, III, F, 3, b.

99. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136.

1. **Ala.**—Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136; Floyd *v.* Ritter's Admr., 65 Ala. 501. **Md.** Sinclair *v.* Auxiliary Realty Co., 99 Md. 223, 232, 57 Atl. 664. **Tenn.**—Foster *v.* Burem, 1 Heisk. 783. **W. Va.** Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424; Reid *v.* Stuart's Exr., 20 W. Va. 382.

that the death of a party shall not abate a suit.[2] However, the codes are held to have abolished the revival of actions by bill of revivor.[3] Statutes providing for the revival of actions at law do not apply to courts of equity, that is they do not control,[4] and it has been held that courts of equity may adopt and follow the rules of procedure made for courts of law only.[5]

(II.) Nature of Proceeding by Bill of Revivor. — The proceeding by bill of revivor is in the nature of a subsidiary or collateral action to determine whether the action should be revived.[6]

(III.) Leave of Court. — Leave of court is unnecessary to authorize the filing of a bill of revivor,[7] or an original bill in the nature of a bill of revivor and supplement,[8] but leave of court is necessary to authorize the filing of a bill of revivor and supplement.[9]

(IV.) Parties to Bill. — The parties to a bill of revivor or bill in the nature thereof vary with the circumstances of the case.[10]

(V.) Form of Bill.[11] — A bill of revivor, bill in the nature of a bill of revivor, or bill of revivor and supplement must state the original

2. Keep *v.* Crawford, 92 Ill. App. 587; Landis *v.* Olds, 9 Minn. 90.

3. **Minn.**—National Council *v.* Scheiber, 137 Minn. 423, 163 N. W. 781; Landis *v.* Olds, 9 Minn. 90. **N. Y.** Beach *v.* Reynolds, 64 Barb. 506; Allen *v.* Walter, 10 Abb. Pr. 379. **Ohio.** Carter *v.* Jennings, 24 Ohio St. 182.

4. Brown *v.* Fletcher, 140 Fed. 639; Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 496, 55 So. 228.

5. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 496, 55 So. 228.

6. Mackaye *v.* Mallory, 79 Fed. 1, 24 C. C. A. 420; Lee *v.* O'Shaughnessy, 20 Minn. 173.

[a] **A proceeding by bill of revivor is not a new suit,** but a mere continuation of the old suit. Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 172, 9 L. ed. 1041; Dunn *v.* Allen, 1 Vern. 426, 23 Eng. Reprint 563.

7. **Ky.**—Crook's Exr. *v.* Turpin, 10 B. Mon. 243. **Mich.**—Webster *v.* Hitchcock, 11 Mich. 56. **N. Y.**—See Beach *v.* Reynolds, 64 Barb. 506; In the Matter of Bornsdorff *v.* Lord, 41 Barb. 211, 17 Abb. Pr. 168; Pendleton *v.* Fay, 3 Paige 204.

8. Webster *v.* Hitchcock, 11 Mich. 56.

9. **U. S.**—Miller *v.* Wattier, 165 Fed. 359. **Ala.**—Bowie *v.* Minter, 2 Ala. 406. **N. Y.**—See Beach *v.* Reynolds, 64 Barb. 506.

10. See *infra,* this note.

[a] **The name of one heir at least** must be stated in a bill of revivor. Pickering *v.* Walcott, 1 Ind. 262.

[b] **Where a person not a party to the original suit files a bill** of revivor or bill in the nature thereof, all the surviving parties to the suit who have any interest in the further proceedings to be had must be made parties, either as plaintiffs or defendant. Farmers' L. & T. Co. *v.* Seymour, 9 Paige (N. Y.) 538.

[c] **In a bill to revive a suit after death of one of several defendants,** it is sufficient to bring the representatives of the decedent before the court without making the surviving defendants parties to the bill. Farmers' L. & T. Co. *v.* Seymour, 9 Paige (N. Y.) 538. See Nicoll *v.* Roosevelt, 3 Johns. Ch. (N. Y.) 60.

[d] **Parties to Bill in the Nature of a Bill of Revivor.**—Where there has been a devise of realty and a revivor in favor of or against the devisee is sought the devisee and heir must both be made parties. Peer *v.* Cookerow, 14 N. J. Eq. 361.

[e] **Where one of the plaintiff's heirs is the wife** of the defendant, she need not be joined in a bill of revivor against her husband. Randolph *v.* Dickerson, 5 Paige (N. Y.) 517.

11. **Form of bill of revivor,** see 9 STANDARD PROC. 1091.

Form of bill in the nature of bill of revivor, see 9 STANDARD PROC. 1093.

Form of bill of revivor on marriage of female, see 9 STANDARD PROC. 1092.

bill and the proceedings thereon,[12] the death[13] or marriage[14] of a party, the interest or title in the person to be brought in,[15] and the manner of transmission of title.[16] In addition thereto, the bill must charge that the cause ought to be revived and stand in the same condition with respect to the parties to the original bill as it was at the time the abatement happened.[17] New matter may be introduced into a bill of revivor and supplement, so that defects in the original bill arising from subsequent events may be supplied.[18] By an allegation of the insufficiency of the assets of the defendant to pay his debts, a bill of revivor may be given the attributes of a creditor's bill.[19] The bill must have a prayer for a revivor,[20] and sometimes a prayer for an answer,[21] and a bill of revivor and supplement must be verified.[22] It has been held that a petition may be regarded as a bill of revivor.[23]

(VI.) Process. — On a bill of revivor, process issues[24] without previous proof of death.[25] This process must be served[26] in the same

12. Webster *v.* Hitchcock, 11 Mich. 56; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Cooper's Eq. Pl. 70.

[a] **In Tennessee,** a bill of revivor need state only facts required by statute to be stated in the scire facias. Foster *v.* Burem, 1 Heisk. (Tenn.) 783.

13. Winter *v.* Shankland, 3 Tenn. Ch. 361.

14. See form of bill, 9 STANDARD PROC. 1092.

15. Pingree *v.* Coffin, 12 Gray (Mass.) 288, 319 (bill in the nature of a bill of revivor); Pingree *v.* Coffin, 12 Gray (Mass.) 288, 319.

16. **Mass.**—Pingree *v.* Coffin, 12 Gray 288, 319. **Mich.**—Webster *v.* Hitchcock, 11 Mich. 56. **N. Y.**—Taylor *v.* Taylor, 43 N. Y. 578; Westcott *v.* Cady, 5 Johns. Ch. 334, 342, 9 Am. Dec. 306, bill of revivor and supplement.

[a] **A bill of revivor** (1) should allege the transmission of title by operation of law. Slack *v.* Walcott, 3 Mason (U. S.) 508, 512, 22 Fed. Cas. No. 12,932. (2) An allegation is sufficient which states that the complainants were heirs at law of the party to whom the real estate described in the original bill filed by him descended by the laws of descent. Gillett *v.* Robbins, 12 Wis. 319, 329.

[b] **A bill in the nature of a bill of revivor** must allege the newly acquired interest and the manner in which the interest has been transmitted. Pingree *v.* Coffin, 12 Gray (Mass.) 288, 319.

17. Taylor *v.* Taylor, 43 N. Y. 578.

18. **Ala.**—Bowie *v.* Minter, 2 Ala. 406. **N. H.**—Eastman *v.* Batchelder, 36 N. H. 141, 72 Am. Dec. 295. **N. Y.** Westcott *v.* Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306. **R. I.**—Manchester *v.* Mathewson, 2 R. I. 416.

Compare Bampton *v.* Birchall, 5 Beav. 330, 49 Eng. Reprint 605.

[a] **The original bill must show a cause of action** to authorize setting up new matter. Eastman *v.* Batchelder, 36 N. H. 141, 72 Am. Dec. 295.

19. Glenn *v.* Hebb, 17 Md. 260.

20. Webster *v.* Hitchcock, 11 Mich. 56; Beach *v.* Reynolds, 64 Barb. (N. Y.) 506.

21. See *infra*, this note.

[a] **A prayer for an answer to a bill of revivor** may be made in the case of an executor of a deceased defendant to ascertain whether he has assets to pay the plaintiff's demand. Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

22. Bowie *v.* Minter, 2 Ala. 406.

23. Reid *v.* Stuart's Exr., 20 W. Va. 382.

24. Shields *v.* Craig's Admrs., 6 Mon. (Ky.) 373; Chambers *v.* Warren, 6 B. Mon. (Ky.) 244; Winter *v.* Shankland, 3 Tenn. Ch. 361, an ordinary summons issues.

25. Winter *v.* Shankland, 3 Tenn. Ch. 361.

26. Chambers *v.* Warren, 6 B. Mon. (Ky.) 244; Barnes *v.* Smith, 5 J. J. Marsh. (Ky.) 311; Hall *v.* Johnston's Admx., 5 J. J. Marsh. (Ky.) 284.

See generally the title "**Service of Process and Papers.**"

[a] **Service by publication** is per-

manner as process on an original bill,[27] unless service is waived by voluntary appearance of the parties.[28]

(VII.) Demurrer, Plea and Answer. — The defendant may set up his objections to a revivor by demurrer,[29] plea,[30] or answer.[31] No answer to a bill of revivor is either necessary or proper,[32] except simply to put in issue the fact as to whether the party sought to be brought in bears such a relation to the deceased as makes him a proper party.[33] But an allegation in an original bill in the nature of revivor, as to the title in the person to be brought in may be litigated.[34]

(VIII.) Hearing. — The issue made by the demurrer, plea or answer to the bill of revivor is heard as other issues in chancery,[35] but if no issue is thus created, a hearing is not required.[36] A cause is revived

missible. Foster *v.* Burem, 1 Heisk. (Tenn.) 783.

27. Shields *v.* Craig's Admrs., 6 Mon. (Ky.) 373.

[a] **Service by Publication.**—Chambers *v.* Warren, 6 B. Mon. (Ky.) 244.

28. Cullum *v.* Batre's Exrx., 2 Ala. 415, 419.

29. See *infra*, this note, and generally the title "**Demurrer.**"

[a] **If a bill of revivor is unnecessarily or improperly filed,** the defendant may raise the objection by plea or demurrer. Pendleton *v.* Fay, 3 Paige (N. Y.) 204.

[b] **That the plaintiff is not entitled to revive** should be shown by plea or demurrer. Harris *v.* Pollard, 3 P. Wms. 348, 24 Eng. Reprint 1095.

[c] **A demurrer to a bill of revivor and supplement** may be filed. Bowie *v.* Minter, 2 Ala. 406; McDermott *v.* McGown, 4 Edw. Ch. (N. Y.) 592 (demurrer on the ground of multifariousness); Pendleton *v.* Fay, 3 Paige (N. Y.) 204, objection to improper or irrelevant matter may be raised by plea, demurrer, or by exception for impertinence.

[d] **The demurrer should not be to the whole bill** where improper supplementary matter is included in a bill of revivor and supplement. Randolph *v.* Dickerson, 5 Paige (N. Y.) 517.

[e] **Objections to the original bill cannot be raised** by demurrer to a bill of revivor. Bettes *v.* Dana, 2 Sumn. 383, 3 Fed. Cas. No. 1,368.

[f] **A bill seeking to revive several suits** is multifarious and demurrable. McDermott *v.* McGown, 4 Edw. Ch. (N. Y.) 592.

30. In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168; Pendleton *v.* Fay, 3 Paige (N. Y.) 204; Harris *v.* Pollard, 3 P. Wms. 348, 24 Eng. Reprint 1095. See generally "**Pleas in Equity.**"

31. In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168. See generally the title "**Bills and Answers.**"

Form of answer to original bill and bill of revivor, see 9 STANDARD PROC. 1094.

32. See Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197.

33. Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769; Sharon *v.* Terry, 13 Sawy. (U. S.) 387, 400, 36 Fed. 337, 1 L. R. A. 572. See Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197, as for example, whether he is the heir at law or administrator of the deceased party.

[a] **If other matters are set up,** the answer is treated as impertinent. Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769. See Dunham *v.* Carson, 42 S. C. 383, 389, 20 S. E. 197.

[b] **The only inquiry on a bill of revivor** is the ascertainment of the person upon whom the law casts the inheritance. **U. S.**—Bettes *v.* Dana, 2 Sumn. 383, 3 Fed. Cas. No. 1,368. **N. J.** Lyons *v.* Van Riper, 26 N. J. Eq. 337. **R. I.**—Manchester *v.* Mathewson, 2 R. I. 416.

[c] **The title of a person who comes in** in the same right as the original party cannot be controverted. Bowie *v.* Minter, 2 Ala. 406.

34. Pingree *v.* Coffin, 12 Gray (Mass.) 288, 319; Lyons *v.* Van Riper, 26 N. J. Eq. 337; Peer *v.* Cookerow, 14 N. J. Eq. 361, 365. See Howard *v.* McKenzie, 54 Tex. 171.

35. In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168. See the title "**Hearing.**"

36. Pruen *v.* Lunn, 5 Russ. 3, 38 Eng. Reprint 928.

as a matter of course on proof that the parties filing the bill are the real or personal representatives of the deceased.[37]

(IX.) Decree. — An order or decree of revivor is necessary before the action can proceed against the person to be brought in,[38] unless waived.[39]

b. *On Petition.* — Some statutes provide for a revivor in equity suits by petition.[40]

4. Under the Codes and Practice Acts. — a. *Generally.*[41] — The codes and practice acts differ somewhat in their provisions relating to the revival and continuance of causes.[42] Generally it is provided that in the case of death or disability of a party to an action which survives or continues, the court on motion may allow the action to be continued by or against his representative or successor in interest.[43]

[a] **A suit of revivor by the personal representatives of a defendant** need not be brought to a hearing to make the order of revivor effectual against both plaintiffs and co-defendants. Pruen *v.* Lunn, 5 Russ. 3, 38 Eng. Reprint 928.

37. Peer *v.* Cookerow, 14 N. J. Eq. 361, 365; Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424; Reid *v.* Stuart's Exr., 20 W. Va. 382, 391.

38. Pickering *v.* Walcott, 1 Ind. 262. See Lee *v.* O'Shaughnessy, 20 Minn. 173.

Form of order to revive, see 9 STANDARD PROC. 1094.

[a] **The order or decree** entered is (1) that the cause be and stand revived in the plight it was when the abatement occurred. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136. (2) The order of revivor should be entitled in the cause as it stands at the time of the abatement. Rogers *v.* Paterson, 4 Paige (N. Y.) 450.

39. See Lee *v.* O'Shaughnessy, 20 Minn. 173.

40. See the statutes and Sinclair *v.* Auxiliary Realty Co., 99 Md. 223, 231, 57 Atl. 664; Griffith *v.* Bronaugh, 1 Bland (Md.) 547; Brown *v.* Thompson, 29 Mich. 72, 75.

[a] **Statute Does Not Prevent Revivor by Bill.**—Sinclair *v.* Auxiliary Realty Co., 99 Md. 223, 231, 57 Atl. 664; Griffith *v.* Bronaugh, 1 Bland (Md.) 547; Hall *v.* Hall, 1 Bland (Md.) 130.

[b] **Defendant cannot file petition** to revive before decree. Griffith *v.* Bronaugh, 1 Bland (Md.) 547.

[c] **If the defendant fails to answer,** the court may decree a revival pro confesso or compel an answer by attachment by express statute. Sheldon *v.* Warner's Est., 59 Mich. 444, 26 N. W. 667.

41. **Suggestion of death** of defendant between declaration and plea, see 9 STANDARD PROC. 915.

42. See the codes and practice acts.

43. **U. S.**—Dundee M. & T. Inv. Co. *v.* Hughes, 89 Fed. 182. **Ala.**—See Phoenix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108. **Cal.**—Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12. **Colo.**—Williams *v.* Carr, 4 Colo. App. 363, 36 Pac. 644. **Minn.**—Willoughby *v.* St. Paul German Ins. Co., 80 Minn. 432, 83 N. W. 377. See Lee *v.* O'Shaughnessy, 20 Minn. 173, prior to amendment of statute. **Nev.**—Twaddle *v.* Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289. **N. Y.**—Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863; Holsman *v.* St. John, 90 N. Y. 461. Formerly the code provided for revivor on motion within a year and by supplemental complaint thereafter. See Gordon *v.* Sterling, 13 How. Pr. 405. **Ohio.** See Eagle Paper Co. *v.* Bragg, 7 Ohio N. P. 165, 4 Ohio Dec. 194, this section is reenacted in somewhat different form in R. S., § 5149. **Ore.**—Culver *v.* Randle, 45 Ore. 491, 78 Pac. 394; Murray *v.* Murray, 6 Ore. 26. **W. Va.**—Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424, statute provides that on death of plaintiff cause may be revived on motion without notice.

[a] **Nature of Proceeding.**—A proceeding to revive an action on motion is one outside of the action, a special proceeding, rather than a proceeding in the action. Harris *v.* Welch, 148 Wis. 441, 134 N. W. 1041; Voss *v.* Stoll, 141 Wis. 267, 124 N. W. 89.

[b] **Mere form** is of little consequence because of the nature of the

The words "on motion" are omitted in some codes and practice acts,[44] and under such a statute, supplemental pleadings may be allowed and the service of summons had as on the commencement of an action.[45] This section in some codes provides for a continuation on motion at any time within one year, or on supplemental complaint afterwards.[46] Some codes, sometimes in addition to the method of continuance just mentioned, provide for a summary remedy of revivor by order, or, under some codes, by a conditional order made within one year, or by consent at any time.[47] This summary method is not exclusive of the right of the court to allow a continuance of the action under the previous section.[48] And if the right to revive the action under this section should become barred by the lapse of time, a revivor under the previous section may be had.[49] Under the former section, the

proceeding. Harris *v.* Welch, 148 Wis. 441, 134 N. W. 1041.

Effect of death of party upon judgment, see 14 STANDARD PROC. 782.

As to what actions survive or continue, see the title "**Survival.**"

44. See the codes.

45. **Neb.**—Rakes *v.* Brown, 34 Neb. 304, 313, 51 N. W. 848; Fox *v.* Abbott, 12 Neb. 328. **Ohio.**—Carter *v.* Jennings, 24 Ohio St. 182. For present law in Ohio see Rev. St., §5149. **Okla.** Glenn *v.* Payne, 48 Okla. 196, 149 Pac. 1151; Boyes *v.* Masters, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576.

[a] **No summons is necessary where** the parties voluntarily appear. Rakes *v.* Brown, 34 Neb. 304, 313, 51 N. W. 848.

46. **Ind.**—Butler *v.* Thornburgh, 141 Ind. 152, 40 N. E. 514; Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075, the court on motion or supplemental complaint at any time within one year or supplemental complaint afterward, may allow the action to be continued. **N. C.**—Coggins *v.* Flythe, 114 N. C. 274, 19 S. E. 701; Grant *v.* Bell, 91 N. C. 495. **S. C.**—Sims *v.* Davis, 70 S. C. 362, 374, 49 S. E. 872; Dunham *v.* Carson, 42 S. C. 383, 388, 20 S. E. 197. **Wis.**—Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

[a] **After a year,** the action cannot be continued by motion, but must be revived by supplemental pleading. Coon *v.* Knapp, 13 How. Pr. (N. Y.) 175. For present law in New York, see *supra,* this section.

[b] **A supplemental complaint is not necessary, where** application is made within a year. Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405. For present law in New York see *supra,* this section.

[c] **A supplemental complaint within the statute includes** any complaint filed after the commencement of the action for the purpose of reviving it. Plumer *v.* McDonald's Lumb. Co., 74 Wis. 137, 42 N. W. 250.

[d] **The fact that the plaintiff has not served his original complaint** does not prevent a revival by supplemental complaint after the year. Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250. See Carter *v.* Jennings, 24 Ohio St. 182, and Rev. St., §5149.

47. **Ark.**—McNutt *v.* State, 48 Ark. 30, 2 S. W. 254. **Ky.**—Thomson's Admr. *v.* Williams, 86 Ky. 15, 4 S. W. 914. **Neb.**—Hayden *v.* Huff, 62 Neb. 375, 87 N. W. 184; Fox *v.* Abbott, 12 Neb. 328, 11 N. W. 303, by conditional order. **Okla.**—Boyes *v.* Masters, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576.

48. **Ark.**—Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47. **Neb.**—Hayden *v.* Huff, 62 Neb. 375, 87 N. W. 184; Missouri P. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130; Rakes *v.* Brown, 34 Neb. 304, 313, 51 N. W. 848; Hunter *v.* Leahy, 18 Neb. 80, 24 N. W. 680; Fox *v.* Abbott, 12 Neb. 328, 11 N. W. 303. **Ohio.**—Phoenix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805; Carter *v.* Jennings, 24 Ohio St. 182; Morris *v.* Schmidt, 8 Ohio N. P. (N. S.) 215. **Okla.**—Glenn *v.* Payne, 48 Okla. 196, 149 Pac. 1151; Boyes *v.* Masters, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576. **Wis.**—Tarbox *v.* French, 27 Wis. 651; Stephens *v.* Magor, 25 Wis. 533.

49. **U. S.**—Spaeth *v.* Sells, 176 Fed. 797. **Ohio.**—Pavev *v.* Pavey, 30 Ohio

revivor rests in the sound discretion of the court,[50] whereas the latter makes the revivor a matter of right when the conditions and limitations of the statute are complied with.[51] The proceeding by bill of revivor is abolished by the codes,[52] but reference is sometimes had to the proceeding by bill of revivor to ascertain the rights of the parties when proceeding under the code.[53]

b. *Continuance on Motion.* — **(I.) Motion and Notice.** — The practice by motion and the practice under the first code provision is by suggesting the death of the party,[54] and by motion[55] made ex parte[56]

St. 600; Morris *v.* Schmidt, 8 Ohio N. P. (N. S.) 215; Eagle Paper Co. *v.* Bragg, 7 Ohio N. P. 165, 4 Ohio Dec. 194. **Okla.**—Glenn *v.* Payne, 48 Okla. 196, 149 Pac. 1151; Boyes *v.* Masters, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576.

[a] **After the expiration of one year** the action may be revived by bill or supplemental petition. Hunter *v.* Leahy, 18 Neb. 80, 24 N. W. 680. To similar effect, see Hayden *v.* Huff, 62 Neb. 375, 87 N. W. 184.

50. U. S.—Spaeth *v.* Sells, 176 Fed. 797. **Minn.**—Landis *v.* Olds, 9 Minn. 90. **Ohio.**—Black *v.* Hill, 29 Ohio St. 86; Carter *v.* Jennings, 24 Ohio St. 182, 188; Eagle Paper Co. *v.* Bragg, 7 Ohio N. P. 165, 4 Ohio Dec. 194. **Wis.**—Uhlmann Fur Co. *v.* Gates, 155 Wis. 385, 144 N. W. 991; Harris *v.* Welch, 148 Wis. 441, 134 N. W. 1041; Voss *v.* Stoll, 141 Wis. 267, 124 N. W. 89. See Allen *v.* Frawley, 138 Wis. 295, 119 N. W. 565. **Wyo.**—Smith *v.* Harrington, 3 Wyo. 503, 27 Pac. 803.

[a] See Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863, and Coit *v.* Campbell, 82 N. Y. 509, as to construction of statute which in New York uses the word "must" instead of "may." See also St. John *v.* West, 4 How. Pr. (N. Y.) 329.

[b] **If the party is guilty of laches** in his application for a revivor, (1) the court in its discretion may deny the motion. Willoughby *v.* St. Paul German Ins. Co., 80 Minn. 432, 83 N. W. 377; Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863. (2) But mere lapse of time does not defeat an application for continuance. Evans *v.* Cleveland, 72 N. Y. 486.

51. U. S.—Spaeth *v.* Sells, 176 Fed. 797. **Ohio.**—Carter *v.* Jennings, 24 Ohio St. 182, 188. **Okla.**—Kilgore *v.* Yarnell, 24 Okla. 525, 103 Pac. 698.

52. See *supra*, III, F, 3, a, (I).

53. Minn. — Lee *v.* O'Shaughnessy, 20 Minn. 173. **N. Y.**—Coit *v.* Campbell, 82 N. Y. 509; In the Matter of Bornsdorff *v.* Lord, 41 Barb. 211, 17 Abb. Pr. 168. **S. C.**—Dunham *v.* Carson, 42 S. C. 383, 388, 20 S. E. 197.

54. Campbell *v.* West, 93 Cal. 653, 29 Pac. 219, 645; Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250, the action may be revived on motion on showing by affidavit of the death of the party.

55. U. S.—See *In re* Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. ed. 1134, by motion suggesting the death and by alias summons. **Ala.**—Waddill *v.* John, 48 Ala. 232. **Colo.**—Symes *v.* Charpiot, 17 Colo. App. 463, 69 Pac. 311. **N. H.**—Ela *v.* Rand, 4 N. H. 54. **N. Y.**—In the Matter of Bornsdorff *v.* Lord, 41 Barb. 211, 17 Abb. Pr. 168. **Wis.**—Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

[a] **Motion should be in writing** under statute, but an objection on this ground for the first time on second trial comes too late. Moreover, an order of revivor in writing is a substantial compliance with the statute. Dean *v.* Feeley, 66 Ga. 273.

56. Ala.—Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136, upon ex parte motion or verbal suggestion an order may be made. **Cal.**—Campbell *v.* West, 93 Cal. 653, 29 Pac. 219, 645; Taylor *v.* Western Pac. R. Co., 45 Cal. 323, 337. **Ohio.**—Morris *v.* Schmidt, 8 Ohio N. P. (N. S.) 215. **S. C.**—Deloach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; Dunham *v.* Carson, 42 S. C. 383, 391, 20 S. E. 197.

[a] **Notice is unnecessary unless** required by the court. Skinner's Will, 40 Ore. 571, 62 Pac. 523, 67 Pac. 951.

[b] **Where the original defendant was not served with summons, notice** to his executor **is not required.** White *v.* Ladd, 34 Ore. 422, 56 Pac. 515.

in some states, and on notice in others,[57] and based on affidavit[58] or satisfactory proof[59] showing that the cause of action is one which survives,[60] and showing the appointment and qualification of the representative if the person to be brought in is a personal representative,[61] or showing that the party to be substituted is a successor in interest, if he claims as such.[62]

(II.) Resisting Revivor. — The defendant may contest the facts set forth in the motion papers.[63]

(III.) Hearing and Order. — The continuation of the action on motion therefor, is within the discretion of the court,[64] but it is almost a matter of course to grant the motion for revivor, made within a year.[65] In some states the order made on a motion to revive is an

57. **Colo.**—Symes *v.* Charpiot, 17 Colo. App. 463, 69 Pac. 311, the order is void if made without notice. **Ga.** Meeks *v.* Johnson, 75 Ga. 629, statute requires notice where plaintiff dies. **Ia.** Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791, where continuance is against defendant's representative. **N. Y.** Robinson *v.* Thomas, 123 App. Div. 414, 107 N. Y. Supp. 1109; In the Matter of Bornsdorff *v.* Lord, 41 Barb. 211, 17 Abb. Pr. 168; Gordon *v.* Sterling, 13 How. Pr. 405, it is usual to give notice. **Tenn.**—Mayfield *v.* Stephenson, 6 Baxt. 397.

Form of notice of motion to revive, see 9 STANDARD PROC. 1094.

[a] **A statute requiring notice to the defendant's** legal representative on continuance against him, by implication makes notice unnecessary on continuance in favor of plaintiff's representative. Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791.

[b] **Personal service is required.** Meeks *v.* Johnson, 75 Ga. 629.

58. **Minn.**—Stocking *v.* Hanson, 22 Minn. 542. **N. Y.**—Holsman *v.* St. John, 90 N. Y. 461; In the Matter of Bornsdorff *v.* Lord, 41 Barb. 211, 17 Abb. Pr. 168. **S. C.**—Deloach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197.

[a] **Where the motion is made solely on the affidavit of the attorney** of the executor, authority to make the motion should appear in his affidavit or the affidavit of the executor. Robinson *v.* Thomas, 123 App. Div. 411, 107 N. Y. Supp. 1110.

59. See Taylor *v.* Western Pac. R. Co., 45 Cal. 323, 337, substitution may be on suggestion of death and "satisfactory proof" of the appointment of the administrator.

60. Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

[a] **The complaint should be a part** of the moving papers, or the nature of the action should be shown for the purpose of showing that the cause of action survives. Robinson *v.* Thomas, 123 App. Div. 411, 107 N. Y. Supp. 1110.

61. Campbell *v.* West, 93 Cal. 653, 29 Pac. 219, 645; Dunham *v.* Carson, 42 S. C. 383, 391, 20 S. E. 197.

62. St. John *v.* Croel, 10 How. Pr. (N. Y.) 253; St. John *v.* West, 4 How. Pr. (N. Y.) 329.

[a] **A prima facie case** must be made out. St. John *v.* Croel, 10 How. Pr. (N. Y.) 253; St. John *v.* West, 4 How. Pr. (N. Y.) 329.

63. Landis *v.* Olds, 9 Minn. 90.

[a] **Affidavits** may be filed. Landis *v.* Olds, 9 Minn. 90.

[b] **The return to the order to show cause is not to be taken as true** simply because not traversed as in mandamus cases. *Ex parte* Jackson, 99 S. C. 66, 82 S. E. 990.

[c] **Issues That May Be Raised.** (1) Following the practice obtaining in a proceeding by bill of revivor, it has been held that where the persons brought in take as heirs and not as devisees, they can only contest the fact that they are heirs or devisees. They cannot answer the complaint generally. Dunham *v.* Carson, 42 S. C. 383, 391, 20 S. E. 197. (2) But when the original defendant has not been served and has not appeared, and a substitution is had ex parte, the substituted person in his answer may set up defenses to the propriety of the continuance against him. White *v.* Ladd, 34 Ore. 422, 56 Pac. 515.

64. See *supra*, III, F, 4, b, (I).

65. Stocking *v.* Hanson, 22 Minn. 542.

unconditional order of revival, whether made on notice or ex parte,[66] while in others it is an order on the person to be brought in for an order to show cause why the action should not be revived.[67] In the latter case, if no cause is shown against the revivor, the action is considered as revived or continued.[68]

Terms. — Terms may be imposed as a condition to granting the revivor where the applicant is guilty of laches.[69]

(IV.) Service of Order and Summons. — Before an executor of the defendant can be affected by notices and proceedings in an action, he must be duly notified of his having been made a party.[70] Unless required by statute,[71] a formal summons is not necessary, where the original party was served,[72] the service of the order on the adverse party being sufficient.[73]

[a] **The motion should always be allowed** unless good cause be shown to the contrary. Landis *v.* Olds, 9 Minn. 90.

66. Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405. See Judson *v.* Love, 35 Cal. 463; Morris *v.* Schmidt, 8 Ohio N. P. (N. S.) 215.

[a] **The order made is for a summons** to issue to the proper parties to appear and defend. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136. See code as to present state of law.

[b] **Form of Order.**—An order of revivor made on motion must show the style of the cause; the court; that the death of the party has been suggested and proved or admitted; the name of the party against whom revivor is sought, that they are nonresidents and that publication is ordered in lieu of personal service. Foster *v.* Burem, 1 Heisk. (Tenn.) 783.

67. Overall *v.* St. Louis Traction Co., 112 Mo. App. 224, 90 S. W. 402 (by express statute); Deloach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; Dunham *v.* Carson, 42 S. C. 383, 391, 20 S. E. 197.

68. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136; Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197.

69. McInnis *v.* Gardiner, 26 Misc. 487, 57 N. Y. Supp. 471; Collins *v.* Jewell, 3 Misc. 341, 22 N. Y. Supp. 716; Smith *v.* Harrington, 3 Wyo. 503, 27 Pac. 803.

70. McCreery *v.* Everding, 44 Cal. 284; Judson *v.* Love, 35 Cal. 463.

[a] **The court in which the party is to appear** must be shown in the citation. Waddill *v.* John, 48 Ala. 232.

[b] **Service by publication** may be had on a foreign administrator against whom a suit begun by attachment is continued. Logan *v.* Greenwich Trust Co., 144 App. Div. 372, 129 N. Y. Supp. 577.

71. See the statutes and Overall *v.* St. Louis Traction Co., 112 Mo. App. 224, 90 S. W. 402.

[a] **Statute provides** (1) that on a revivor against a defendant the court may direct supplemental summons to issue, and supplemental pleadings to be made. This statute does not provide an exclusive method of revivor and is designed to reach nonresidents on whom the order cannot be served. Citizens' Nat. Bank *v.* Bang, 112 App. Div. 748, 99 N. Y. Supp. 76. (2) If the person to be brought in is a foreign administrator service of supplemental summons by publication or personally is not permissible where no property has been attached. German-American Coffee Co. *v.* Johnston, 168 App. Div. 31, 153 N. Y. Supp. 866.

72. Morris *v.* Schmidt, 8 Ohio N. P. (N. S.) 215; Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829.

[a] **Where the original defendant was not served,** the service of a summons on the substituted party cannot be dispensed with. Probably the practice is to file a supplemental complaint showing the death and the appointment of the executor and thereupon to issue an alias summons entitled in the action after substitution made. White *v.* Johnson, 27 Ore. 282, 293, 40 Pac. 511, 50 Am. St. Rep. 726. See *In re* Georgi's Est., 35 Misc. 685, 72 N. Y. Supp. 431.

73. Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829.

[a] **Service by mail** of the rule to show cause why the person should not

(V.) Record. — The making of a motion to revive an action within the prescribed time must appear of record.[74]

c. *Continuance on Supplemental Pleading.* — **(I.) Contents of Supplemental Complaint.** — When an action is continued by supplemental pleading, the supplemental complaint must state the grounds upon which the application is made,[75] the death of the party,[76] the appointment of the representative, if the action is to be revived in his favor,[77] and some excuse for delay when it is not filed within a year.[78] The facts constituting the cause of action need not be restated in the supplemental complaint,[79] unless the original complaint was not served.[80]

(II.) Leave of Court To File. — No leave of court is necessary for the filing of the supplemental complaint.[81]

(III.) Notice and Process. — The proceeding being regarded as a continuance of the original action,[82] a summons is not required,[83] a rule to show cause being sufficient notice to the heir to answer the supplemental complaint.[84] A summons is proper and sufficient, however.[85]

(IV.) Demurrer, Answer and Plea. — The defendant may file a demurrer,[86] answer,[87] or plea[88] to the supplemental complaint.

(V.) Hearing. — The action is not continued except upon a hearing,[89] after an opportunity has been offered to persons sought to be brought in, to appear and resist the continuance.[90] The issues raised by the demurrer or answer are to be tried as other formal issues of fact or law.[91]

be made a party is not permissible. Ham *v.* Robinson Co., 146 Ga. 442, 91 S. E. 483.

74. Pope *v.* Irby, 57 Ala. 105.

75. Stocking *v.* Hanson, 22 Minn. 542.

76. Allen *v.* Walter, 10 Abb. Pr. (N. Y.) 379; Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

77. Allen *v.* Walter, 10 Abb. Pr. (N. Y.) 379; Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

78. Stocking *v.* Hanson, 22 Minn. 542.

79. Mulligan *v.* O'Brien, 119 App. Div. 355, 104 N. Y. Supp. 301.

80. Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

81. In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168 (because the complaint is analagous to a bill of revivor); Arthur *v.* Allen, 22 S. C. 432, 444.

82. Sims *v.* Davis, 70 S. C. 362, 374, 49 S. E. 872.

83. Sims *v.* Davis, 70 S. C. 362, 374, 49 S. E. 872.

84. Sims *v.* Davis, 70 S. C. 362, 374, 49 S. E. 872; Durbin *v.* Waldo, 15 Wis. 352.

[a] **The rule need not specify a time or place** at which cause shall be shown. Durbin *v.* Waldo, 15 Wis. 352.

85. Sims *v.* Davis, 70 S. C. 362, 375, 49 S. E. 872; Arthur *v.* Allen, 22 S. C. 432, 444.

86. Stocking *v.* Hanson, 22 Minn. 542; In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168.

87. Stocking *v.* Hanson, 22 Minn. 542; In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168.

[a] **A supplemental answer** may be filed by the personal representatives. Mulligan *v.* O'Brien, 119 App. Div. 355, 104 N. Y. Supp. 301.

88. In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168.

89. Lee *v.* O'Shaughnessy, 20 Minn. 173.

[a] **Whether the excuse for delay is sufficient** is a question for the sound discretion of the court. Stocking *v.* Hanson, 22 Minn. 542.

90. Lee *v.* O'Shaughnessy, 20 Minn. 173.

91. Stocking *v.* Hanson, 22 Minn.

(VI.) Order. — An order of continuance is necessary to revive or continue the action.[92]

d. *Summary Method of Revivor.* — **(I.) Generally.** — The summary method of revivor is by an order or conditional order of revivor by the court or judge made on motion of a party,[93] or by consent.[94] If the order is not made by consent, there are two methods of obtaining the revivor, although some statutes make no provision for the second method by conditional order.[95]

(II.) First Method. — A party proceeding under the first method serves notice of application for the order on the adverse party,[96] in the same manner as a summons.[97] When this is done, the court may make an absolute order reviving the action if sufficient cause be not shown to the contrary, whereupon the cause shall stand revived.[98]

(III.) Second Method. — When proceeding by the second method, the party may, on motion,[99] without notice,[1] suggest the death of the party and obtain a conditional order reviving the action,[2] which order is required to be served on the adverse party in the same manner[3] as

542; In the Matter of Bornsdorff *v.* Love, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168.

92. Lee *v.* O'Shaughnessy, 20 Minn. 173.

Form of order reviving action, see 9 STANDARD PROC. 1096.

[a] **If the propriety of the revival is not contested,** an order of revival is entered of course pro confesso. In the Matter of Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211, 17 Abb. Pr. 168.

93. McNutt *v.* State, 48 Ark. 30, 2 S. W. 254.

94. **As to revivor by consent,** see *infra,* III, F, 4, f.

95. See the statutes.

96. Zahn *v.* Obert (Okla.), 159 Pac. 298.

97. Guess *v.* Briggs, 54 Kan. 32, 37 Pac. 121; Hanlen *v.* Baden, 6 Kan. App. 635, 49 Pac. 615; Zahn *v.* Obert (Okla.), 159 Pac. 298.

[a] **Notice and Service Is Jurisdictional.**—Zahn *v.* Obert (Okla.), 159 Pac. 298.

[b] **Notice may be served on the adverse party or his attorney** by delivering him a copy personally, or by leaving a copy at his usual place of residence or by securing his acknowledgment of service. Hanlen *v.* Baden, 6 Kan. App. 635, 49 Pac. 615.

98. McNutt *v.* State, 48 Ark. 30, 2 S. W. 254.

99. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47.

[a] **Motion may be oral** although a written motion is better practice. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47.

1. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47.

2. McNutt *v.* State, 48 Ark. 30, 2 S. W. 254; Phillips' Exr. *v.* Rudy, 146 Ky. 780, 143 S. W. 397.

[a] **The conditional order** is to the effect that the action be revived in his name as administrator, and proceed against him as such unless he shall show sufficient cause against the revivor at the next term of court. McNutt *v.* State, 48 Ark. 30, 2 S. W. 254.

[b] **The Order Must Be Against All the Parties.**—Fox *v.* Abbott, 12 Neb. 328, 11 N. W. 303.

[c] **When Made.**—A conditional order may be made as soon as the administrator is appointed. The statute providing that an order to revive shall not be made until six months after qualification applies to the final order only. State Fair Assn. *v.* Townsend, 69 Ark. 215, 63 S. W. 65.

3. **Ark.**—Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47; McNutt *v.* State, 48 Ark. 30, 2 S. W. 254; Evans *v.* Davies, 39 Ark. 235; Haley *v.* Taylor, 39 Ark. 104. **Ind. Ter.**—Cassidy *v.* Saline Co. Bank, 7 Ind. Ter. 543, 104 S. W. 829. **Ky.**—Fishback *v.* Green, 87 Ky. 107, 7 S. W. 881. **Neb.**—Missouri Pac. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130.

[a] **Service of an ordinary summons** instead of a copy of the conditional order is a sufficient compliance with

a summons, unless the party voluntarily appears.[4] A hearing within a specified time is contemplated,[5] at which the party upon whom the order of revivor is served may show cause against the revivor.[6] If sufficient cause be not then shown, the action stands revived.[7] No further order is necessary to perfect the revivor,[8] though some courts make the order final or absolute.[9] If the defendant is absent from the state, service may be by publication,[10] or the court may make a warning order to appear at a specified time,[11] as the statute may prescribe. But a general appearance will cure a failure to serve the order,[12] or any defect in the service.[13]

e. *By Voluntary Appearance.* — Under some statutes, on the death of a party either plaintiff or defendant, the person to whom the action survives, on suggesting the death on the record, may voluntarily[14]

the statute. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47; McNutt *v.* State, 48 Ark. 30, 2 S. W. 254.

[b] **Service on the attorney** of record is sufficient. Missouri Pac. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130.

[c] **Notice to the defendant is not necessary for revivor on death of plaintiff** within a year. Keffer *v.* Stuart, 127 Ark. 498, 193 S. W. 83.

[d] **A failure to serve a copy of the order does not defeat** a revivor. It merely postpones the duty to show cause against the revivor until proper service. Hodges *v.* Taylor (Ark.), 13 S. W. 129.

4. **Ark.**—State Fair Assn. *v.* Townsend, 69 Ark. 215, 63 S. W. 65. **Ky.** Gish Banking Co. *v.* Leachman's Admr., 159 Ky. 769, 169 S. W. 481. **Neb.** Schaberg *v.* McDonald, 60 Neb. 493, 498, 83 N. W. 737.

5. Spaeth *v.* Sells, 176 Fed. 797.

[a] **Issues Triable.**—The merits of the controversy are not the subject of inquiry. **Neb.**—Gillette *v.* Morrison, 7 Neb. 263, 266. **Ohio.**—Foresman *v.* Haag, 37 Ohio St. 143. **Okla.**—Kilgore *v.* Yarnell, 24 Okla. 525, 103 Pac. 698.

[b] **The question of revival must be finally determined** on the hearing on the motion, conditional order and answer. Hendrix *v.* Rieman, 6 Neb. 516.

6. Cassidy *v.* Saline Co. Bank, 7 Ind. Ter. 543, 104 S. W. 829; Schaberg *v.* McDonald, 60 Neb. 493, 499, 83 N. W. 737; Missouri P. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130.

[a] **The Defendant May Answer.** Hendrix *v.* Rieman, 6 Neb. 516.

7. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47; McNutt *v.* State, 48 Ark. 30, 2 S. W. 254; Phillips' Exr. *v.* Rudy, 146 Ky. 780, 143 S. W. 397.

8. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47. See Schaberg *v.* McDonald, 60 Neb. 493, 83 N. W. 737, if the party appears and thereby waives a conditional order, the court may enter a positive order of revivor, no cause being shown against it.

9. **U. S.**—Spaeth *v.* Sells, 176 Fed. 797. **Neb.**—Missouri P. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130. **Ohio.** Foresman *v.* Haag, 37 Ohio St. 143.

10. See the statutes.

11. Will *v.* Louisville, 176 Ky. 450, 195 S. W. 822.

12. Phillips' Exr. *v.* Rudy, 146 Ky. 780, 143 S. W. 397; Fishback *v.* Green, 87 Ky. 107, 7 S. W. 881.

13. Missouri Pac. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130; Hendrix *v.* Rieman, 6 Neb. 516, 520.

14. **U. S.**—Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. ed. 641, under Illinois practice. **Ill.**—Selden *v.* Illinois T. & S. Bank, 239 Ill. 67, 77, 87 N. E. 860 (on death of sole plaintiff); Strauss *v.* Merchants' L. & T. Co., 119 Ill. App. 588; Keep *v.* Crawford, 92 Ill. App. 587. **Mass.** Electric Welding Co. *v.* Prince, 195 Mass. 242, 81 N. E. 306. **Mich.**—Vickery *v.* Beir, 16 Mich. 50; Larned *v.* Wilcox, 4 Mich. 333. **Miss.**—Smith *v.* Pattison, 45 Miss. 619. **Tex.**—Armstrong *v.* Nixon, 16 Tex. 610 (statute relates to death of plaintiff); Gowings *v.* Loyd, 4 Tex. 483, 489; Beck *v.* Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207. **Va.** Wilson *v.* Smith, 22 Gratt. (63 Va.) 493, 503, on death of plaintiff.

[a] **Who May Procure Revival.** Under a statute providing that if the sole plaintiff dies, any person to whom

appear and be substituted as a party. The proceeding is ex parte,[15] except under particular circumstances,[16] and a formal order of court is not required.[17]

f. *By Consent.* — Some statutes expressly authorize a revivor by consent, usually providing that an order of revivor cannot be made after the expiration of one year without the consent of the defendant.[18]

the cause of action survives "may, by suggesting such death on the record, be substituted as plaintiff," either party may make the suggestion and procure a revival. Strauss *v.* Merchants' L. & T. Co., 119 Ill. App. 588.

[b] **A suggestion of death must be made** to authorize the representative to come in as a party. Gowings *v.* Loyd, 4 Tex. 483.

[c] **Effect of Suggestion.**—A suggestion of death and an order of court thereon is prima facie proof of the death of the party. Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. ed. 641.

[d] **The suggestion of death need not be made through** an amended petition. Callahan *v.* Houston, 78 Tex. 494, 14 S. W. 1027.

[e] **Objection to the party** to be substituted for the deceased plaintiff may be made orally. The sustaining of such objection would not abate the action, however, but it will stand until a proper party is brought in. O'Neal *v.* Tisdale, 12 Tex. 40. *Compare* Vickery *v.* Beir, 16 Mich. 50, intervention by the adverse party is not allowable even though he may happen to be present.

[f] **Showing in Record.**—A recital in the judgment of the making of a suggestion of death and of the granting of leave to heirs to sue is sufficient without the entry of record preliminarily made, as contemplated by statute. Lowry *v.* Haynes, 44 Tex. Civ. App. 431, 98 S. W. 1068.

[g] **The representative is held to have adopted the pleadings** of the original plaintiff by appearing, and going to trial on the pleadings. Houston & T. C. R. Co. *v.* Buchanan, 48 Tex. Civ. App. 129, 107 S. W. 595.

[h] **Enforcement of Order.**—If the plaintiff's representative refuses to come in after suggestion of death by the defendant and order of substitution, a scire facias will issue. Strauss *v.* Merchants' L. & T. Co., 119 Ill. App. 588.

[i] **In Delaware,** it is sufficient if the suggestion of death in writing be filed with the prothonotary. Use of Smith *v.* Simmons, 1 Penne. (Del.) 249.

[j] **Revivor by Filing Statement.** The executors of a defendant cannot make themselves parties by filing a statement to that effect without leave of court. First Nat. Bank *v.* Pancake, 172 N. C. 513, 90 S. E. 515.

15. Vickery *v.* Beir, 16 Mich. 50, 54; Larned *v.* Wilcox, 4 Mich. 333.

16. See *infra,* this note.

[a] **Notice.**—Where the cause has not been on the docket for a long time, following the death of the plaintiff, notice of the proceeding must be given the defendant. Beck *v.* Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207. In this case the revival was instituted by minors on coming of age eight years after the death.

17. Thompson *v.* McGreal, 9 Tex. 392.

[a] **A formal order** is not necessary. The representative is a party from the time he appears in court and asks to have the suit revised in his name. There being no ruling of the court refusing permission, it is to be taken as granted. Thompson *v.* McGreal, 9 Tex. 392.

18. **Ala.**—See Parker's Admr. *v.* Abrams, 50 Ala. 35. **Ark.**—Keffer *v.* Stuart, 127 Ark. 498, 193 S. W. 83; State Fair Assn. *v.* Townsend, 69 Ark. 215, 63 S. W. 65; McNutt *v.* State, 48 Ark. 30, 2 S. W. 254. **Ky.**—Williams *v.* Thompson, 80 Ky. 325. **Miss.**—Reynolds *v.* Carter, 109 Miss. 314, 68 So. 467. **Mo.**—Minton *v.* Steinhauer, 243 Mo. 51, 147 S. W. 1014; Overall *v.* St. Louis Traction Co., 112 Mo. App. 224, 90 S. W. 402. **Neb.**—Hayden *v.* Huff, 62 Neb. 375, 87 N. W. 184. **Okla.** Zahn *v.* Obert, 159 Pac. 298; Kilgore *v.* Yarnell, 24 Okla. 525, 103 Pac. 698.

[a] **Admission of heirs as parties plaintiff by order of court without objection** is in effect a revivor by con-

g. *By Scire Facias or Notice.*[19] — Early English statutes which have the force of common law, authorized a revivor by scire facias, if the cause of action survive, where a party dies between interlocutory and final judgments.[20] Statutes sometimes authorize the revival of suits by scire facias or notice both at law and in equity.[21] For example it is provided that on suggestion of the death of a party, the clerk must issue a scire facias, or by some statutes, a summons, to the representative or successor of the decedent.[22] The process of

sent. Rakes *v.* Brown, 34 Neb. 304, 51 N. W. 848.

[b] **Consent to a revivor within the year** is not required. Zahn *v.* Obert (Okla.), 159 Pac. 298.

Form of order of revivor by consent, see 9 STANDARD PROC. 1096.

[c] **Process is unnecessary** where the revivor is by consent. Zahn *v.* Obert (Okla.), 159 Pac. 298; Teter *v.* Irwin, 69 W. Va. 200, 71 S. E. 115, Ann. Cas. 1913A, 707.

[d] **Infants cannot consent** for themselves, and an order of revivor made on their consent is void. Burchett *v.* Clarke, 33 Ky. L. Rep. 240, 109 S. W. 888. As to representation of infants, see 10 STANDARD PROC. 716.

[e] **The cause stands revived forthwith,** where the order of revivor is made by consent. McNutt *v.* State, 48 Ark. 30, 2 S. W. 254.

19. As to scire facias generally, see the title "**Scire Facias.**"

Scire facias to revive judgments, see 16 STANDARD PROC. 512, et seq.

20. 8 & 9 Will. III, c. 11; Warren *v.* Furstenheim, 35 Fed. 691, 1 L. R. A. 40. See the title "**Survival.**"

21. U. S.—*In re* Connawa, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. ed. 1134; McNeil *v.* McNeil, 170 Fed. 289, 95 C. C. A. 485; Allen *v.* Fairbanks, 40 Fed. 188. **Conn.**—Craig *v.* Wagner, 88 Conn. 100, 89 Atl. 916, Ann. Cas. 1917A, 160. **Fla.**—Parker *v.* Hendry, 8 Fla. 53. **Ga.** Ham *v.* Robinson Co., 146 Ga. 442, 91 S. E. 483, on death of defendant. **Mass.**—See Electric Welding Co. *v.* Prince, 195 Mass. 242, 81 N. E. 306, if the executor does not appear voluntarily citation may be taken out against him. **Mo.**—Chicago, R. I. & P. Ry. Co. *v.* Woodson, 110 Mo. App. 208, 85 S. W. 105. **N. H.**—Shea *v.* Starr, 76 N. H. 538, 85 Atl. 788; Pierce *v.* Jaquith, 48 N. H. 231; Ela *v.* Rand, 4 N. H. 54. **Tenn.**—Tipton *v.* Tipton, 118 Tenn. 691, 702, 104 S. W. 237; Winter *v.* Shankland, 3 Tenn. Ch. 361, "scire facias or notice." **Va.**—Wilson *v.* Smith, 22 Gratt. (63 Va.) 493; Reid's Admr. *v.* Strider's Admr., 7 Gratt. (48 Va.) 76, 54 Am. Dec. 120; Catlett's Exr. *v.* Russell, 6 Leigh (33 Va.) 344. **W. Va.**—Moore *v.* Moore, 81 W. Va. 17, 93 S. E. 937; Laidley *v.* Jasper, 49 W. Va. 526, 39 S. E. 169; Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424; Reid *v.* Stuart's Exr., 20 W. Va. 382; Garrison *v.* Myers, 12 W. Va. 330. See Foresman *v.* Haag, 37 Ohio St. 143, holding scire facias is not abolished and may doubtless be resorted to to revive suits. See the title "**Scire Facias.**"

[a] **From What Court Issued.**—A scire facias to revive a suit can only be issued in the suit to be revived. Garrison *v.* Myers, 12 W. Va. 330.

[b] **If the suit is in equity,** the scire facias must be in equity and must be governed by the rules of that court. Garrison *v.* Myers, 12 W. Va. 330.

[c] **Delay in returning** the scire facias does not necessarily operate as an abatement of the original action. Shea *v.* Starr, 76 N. H. 538, 85 Atl. 788.

[d] **Objections to the scire facias** must be made before appearance. Boone *v.* Roberts, 1 Tex. 147.

[e] **Revivor may be had at term subsequent** to that at which the scire facias is returnable. Davidson *v.* Kunst, 72 W. Va. 116, 77 S. E. 548; Laidley *v.* Jasper, 49 W. Va. 526, 39 S. E. 169.

22. Mo.—See Chicago, R. I. & P. Ry. Co. *v.* Woodson, 110 Mo. App. 208, 85 S. W. 105. **N. C.**—Rogerson *v.* Leggett, 145 N. C. 7, 58 S. E. 596. **Pa.** See Philadelphia *v.* Jenkins, 162 Pa. 451, 29 Atl. 794. **Tex.**—Siese *v.* Malsch, 54 Tex. 355; McCampbell *v.* Henderson, 50 Tex. 601; Armstrong *v.* Nixon, 16 Tex. 610; Gowings *v.* Loyd, 4 Tex. 483, 489.

[a] **Unless the representative of the defendant makes a voluntary appear-**

scire facias to revive actions is not an action,[23] but is more in the nature of an ordinary citation, notice or summons.[24] The writ need not possess the incidents of the common law scire facias,[25] and it is not intended that it should be pleaded to,[26] unless to show that the person to be substituted is not a proper party.[27]

h. *By Amendment of Pleadings.* — In the absence of statute authorizing it, amending the bill is not a very regular or usual way of bringing in the personal representatives or heirs of a deceased party defendant.[28] Such a proceeding is erroneous,[29] but it may serve the purpose of suggesting the death of the party,[30] and when the heirs or representatives are served with notice to appear and plead, the statute is satisfied.[31]

5. In Admiralty. — In admiralty a revivor may be had by a motion for substitution.[32]

6. Effect of Order of Revival. — After a valid order of revivor the person named therein becomes in legal effect a party to the action.[33] An absolute order of revival is res judicata as to the right

ance after the suggestion of death, scire facias must issue. Gowings *v.* Loyd, 4 Tex. 483, 489.

[b] **A scire facias not based on a suggestion of death** does not (1) bring the personal representatives or heirs of the deceased into court under a statute requiring the issuance of a scire facias on suggestion of death of defendant. Siese *v.* Malsch, 54 Tex. 355. See Sargent *v.* Rowsey, 89 Mo. 617, 1 S. W. 823. (2) If so issued, the scire facias and service will be quashed on motion. Hanley *v.* Lemmon, 28 Tex. 155.

[c] **Service and Notice.** — Scire facias on the administrator is sufficient where service was perfected against the intestate. But in the absence of service on him, the notice to be given him must be given the administrator. Lyendecker *v.* Martin, 38 Tex. 287.

23. Shea *v.* Starr, 76 N. H. 538, 85 Atl. 788; Boone *v.* Roberts, 1 Tex. 147.

24. **N. H.**—Shea *v.* Starr, 76 N. H. 538, 85 Atl. 788. **Tenn.**—Winter *v.* Shankland, 3 Tenn. Ch. 361. **Tex.** Boone *v.* Roberts, 1 Tex. 147.

25. Boone *v.* Roberts, 1 Tex. 147.

[a] **The nature of the liability to be enforced** against the person to be brought in need not be set up in the scire facias. Tipton *v.* Tipton, 118 Tenn. 691, 702, 104 S. W. 237.

[b] **A recital of the pleadings and proceedings** up to the death of the party is not required. Boone *v.* Roberts, 1 Tex. 147.

[c] **A scire facias against an executor in a detinue action** should show that the specific thing came into his possession. If not there shown, the plaintiff must file a count alleging such possession. Catlett's Exr. *v.* Russell, 6 Leigh (33 Va.) 344.

[d] **Misdescription of an action in a** scire facias as debt instead of assumpsit is immaterial where there is no surprise or prejudice. Davidson *v.* Kunst, 72 W. Va. 116, 77 S. E. 548.

26. Boone *v.* Roberts, 1 Tex. 147.

[a] **A motion to dismiss** a scire facias because the original bill sets forth no ground for relief is not proper. Allen *v.* Fairbanks, 40 Fed. 188.

27. Lewis *v.* Allen, 68 Ga. 398; Berrigan *v.* Fleming, 2 Lea (Tenn.) 271.

[a] **That the defendant is not a proper party** to be substituted should be set up in the pleading of the defendant. Lewis *v.* Allen, 68 Ga. 398.

28. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136; Floyd *v.* Ritter's Admr., 65 Ala. 501; Evans *v.* Welch, 63 Ala. 250.

[a] **Statutes relating to amendments** before and after judgment by adding and striking out parties do not authorize a continuance of the action by or against new parties after the death of a party. Lee *v.* O'Shaughnessy, 20 Minn. 173.

29. Evans *v.* Welch, 63 Ala. 250.

30. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136.

31. Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136.

32. See 1 STANDARD PROC. 528.

33. Jenkins *v.* Bramlett, 131 Ala. 597, 32 So. 575.

of the person named to proceed with the action.[34] The order is conclusive unless vacated or reversed on error,[35] and it cannot be reviewed on a subsequent trial of the cause,[36] or collaterally attacked on the ground of mere irregularities in the proceeding.[37] But an order reviving an action that does not survive is void.[38]

7. Vacation and Correction of Order of Revival. — Orders of revivor improperly made may be vacated or corrected on motion.[39]

8. Compelling Revivor. — To enable the adverse party to compel a revival within a reasonable time after the death of the plaintiff, some codes give him a right, at any time, to apply for an abatement or dismissal of the action unless the action is revived within the time fixed in the order.[40] Under some statutes the defendant may suggest the plaintiff's death, and if the cause is not revived within a certain time it is discontinued.[41]

9. Remedy Where Cause Is Not Revived in Time. — If a cause is not revived within the statutory period, it will be abated on motion of the parties,[42] or on the court's own motion.[43] In equity, if a suit is not revived within a proper time the court will dismiss the suit.[44] This rule has been incorporated in rules of court,[45] and re-enacted

34. Missouri P. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130.

35. Hendrix *v.* Rieman, 6 Neb. 516; Riley *v.* Gitterman, 55 Hun 605, 10 N. Y. Supp. 38.

36. Hendrix *v.* Rieman, 6 Neb. 516, 520.

[a] **A plea denying appointment of administrator** filed after revivor, is bad and will be treated as surplusage. Hendrix *v.* Rieman, 6 Neb. 516.

37. Riley *v.* Gitterman, 55 Hun 605, 10 N. Y. Supp. 38; Edgington *v.* Jamison, 2 Lea (Tenn.) 569.

38. Garrison *v.* Burden, 40 Ala. 513.

[a] **Right To Object.**—An order reviving an action does not preclude a party from objecting that the cause of action does not survive, even if made by consent. Mundt *v.* Glokner, 20 Misc. 63, 44 N. Y. Supp. 430.

39. **D. C.**—Danenhower *v.* Ball, 8 App. Cas. 137. **Mo.**—Coulter *v.* Phoenix Brick & Const. Co., 131 Mo. App. 230, 110 S. W. 655, where an order of revivor unless good cause be shown against it at the next term, was vacated at the next term and judgment rendered nunc pro tunc **N. Y.**—Robinson *v.* Thomas, 123 App. Div. 414, 107 N. Y. Supp. 1109; Riley *v.* Gitterman, 55 Hun 605, 10 N. Y. Supp. 38. **S. C.** Shull *v.* Caughman, 54 S. C. 203, 32 S. E. 301.

[a] **Void Order.**—Garrison *v.* Burden, 40 Ala. 513.

[b] **An unconditional order of revivor when a conditional order is required** will be set aside. Overall *v.* St. Louis Traction Co., 112 Mo. App. 224, 90 S. W. 402.

40. **U. S.**—Dillard's Admr. *v.* Central Va. Iron Co., 125 Fed. 157. **Kan.** Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008. **N. Y.**—Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863; Holsman *v.* St. John, 90 N. Y. 461; McInnis *v.* Gardiner, 26 Misc. 487, 57 N. Y. Supp. 471. **N. C.**—Moore *v.* North Carolina R. Co., 74 N. C. 528; Baggarly *v.* Calvert, 70 N. C. 688. See Rowe *v.* Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830. **Wis.**—Plumer *v.* McDonald Lumb. Co., 74 Wis. 137, 42 N. W. 250.

[a] **The court has a discretion** as to whether the motion for abatement shall be granted. Coggins *v.* Flythe, 114 N. C. 274, 19 S. E. 701; Baggarly *v.* Calvert, 70 N. C. 688.

Form of order to show cause on petition by defendant to revive, see 9 STANDARD PROC. 1097.

41. Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

42. Holmar *v.* Clark, 11 Ala. App. 238, 65 So. 913; Young *v.* Officer, 7 Yerg. (Tenn.) 137.

43. Life Assn. of America *v.* Fassett, 102 Ill. 315.

44. Spring *v.* Webb, 227 Fed. 481; Brown *v.* Fletcher, 140 Fed. 639; Hoxie *v.* Carr, 1 Sumn. 173, 12 Fed. Cas. No. 6,802.

45. Spring *v.* Webb, 227 Fed. 481.

in statute.[46] But if a revivor is asked at any time before the suit is actually abated by order, the revivor will be allowed despite a motion to abate.[47]

G. JURISDICTION AND PROCEEDINGS AFTER REVIVOR. — **1. Generally.** The revivor of an action restores it to the condition it was in at the time of the abatement,[48] and authorizes the continuance of the proceedings from the point at which they were interrupted,[49] according to the same rules and to recover the same damages as if the original party were living and prosecuting his action or defense in person.[50] The cause after revival is not a new action but is a continuation of the cause suspended by death.[51]

2. Jurisdiction. — Jurisdiction over a suit brought in a federal court on the ground of diversity of citizenship is not divested by the fact that the personal representative of a deceased party resides in the same state as the adverse party.[52]

3. Title of Action. — Proceedings subsequent to the revival should be entitled in the cause as revived,[53] but a failure to do so is not

46. See the statutes.

[a] **The court must strike the case from the docket** (1) on a showing by affidavit that the cause is not revived within one year under statute. Temple *v.* Culp, 105 Ark. 222, 150 S. W. 867; Sackett *v.* Grinstead, 176 Ky. 91, 195 S. W. 103; Sailsberry *v.* Sailsberry, 140 Ky. 731, 131 S. W. 802. (2) This order striking the case from the docket is not equivalent to dismissing the case out of court. It merely suspends further proceedings until some other steps are taken by which a final disposition thereof can be made. The action still remains in court in which it is pending and may be revived. Hayden *v.* Huff, 62 Neb. 375, 87 N. W. 184.

[b] **The court must dismiss the cause** under the Kansas statute. Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008.

47. Brooks *v.* Jones, 5 Lea (Tenn.) 244.

48. Dickens *v.* Dickens, 174 Ala. 305, 56 So. 806; Evans *v.* Welch, 63 Ala. 250.

49. **Colo.**—Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027. **N. Y.** Reilly *v.* Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540; Moore *v.* Hamilton, 48 Barb. 120. **Ore.**—White *v.* Johnson, 27 Ore. 282, 295, 40 Pac. 511, 50 Am. St. Rep. 726.

[a] *Compare* Gauss *v.* Hussmann, 22 Mo. App. 115, holding the death of the defendant, after submission of the case and the revivor vacated the former submission and the court could not proceed to judgment without a new trial unless waived.

50. **Fla.**—Parker *v.* Hendry, 8 Fla. 53. **Mich.**—Rouse *v.* Michigan United Rys. Co., 164 Mich. 475, 129 N. W. 719. **N. Y.**—Moore *v.* Hamilton, 44 N. Y. 666; Tindal *v.* Jones, 19 How. Pr. 469, 11 Abb. Pr. 258.

51. **Ala.**—Dickens *v.* Dickens, 174 Ala. 305, 56 So. 806. **N. J.**—Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755. **Tex.**—McCampbell *v.* Henderson, 50 Tex. 601.

[a] **After revivor, a cause in equity** proceeds to its regular determination as an original bill. Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 172, 9 L. ed. 1041.

52. Hatfield *v.* Bushnell, 1 Blatchf. (U. S.) 393, 11 Fed. Cas. No. 6,211. See generally the title "**United States Courts.**"

53. **Ark.**—Bentley *v.* Dickson, 1 Ark. 165. **Ill.**—Thorpe *v.* Starr, 17 Ill. 199. **Mich.**—People *ex rel.* Stimpson *v.* Judge, 41 Mich. 3, 2 N. W. 179. **Mo.**—C. H. Albers Com. Co. *v.* Milliken, 183 Mo. App. 662, 167 S. W. 1056. **Neb.**—Brandt *v.* Albers, 6 Neb. 504. **N. Y.**—Rogers *v.* Paterson, 4 Paige 450.

[a] **A revivor in the name of a person as executor omitting the word** "as" before the word executor is a revivor in his name in a representative capacity, the words after his name not being descriptio personae. Alabama City, G. & A. R. Co. *v.* Heald, 178 Ala. 636, 59 So. 461; State *ex rel.*

fatal,[54] and may be corrected at any time,[55] even after judgment,[56] or by order of the court.[57]

4. Process.[58] — On death of a party pending publication of summons, publication must be had anew.[59]

5. Pleadings. — On revival the pleadings stand in the same attitude as if the action had never been abated.[60] The person brought in must take up the prosecution or defense at the point where he finds it,[61] and though he may file new pleadings,[62] he need not do so according to some authorities, as the change of parties appears on the record.[63] But other courts require that the original pleadings be amended to make the persons in whose names the cause is revived parties,[64] and show the interests of the persons substituted.[65]

Townley *v.* Pugh, 14 Ala. App. 585, 70 So. 973. *Contra,* Jenkins *v.* Bramlett, 131 Ala. 597, 32 So. 575.

54. Brandt *v.* Albers, 6 Neb. 504.

55. Brandt *v.* Albers, 6 Neb. 504.

56. Brandt *v.* Albers, 6 Neb. 504.

57. Brandt *v.* Albers, 6 Neb. 504.

58. See *supra,* III, F, 4, b, (IV).

59. Reilly *v.* Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540; Logan *v.* Greenwich Trust Co., 144 App. Div. 372, 129 N. Y. Supp. 577.

As to right to revive where defendant dies before service, see *supra,* III, B.

60. Bentley *v.* Dickson, 1 Ark. 165.

61. Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Warren *v.* Robison, 25 Utah 205, 219, 70 Pac. 989.

[a] **The person brought in is bound by the pleadings** filed (1) by the original party. Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Warren *v.* Robison, 25 Utah 205, 219, 70 Pac. 989. (2) The pleadings of the original party are to be taken as those of his representative unless the latter files amended pleadings. Scott *v.* Davis, 141 Mo. 213, 226, 42 S. W. 714; Davis *v.* Smith, 75 Mo. 219.

62. **Colo.**—Morgan *v.* King, 27 Colo. 539, 559, 63 Pac. 416. **Ind.**—Shirk *v.* Coyle, 2 Ind. App. 354, 27 N. E. 638. **Mich.**—Jones *v.* Pendleton, 151 Mich. 442, 115 N. W. 468. **Mo.**—Scott *v.* Davis, 141 Mo. 213, 226, 42 S. W. 714; Davis *v.* Smith, 75 Mo. 219. **Utah.** Warren *v.* Robison, 25 Utah 205, 219, 70 Pac. 989.

[a] **The filing of an answer setting up irrelevant matters** may be denied. Grant *v.* Bell, 91 N. C. 495.

[b] **The court has the same power of amendment,** after revivor, that it has in ordinary cases. Jones *v.* Pendleton, 151 Mich. 442, 115 N. W. 468. See Shirk *v.* Coyle, 2 Ind. App. 354, 27 N. E. 638.

63. **U. S.**—Equitable Life Assn. Soc. *v.* Trimble, 83 Fed. 85, 27 C. C. A. 404. **Cal.**—Campbell *v.* West, 93 Cal. 653, 29 Pac. 219, 645. **Ind.**—Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787. See Trent *v.* Edmonds, 32 Ind. App. 432, 70 N. E. 169. **Mich.**—People *ex rel.* Stimpson *v.* Judge, 41 Mich. 3, 2 N. W. 179; Webster *v.* Bailey, 31 Mich. 36; Webster *v.* Hitchcock, 11 Mich. 56. **Neb.**—Missouri Pac. Ry. Co. *v.* Fox, 56 Neb. 746, 77 N. W. 130. **N. Y.**—See People *ex rel.* Collins *v.* Donohue, 64 Hun 635, 19 N. Y. Supp. 36. **Utah.** Warren *v.* Robison, 25 Utah 205, 219, 70 Pac. 989.

[a] **An objection that the complaint makes no charge against the heirs** substituted after the death of the defendant is untenable as the allegations apply to them as if they were the original defendants. Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787.

[b] **On revivor against infant defendants,** the filing of an answer by the guardian where the pleadings were made up before the death of the original defendant is not required. Vandiever *v.* Conditt, 110 Ark. 311, 162 S. W. 47, holding statute requiring guardian to answer has no application to revived action where the original defendant answered.

64. Douglass *v.* Galend, 69 Kan. 846, 76 Pac. 395.

65. Central Branch U. P. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213; Atchison *v.* Twine, 9 Kan. 350.

[a] **Where the suit is revived in the name of the administrator,** the petition must be amended to show he is entitled to sue in that capacity. Central

6. Issues. — The issues of the case remain the same after the revivor as before.[66] The substituted party cannot litigate anew the questions already decided when he is made a party.[67]

7. Evidence. — Where the plaintiff's representative is made a party at the close of the testimony, a retaking of the testimony has been held unnecessary.[68]

8. Continuance. — On revivor of an action in favor of plaintiff's executor, the defendant is not entitled to a continuance on this ground merely.[69] But on revivor against the representative of a defendant, a continuance is allowed by some courts.[70]

9. Judgment. — A judgment after revivor should not be entered in favor of or against the deceased by name, but should be entered in the name of the substituted party.[71]

10. Review. — a. *By Appeal.* — There is a conflict of authority as to whether an order of revivor is an appealable order, some courts holding that it is,[72] and others that it is not.[73] In the latter case, an improper revivor may be reviewed on appeal from final judgment.[74] But it is clear that an order denying a revival is a final and appeal-

Branch U. P. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213; Atchison *v.* Twine, 9 Kan. 350.

[b] **On revival of a personal action in the names of heirs,** the amended petition is demurrable unless it shows there is no administration and no necessity therefor. Galveston H. & S. A. Ry. Co. *v.* Kelley, (Tex. Civ. App.), 26 S. W. 470.

[c] **An allegation that plaintiffs are children** and heirs at law of I. H. deceased, is sufficient. Hodges *v.* Wilson, 165 N. C. 323, 81 S. E. 340.

66. White *v.* Ladd, 34 Ore. 422, 56 Pac. 515.

67. Dickens *v.* Dickens, 174 Ala. 305, 56 So. 806.

68. Meade *v.* Rutledge, 11 Tex. 44.

69. Wilson *v.* Codman's Exr., 3 Cranch (U. S.) 193, 2 L. ed. 408; Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791.

70. St. Clair *v.* Hotchkiss, 28 Tex. 474; Davidson *v.* Kunst, 72 W. Va. 116, 77 S. E. 548, under statute. See Haley *v.* Evans, 60 Ga. 157 holding that the executor of a defendant may be ruled to trial at once unless cause be shown for continuance. But see Minor *v.* Jones, 4 Hen. & M. (15 Va.) 480.

71. Montgomery *v.* Sawyer, 100 U. S. 571, 25 L. ed. 692. See Parker's Admr. *v.* Abrams, 50 Ala. 35.

[a] **A judgment against a tort-feasor's executor must be several,** not jointly with the co-defendant and must provide that execution is to run against the goods and estate in his hands. Nelson Theatre Co. *v.* Nelson, 216 Mass. 30, 102 N. E. 926.

72. See *infra*, this note.

[a] **The Order Is a Final Order.** Uhlmann Fur Co. *v.* Gates, 155 Wis. 385, 144 N. W. 991; Harris *v.* Welch, 148 Wis. 441, 134 N. W. 1041; Voss *v.* Stoll, 141 Wis. 267, 124 N. W. 89.

[b] **An order of revivor affects a substantial right** within the meaning of a statute regulating appeals. St. John *v.* Croel, 10 How. Pr. (N. Y.) 253; Rogers *v.* Paterson, 4 Paige (N. Y.) 450; see St. John *v.* West, 4 How. Pr. (N. Y.) 329.

73. See *infra*, this note.

[a] **An Order of Revivor Is Not a Final Order.—U. S.**—Mackaye *v.* Mallory, 79 Fed. 1, 24 C. C. A. 420, *distinguishing* Terry *v.* Sharon, 131 U. S. 40, 9 Sup. Ct. 705, 33 L. ed. 94, on the ground that the original suit had passed to final decree and the defendant had no opportunity to review the order by appealing from it. **Ark.** Blum *v.* Pulaski Co., 92 Ark. 101, 122 S. W. 109. **Ga.**—Ray *v.* Anderson, 117 Ga. 136, 43 S. E. 408. **Ky.**—Reeves *v.* Davis' Admr., 6 Ky. L. Rep. 514.

74. **U. S.**—Mackaye *v.* Mallory, 79 Fed. 1, 24 C. C. A. 420. **Ark.**—Blum *v.* Pulaski Co., 92 Ark. 101, 122 S. W. 109. **Ky.**—Reeves *v.* Davis' Admr., 6 Ky. L. Rep. 514.

able order.[75] The same is true of an order sustaining a motion to abate a cause for want of a revivor.[76]

Where the revivor is within the discretion of the court, the action of the court will not be interfered with in the absence of an abuse of discretion.[77]

b. *By Mandamus.* — Mandamus is an appropriate remedy to correct an erroneous order refusing to allow a revivor and striking the cause from the docket.[78] But mandamus is not an appropriate remedy to compel a revivor where there is an adequate remedy by appeal.[79]

IV. ON MARRIAGE OF FEMALE PARTIES. — **Plaintiff.**[80] — In equity, a revivor after the marriage of a female plaintiff may be had by bill of revivor.[81] Statutes sometimes require that the husband be brought in on the marriage of a female plaintiff.[82] But under some statutes, the husband is not a necessary party and need not be brought in.[83]

Defendant. — On marriage of a female defendant in equity, it is necessary to obtain an order that the suit proceed against the husband and wife.[84] Statutes sometimes provide that on suggestion of the marriage of a female defendant with the name of the husband, the suit may proceed against both.[85] And it is error to proceed without

75. Mackaye *v.* Mallory, 79 Fed. 1, 24 C. C. A. 420; Strauss *v.* Merchants L. & T. Co., 119 Ill. App. 588.

76. Board of Councilmen *v.* Herndon's Admr., 133 Ky. 583, 118 S. W. 347.

77. Uhlmann Fur. Co. *v.* Gates, 155 Wis. 385, 144 N. W. 991.

[a] **The appellate court will presume** (1) that the order of substitution was regularly made, in the absence of evidence to the contrary. Warren *v.* Robison, 25 Utah 205, 219, 70 Pac. 989. (2) The presence of the personal representative defending the action sufficiently establish the regularity of his admission as a party. Grant *v.* Bell, 90 N. C. 558.

78. *In re* Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. ed. 1134; *Ex parte* Sayre, 69 Ala. 184; State *ex rel.* Wilder *v.* Smith, 12 Ala. App. 636, 68 So. 490, citing local cases.

79. State *ex rel.* Goldsborough *v.* Huston, 26 Okla. 861, 110 Pac. 907.

80. **As to abatement of actions by marriage of female parties,** see the title "**Survival.**"

81. **U. S.**—Brown *v.* Fletcher, 140 Fed. 639. **Ala.**—Bowie *v.* Minter, 2 Ala. 406. **N. Y.**—Douglass *v.* Sherman, 2 Paige 358. **R. I.**—Manchester *v.* Mathewson, 2 R. I. 416.

[a] **The defendant** may file a bill of revivor to revive a suit, after marriage of a female plaintiff. Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131.

[b] **The husband** of a female plaintiff who marries pending suit may file a bill of revivor. Bowie *v.* Minter, 2 Ala. 406.

82. See the statutes and James *v.* Tait, 8 Port. (Ala.) 476, the husband may make himself a party by motion.

[a] **The objection that the husband is not brought in** can (1) only be presented by plea in abatement. Powell *v.* Glenn, 21 Ala. 458 (where one of several plaintiffs married); Laster *v.* Toliver, 11 Ark. 450. (2) The failure to bring in the husband is not reversible error if not objected to in the lower court. Alexander *v.* Steele, 84 Ala. 332, 4 So. 281.

83. **Cal.**—Calderwood *v.* Pyser, 31 Cal. 333. **N. C.**—Shuler *v.* Millsaps' Exr., 71 N. C. 297. **Tex.**—Western Cottage Piano & O. Co. *v.* Anderson, 45 Tex. Civ. App. 513, 101 S. W. 1061, statute confers on husband the privilege of making himself a party which he need not avail himself of. **W. Va.** Stevens *v.* Friedman, 58 W. Va. 78, 82, 51 S. E. 132.

84. Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131; Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

85. See the statutes and Sackett *v.* Wilson, 2 Blackf. (Ind.) 85; Reed *v.*

making the husband a party when statute requires that he be brought in.[86]

V. ON TRANSFER OF INTEREST. — The continuation of an action after a transfer of the interest of a party in the subject matter is elsewhere discussed.[87]

Cavitt, 10 Tex. Civ. App. 373, 30 S. W. 575.

86. Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778; Reed *v.* Cavitt, 10 Tex. Civ. App. 373, 30 S. W. 575.

87. See the titles "**Parties**" and "**Survival.**"

REWARDS

By the Editorial Staff.

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CROSS-REFERENCES:

Implied and Express Agreements.

For forms, see 9 STANDARD PROC. 1099, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. FORM OF ACTION. — Assumpsit is the usual form of action for the recovery of a reward,[1] but debt will also lie.[2]

II. CONDITIONS PRECEDENT. — A notice that the offer of reward is being acted upon,[3] or that it has been acted upon with knowledge or upon the faith thereof,[4] need not be given. Statutes in some states create certain conditions precedent to the recovery of rewards offered by the government.[5]

III. PARTIES.[6] — Where a reward is earned by the joint efforts of several persons they must all join in an action to recover therefor.[7]

IV. PLEADINGS. — The complaint need not allege that the plaintiff had knowledge of the offer of reward,[8] or that notice was given

1. **Ill.**—Madison First Nat. Bank *v.* Hart, 55 Ill. 62. **Mass.**—Symmes *v.* Frazier, 6 Mass. 344, 4 Am. Dec. 142. **N. J.**—Furman *v.* Parke, 21 N. J. L. 310. **N. Y.**—Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

See generally the title "**Assumpsit.**"

2. Furman *v.* Parke, 21 N. J. L. 310. See generally the title "**Debt.**"

3. Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

4. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

5. See the statutes and Johnson *v.* Com., 25 Ky. L. Rep. 986, 76 S. W. 832, under Ky. St. 1915, Ch. 20, §344.

6. See generally the title "**Parties.**"

7. Janvrin *v.* Exeter, 48 N. H. 83; Williams *v.* Carwardine, 4 R. & Ad. 621, 24 E. C. L. 274, 110 Eng. Reprint 590.

8. Board of Commrs. of Clinton

that the offer was being acted upon.[9] The complaint should allege the offer of reward, the performance of the act or service specified in the offer, and the defendant's refusal to pay.[10]

The defendant may plead that the act performed by the plaintiff was not within the purview of the offer of reward.[11]

V. TRIAL. — Questions of fact should be left to the jury,[12] but where the evidence presents nothing for the jury to pass on the court may direct a verdict.[13] Instructions must be requested in accordance with the general rules elsewhere treated.[14]

VI. MANDAMUS TO COMPEL PAYMENT. — Mandamus may, in an otherwise proper case, be brought to compel the payment of a reward and the proceeding will be regulated by those rules and principles controlling such proceedings generally.[15]

County *v.* Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780; Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284; Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

9. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

Notice of knowledge of offer of reward generally, see *supra,* II.

[a] **If notice be regarded as necessary it may be pleaded** generally by the statutory allegation of the performance of the conditions precedent. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731. See 11 STANDARD PROC. 1002.

10. Amis *v.* Conner, 43 Ark. 337; Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29.

[a] **When relying upon a general offer** of reward it is sufficient to aver that such reward was offered to "any person or persons"; the exact manner in which such offer was made, as by poster, handbill or newspaper, need not be alleged. Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

11. Southwestern Tel. & Tel. Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

[a] **An Illustration.** — Suit was brought against a telephone company to recover a reward offered by the company for the apprehension of persons who should cut or destroy its telephone wires. It was held that the defendant might plead that the wire cut was a dead one to which the offer of reward did not, as the plaintiff well knew, apply. Southwestern Tel. & Tel. Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

12. Huckins *v.* Second Nat. Bank, 47 Mich. 92, 10 N. W. 122; Elkhorn Valley Lodge *v.* Hudson, 59 Neb. 672, 81 N. W. 859; Miller *v.* Hogeboom, 56 Neb. 434, 76 N. W. 888.

13. Hart *v.* Green, 16 Colo. App. 70, 65 Pac. 344.

14. Cornwell *v.* St. Louis Transit Co., 106 Mo. App. 135, 80 S. W. 744. See the title "**Instructions.**"

15. Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44. See generally the title "**Mandamus.**"

RIGHT OF ACTION. — See **Cause of Action; New Cause of Action or Defense; Remedy; Suits and Actions.**

RIGHT OF PROPERTY, TRIAL OF. — See **Interpleader; Intervention; Replevin; Trespass To Try Title.**

RIGHT OF WAY. — See **Easements; Private and Toll Roads.**

RIGHT, WRIT OF. — See **Real and Mixed Actions**

RIOT

By the Editorial Staff.

I. **INDICTMENT AND INFORMATION**, 187

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B. *Particular Allegations*, 187
C. *Duplicity*, 189

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CROSS-REFERENCES:

Affray;	Indictment and Information;
Breach of the Peace;	Prize Fighting;
Disorderly Conduct;	Unlawful Assembly.

For forms, see 9 STANDARD PROC. 1101, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INDICTMENT AND INFORMATION. — A. IN GENERAL. Riot, like other crimes,[1] may ordinarily be set forth in the language of the statute.[2] Since, however, every material element of the crime should appear in the charge,[3] the pleader is warranted in following the language of the statute, only when it embraces all the ingredients of the crime.[4]

B. PARTICULAR ALLEGATIONS. — Time and place of the offense,[5]

1. See 12 STANDARD PROC. 442.

2. **Ga.**—Lock *v.* State, 122 Ga. 730, 50 S. E. 932. **Ill.**—People *v.* Crilly, 185 Ill. App. 160. **Ind.**—Kiphart *v.* State, 42 Ind. 273. **P. R.**—People *v.* Ortiz, 17 Porto Rico 1149; People *v.* Dessus, 12 Porto Rico 330. **Wis.** Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427.

[a] **The precise words employed in the statute** need not be used and where the statute uses the words "violent manner" an averment that the riot was committed in a riotous and tumultuous manner is sufficient. State *v.* Kutter, 59 Ind. 572.

3. Whitesides *v.* People, 1 Ill. 21; Martin *v.* State, 9 Mo. 286.

[a] **An indictment sufficient at common law** sustained under the statute. Robert *v.* State, 21 Ark. 183.

4. People *v.* Crilly, 185 Ill. App. 160; State *v.* Dean, 71 Wis. 678, 38 N. W. 341.

5. Lambert *v.* People, 34 Ill. App. 637; Mackaboy *v.* Com., 2 Va. Cas. (4 Va.) 268.

See generally 12 STANDARD PROC. 411, *et seq.*

and the names[6] of the participants should be alleged and if their names are not known that fact should be stated.[7] Proper averments should also be made showing the assembly of such persons for an unlawful purpose,[8] and the commission of,[9] or attempts[10] or threats[11] to commit acts of violence in terrorem populi.[12] Where the statute provides for a greater punishment if the defendants at the time of the alleged riot carried any dangerous weapon, or was disguised, or encouraged others to acts of violence, the existence of such facts must be expressly alleged.[13]

Inciting Riot. — And where the common law offense of inciting a riot is charged, it is not necessary to allege that a riot in fact occurred in consequence of defendant's acts.[14]

[a] **That it was a public place** need not be alleged. Carmody *v.* State, 178 Ind. 158, 98 N. E. 870.

6. Martin *v.* State, 115 Ga. 255, 41 S. E. 476. See 12 STANDARD PROC. 361, *et seq.*

7. Martin *v.* State, 115 Ga. 255, 41 S. 7. 576; Com. *v.* Berry, 5 Gray (Mass.) 93.

[a] **An allegation such as "divers others"** or "several others" without a statement that their names are unknown is not sufficient as against a special demurrer, though good after verdict. Martin *v.* State, 115 Ga. 255, 41 S. E. 576.

8. Mass.—Com. *v.* Gibney, 2 Allen 150. **N. C.**—State *v.* Hughes, 72 N. C. 25. **Ore.**—State *v.* Mizis, 48 Ore. 165, 85 Pac. 611. **Tex.**—Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676.

[a] **The intent** of defendants should be stated. McWaters *v.* State, 10 Mo. 167; Martin *v.* State, 9 Mo. 286.

[b] **A general allegation** that the defendants assembled for disturbing the public peace sufficiently shows the unlawful purpose of the assembly. **U. S.**—United States *v.* McFarlane, 1 Cranch C. C. 140, 26 Fed. Cas. No. 15,674; United States *v.* Fenwick, 14 Cranch C. C. 675, 25 Fed. Cas. No. 15,086. **N. H.**—State *v.* Renton, 15 N. H. 169. **Wis.**—Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427.

[c] **Refusal to disperse** after a proclamation under the riot act had been read, need not be alleged. State *v.* Russell, 45 N. H. 83.

9. State *v.* Russell, 45 N. H. 83.

[a] **A breach of the peace** or acts directly tending to it, must be pleaded. State *v.* Hathcock, 29 N. C. 52.

[b] **That the particular act for which they assembled** was executed by defendants, need not be charged. State *v.* Russell, 45 N. H. 83.

[c] **Commission of an assault** by defendants, charged. Lambert *v.* People, 34 Ill. App. 637.

[d] **Obstructing Sheriff.**—And an indictment charging defendants with preventing in a violent and tumultuous manner a sheriff from removing a prisoner is sufficient to show the unlawful act committed by the rioters. Green *v.* State, 109 Ga. 536, 35 S. E. 97.

[e] **An averment that the act consisted in striking and beating** a certain person sufficiently shows an act of violence although the precise word is not used in the indictment. Kiphart *v.* State, 42 Ind. 273.

[f] **Either the commission of an unlawful act** or of a lawful act in a riotous manner, must be shown. Taylor *v.* State, 8 Ga. App. 241, 68 S. E. 945; Carter *v.* State, 7 Ga. App. 44, 65 S. E. 1072; Kiphart *v.* State, 42 Ind. 273.

10. State *v.* York, 70 N. C. 66; Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676.

11. People *v.* Dessus, 12 Porto Rico 330.

12. See *infra*, this note.

[a] **Such allegation is necessary only** where the unlawful act charged consists in going about armed without committing acts of violence and not where acts of violence were in fact committed. **Mass.**—Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148. **S. C.** State *v.* Sims, 16 S. C. 486. **Tenn.** State *v.* Whitesides, 1 Swan 88.

13. Christensen *v.* United States, 151 Fed. 766, 81 C. C. A. 390.

14. United States *v.* Fenwick, 4 Cranch C. C. 675, 25 Fed. Cas. No.

C. DUPLICITY. — The general rules against duplicity should be observed.[15] Where various acts of violence were perpetrated by the defendants all tending to disturb the public peace such acts constituting but one offense need not be separately pleaded.[16] And an indictment and information may charge a riot and an assault and battery in the same count, as the act of violence constitutes a part of the offense of riot.[17]

II. VARIANCE.[18] — Under an indictment charging riot and alleging an assault as part of the offense, proof of battery instead of an assault creates no material variance.[19] But an indictment or information charging a riot and trespass upon the property of one varies from the proof that the property was in possession of another though it was owned by the party named in the indictment or information.[20] And where the information charges three defendants with committing a riot, proof that two of the defendants assembled with others constitutes a fatal variance.[21]

III. INSTRUCTIONS. — In accordance with the general rules elsewhere treated,[22] the charge must not be misleading,[23] nor invade the province of the jury.[24] Where the statutory definition of riot differs from the common law definition, it is not error to refuse to give the common law definition in the charge.[25]

IV. VERDICT. — The general rules as to verdicts[26] apply to ver-

15,086; People *v.* Dessus, 12 Porto Rico 330.

15. See generally 12 STANDARD PROC. 499.

[a] **Where the statute specifies disjunctively** various acts as constituting the crime of riot an indictment or information which sets forth in one count conjunctively several of the acts forbidden by the statute is not bad for duplicity. Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

[b] **Words qualifying the description of the offense,** such as "violent or tumultuous" may be used disjunctively in an indictment or information without rendering it duplicitous. Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427.

16. People *v.* Ortiz, 17 Porto Rico 1149.

17. State *v.* Russell, 45 N. H. 83.

18. See the title "**Variance and Failure of Proof.**"

19. Carter *v.* State, 7 Ga. App. 44, 65 S. E. 1072.

20. State *v.* Wilson, 23 N. C. 32.

21. **Ga.**—Martin *v.* State, 115 Ga. 255, 41 S. E. 576. **Mass.**—Com. *v.* Berry, 5 Gray 93. **Mo.** — State *v.* Kuhlmann, 5 Mo. App. 587-588. **Okla.** Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787.

22. See generally the title "**Instructions.**"

23. State *v.* Kuhlmann, 5 Mo. App. 587.

[a] **Where the information assumes** to name all the persons engaged in a riot it is error to instruct the jury that if the defendant and more than one other person committed the act, he should be found guilty as under such instruction the jury was authorized to convict him, though the persons with whom he acted were not charged in the information. Hardebeck *v.* State, 10 Ind. 459.

24. Lambert *v.* State, 34 Ill. App. 637.

[a] **To charge that a witness testifying affirmatively** to a fact is to be believed in preference to the one negativing such fact, is error. State *v.* Dean, 71 Wis. 678, 38 N. W. 341.

25. Whitley *v.* State, 66 Ga. 656.

26. See generally the title "**Verdict.**"

[a] **Where a defendant is found guilty by a general verdict** upon an indictment containing several counts the judgment will not be arrested if there is one good count, although the others are defective. State *v.* Connolly, 3 Rich. (S. C.) 337.

[b] **Where a special verdict omits**

dicts found in prosecutions for a riot. If the defendants are tried together, and by the same jury, no conviction can be had of any unless the minimum number necessary to commit the crime are found guilty.[27] But this rule does not obtain where a defendant is tried separately.[28] Under an indictment charging several persons with riot, and a riotous assault and battery, one may be convicted of an assault and battery, and the others acquitted generally.[29]

to set forth any fact essential to constitute the crime charged, it is equivalent to an acquittal. State *v.* Stephanus, 53 Ore. 135, 99 Pac. 428.

27. Turpin *v.* State, 4 Blackf. (Ind.) 72.

28. **Ga.**—Martin *v.* State, 115 Ga. 255, 41 S. E. 576. **Okla.**—Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787. **Tenn.**—State *v.* Allison, 3 Yerg. 428.

[a] **A subsequent trial and acquittal** of one of the accused does not affect a prior conviction of another of the rioters. Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787.

29. Shouse *v.* Com., 5 Pa. 83.

RIPARIAN RIGHTS. — See **Navigable Waters; Waters and Watercourses; Wharves.**

RIVERS. — See **Admiralty; Navigable Waters; Ships and Shipping; Waters and Watercourses.**

ROADS. — See **Highways, Streets and Bridges; Private and Toll Roads.**

ROBBERY

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CROSS-REFERENCES:

Assault and Battery;	Piracy;
Burglary;	Post-Office;
Indictment and Information;	Receiving Stolen Goods;
Larceny;	Venue.

For forms, see 9 STANDARD PROC. 1103, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ROBBERY. — A. INDICTMENT AND INFORMATION. — **1. In General.** — The indictment or information should charge every material element of the crime of robbery as defined by law.[1] If based on a statute the language thereof may ordinarily be followed,[2] though when a fact must be stated in the indictment or information in order to charge the offense, it cannot be omitted because the statute is silent on the subject.[3] Matters of aggravation, if relied on, must be pleaded.[4]

That a preliminary examination has been had, or is waived, need not be alleged in the information.[5]

1. **Cal.**—People *v.* Ah Sing, 95 Cal. 654, 30 Pac. 796; People *v.* Schuler, 28 Cal. 490. **Idaho.**—State *v.* Brill, 21 Idaho 269, 121 Pac. 79. **Mo.**—State *v.* Carroll, 214 Mo. 392, 113 S. W. 1051, 21 L. R. A. (N. S.) 311.

[a] **When the common law offense** of robbery is charged, an indictment or information is sufficient that charges the felonious and forcible taking by the accused from the person of another, of goods and money of a named value, by violence or putting in fear, and that such goods and money were the property of such other person. **Ky.** Com. *v.* Harding, 1 Ky. Op. 132; Com. *v.* Finn, 120 Ky. 364, 86 S. W. 693. **Mo.**—State *v.* Wilcoxen, 38 Mo. 370. **Mont.**—State *v.* Gill, 21 Mont. 151, 53 Pac. 184. **N. H.**—State *v.* Gorham, 55 N. H. 152. **Tex.**—Reardon *v.* State, 4 Tex. App. 602. **Va.**—Houston *v.* Com., 87 Va. 257, 12 S. E. 385. See also 4 Bl. Com. 242.

2. **Ala.**—Toliver *v.* State, 142 Ala. 3, 38 So. 801; Thompson *v.* State, 106 Ala. 67, 17 So. 512. **Ga.**—Long *v.* State, 12 Ga. 293. **Idaho.**—State *v.* Brill, 21 Idaho 269, 121 Pac. 79. **Ill.** People *v.* Boer, 262 Ill. 152, 104 N. E. 162. **Ia.**—State *v.* Osborne, 96 Iowa 281, 65 N. W. 159; State *v.* Brewer, 53 Iowa 735, 6 N. W. 62. **Kan.**—State *v.* Stoffel, 48 Kan. 364, 29 Pac. 685; State *v.* Ready, 44 Kan. 697, 700, 26 Pac. 58; State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471. **La.**—State *v.* Curtin, 111 La. 129, 35 So. 485; State *v.* Henry, 47 La. Ann. 1587, 18 So. 638. **Mich.**—People *v.* Calvin, 60 Mich. 113, 26 N. W. 851. **Minn.**—State *v.* O'Neil, 71 Minn. 399, 73 N. W. 1091. **Mo.**—State *v.* Howerton, 59 Mo. 91; State *v.* Scott, 39 Mo. 424; State *v.* Davidson, 38 Mo. 374. **Mont.**—State *v.* Paisley, 36 Mont. 237, 92 Pac. 566. **Nev.**—State *v.* Switzer, 38 Nev. 108, 145 Pac. 925; State *v.* Luhano, 31 Nev. 278, 102 Pac. 260. **Okla.**—Robinson *v.* State, 8 Okla. Crim. 667, 130 Pac. 121. **Ore.**—State *v.* Carlson, 39 Ore. 19, 62 Pac. 1016, 1119. **Pa.**—Acker *v.* Com., 94 Pa. 284. **P. I.**—United States *v.* Aquino, 11 Phil. Isl. 244; United States *v.* Decusin, 2 Phil. Isl. 536. **Tenn.**—State *v.* Swafford, 3 Lea 162. **Tex.**—Robinson *v.* State, 67 Tex. Crim. 79, 149 S. W. 186; Burns *v.* State, 12 Tex. App. 269.

See also 12 STANDARD PROC. 447.

[a] **The exact words of the statute** need not be used, the use of other words conveying the same meaning being permissible. **Idaho.**—State *v.* Brill, 21 Idaho 269, 121 Pac. 79. **Kan.** State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471. **Miss.**—State *v.* Presley, 91 Miss. 377, 44 So. 827. **Neb.**—Smith *v.* State, 72 Neb. 345, 100 N. W. 806. **Tex.**—Robinson *v.* State, 67 Tex. Crim. 79, 149 S. W. 186. **Wis.**—Gillotti *v.* State, 135 Wis. 634, 116 N. W. 252.

3. State *v.* Ammerman, 118 Cal. 23, 50 Pac. 15.

4. **Ill.**—People *v.* Boer, 262 Ill. 152, 104 N. E. 162. **P. I.**—United States *v.* Decusin, 2 Phil. Isl. 536. **Tex.**—Dosh *v.* State, 72 Tex. Crim. 239, 161 S. W. 979.

See also 12 STANDARD PROC. 354, *et seq.*

[a] **That a firearm or other deadly weapon** was used in the commission of the offense should be alleged where the offense is thereby aggravated. Robinson *v.* State, 67 Tex. Crim. 79, 149 S. W. 186. See also State *v.* Callahan, 96 Iowa 304, 65 N. W. 150.

[b] **Brigandage.**—An indictment for brigandage need not specifically allege that the robberies were committed on the highway, where that is a necessary inference from what is alleged. United States *v.* Bundoc, 3 Phil. Isl. 614.

5. State *v.* Barnett, 3 Kan. 250, 87

2. Particular Averments. — a. *Time and Place.*[6] — The precise time the robbery was committed need not be alleged[7] if it is shown to have been within the limitation prescribed by statute.[8] An indictment for highway robbery may charge that the robbery was committed in the highway,[9] or that it was committed near the highway.[10] The particular kind of highway where the offense occurred need not be alleged.[11]

b. *Taking from Person of Victim.* — The facts set out should fairly show that the property was taken from the personal control and possession of the one alleged to have been robbed,[12] but the character of the victim's possession need not appear.[13]

c. *Force, Fear or Violence.* — Sufficient must be alleged to show that the property was taken against the will[14] of the person robbed and by violence or a putting in fear.[15] The means by which the

Am. Dec. 471. See also 12 STANDARD PROC. 255.

6. See generally 12 STANDARD PROC. 411, *et seq.*

7. State *v.* Barnett, 3 Kan. 244, 250, 87 Am. Dec. 471; State *v.* Moore, 203 Mo. 624, 102 S. W. 537.

8. See State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471.

9. State *v.* Burke, 73 N. C. 83; State *v.* Anthony, 29 N. C. 234.

10. State *v.* Anthony, 29 N. C. 234.

11. State *v.* Burke, 73 N. C. 83.

[a] **It is sufficient to allege** that the robbery occurred "in the public and common highway of the state," without stating that it led to and from certain places. State *v.* Wilson, 67 N. C. 456.

12. **Ala.**—See Henderson *v.* State, 172 Ala. 415, 55 So. 816; Hill *v.* State, 145 Ala. 58, 40 So. 654. **Cal.**—People *v.* Ham Tong, 155 Cal. 579, 102 Pac. 263, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481; People *v.* Ah Sing, 95 Cal. 654, 30 Pac. 796; People *v.* Beck, 21 Cal. 385. And see People *v.* Ho Sing, 6 Cal. App. 752, 93 Pac. 204. **Ky.**—Breckinridge *v.* Com., 97 Ky. 267, 30 S. W. 634. **Miss.**—Blackwell *v.* State, 94 Miss. 240, 48 So. 290; Smith *v.* State, 82 Miss. 793, 35 So. 178. **Mo.** State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575. **Tenn.** Kit *v.* State, 11 Humph. 167. **Tex.** Smedly *v.* State, 30 Tex. 214; Smith *v.* State, 37 Tex. Crim. 342, 39 S. W. 933; Parker *v.* State, 9 Tex. App. 351. **Utah.**—People *v.* Kern, 8 Utah 268, 30 Pac. 988. **Wash.**—State *v.* Hall, 54 Wash. 142, 102 Pac. 888.

[a] **An alternative averment** of taking from the "person or possession" is not sufficient. Hill *v.* State, 145 Ala. 58, 40 So. 654.

[b] **Sufficient to allege a taking from the person** of the victim of the robbery without an allegation as to possession in him. People *v.* Walbridge, 123 Cal. 273, 55 Pac. 902; Rasberry *v.* State, 4 Okla. Crim. 613, 103 Pac. 865.

13. People *v.* Shuler, 28 Cal. 490.

[a] **The right of the person robbed to the property** need not be stated in the indictment, because the law presumes a rightful possession. People *v.* Shuler, 28 Cal. 490.

14. **Cal.**—People *v.* Riley, 75 Cal. 98, 16 Pac. 544; People *v.* Shuler, 28 Cal. 490. **Ind.**—Anderson *v.* State, 28 Ind. 22; Terry *v.* State, 13 Ind. 70. **La.**—State *v.* Wilson, 136 La. 345, 67 So. 26; State *v.* Patterson, 42 La. Ann. 934, 8 So. 529. **Miss.**—State *v.* Presley, 91 Miss. 377, 44 So. 827. **Pa.** Acker *v.* Com., 94 Pa. 284. **Tex.** Chancey *v.* State, 58 Tex. Crim. 54, 124 S. W. 426. And see Robinson *v.* State, 67 Tex. Crim. 79, 149 S. W. 186. **Utah.**—State *v.* La Chall, 28 Utah 80, 77 Pac. 3.

15. **Ill.**—Collins *v.* People, 39 Ill. 233. **Ind.**—Craig *v.* State, 157 Ind. 574, 62 N. E. 5. **Ia.**—State *v.* Brewer, 53 Iowa 735, 6 N. W. 62. **La.**—State *v.* Cook, 20 La. Ann. 145. **Miss.**—State *v.* Presley, 91 Miss. 377, 44 So. 827. **Mo.**—State *v.* Flynn, 258 Mo. 211, 167 S. W. 516; State *v.* Montgomery, 109 Mo. 645, 19 S. W. 221, 32 Am. St. Rep. 684. See also State *v.* Calvert, 209 Mo. 280, 107 S. W. 1078. **Mont.**—State *v.* Gill, 21 Mont. 151, 53 Pac. 184. And see State *v.* Pemberton, 39 Mont. 530, 104 Pac. 556. **N. C.**—State *v.* Brown,

victim was put in fear need not be alleged,[16] unless relied on as constituting matter of aggravation;[17] nor, is it necessary, as a rule, to specify the kind or degree of fear entertained by him.[18]

d. *Intent.*[19] — A felonious intent to steal the property must be alleged either in terms or in equivalent language.[20]

e. *Description, Ownership and Value of Property.*[21] — The indictment or information must describe the property taken with sufficient particularity to enable the jury to say whether the chattels proved to have been stolen are the identical articles referred to in the information or indictment.[22] When the property taken is money, under

113 N. C. 645, 18 S. E. 51; State *v.* Cowan, 29 N. C. 239. **Tex.**—Wiley *v.* State (Tex. Crim.), 43 S. W. 995; Trimble *v.* State, 16 Tex. App. 115. **Utah.** State *v.* Waldron, 28 Utah 14, 76 Pac. 1135; State *v.* Davis, 28 Utah 10, 76 Pac. 705. **Wis.**—See Gillotti *v.* State, 135 Wis. 634, 116 N. W. 252.

[a] **The amount of force** used need not be alleged. State *v.* Paisley, 36 Mont. 237, 92 Pac. 566.

[b] **A taking with "force and arms"** alleges violence. Robinson *v.* State, 67 Tex. Crim. 79, 149 S. W. 186.

[c] **If either element** is charged, it is sufficient. **Ark.**—Traver *v.* State, 72 Ark. 524, 81 S. W. 615; Young *v.* State, 50 Ark. 501, 8 S. W. 828; Clary *v.* State, 33 Ark. 561. **Ky.**—Blanton *v.* Com., 22 Ky. L. Rep. 515, 58 S. W. 422. **Mass.**—Com. *v.* Humphries, 7 Mass. 242. **Miss.**—Cunningham *v.* State, 28 So. 750. **Mo.**—State *v.* Lawlor, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575; State *v.* Stinson, 124 Mo. 447, 27 S. W. 1098. **Mont.**—State *v.* Paisley, 36 Mont. 237, 92 Pac. 566; State *v.* Clancy, 20 Mont. 498, 52 Pac. 267. **Tex.**—Burns *v.* State (Tex. Crim.), 70 S. W. 24.

16. State *v.* Moore, 203 Mo. 624, 102 S. W. 537; State *v.* Sanders, 14 N. D. 203, 103 N. W. 419.

17. **Use of deadly weapons,** see *supra,* I, A, 1, note 4 [a].

18. State *v.* Paisley, 36 Mont. 237, 92 Pac. 566; State *v.* Clancy, 20 Mont. 498, 52 Pac. 267. But see Scales *v.* State, 65 Tex. Crim. 355, 144 S. W. 263, as to the necessity for stating facts constituting the fear when property was obtained by threat to do an illegal act. And see Slaver *v.* Territory, 5 Okla. 506, 49 Pac. 1009.

[a] **When the particulars as to the fear are set out,** and they are not sufficient to constitute the offense the indictment will be quashed. Blackwell *v.* State, 94 Miss. 240, 48 So. 290.

19. See generally 12 STANDARD PROC. 402.

20. **Ala.**—Chappell *v.* State, 52 Ala. 359. **Ark.**—Keeton *v.* State, 70 Ark. 163, 66 S. W. 645. **Ga.**—Holland *v.* State, 8 Ga. App. 202, 68 S. E. 861. **Ia.**—State *v.* Kegan, 62 Iowa 106, 17 N. W. 179. **Ky.**—Ward *v.* Com., 14 Bush 233. **Miss.**—Jones *v.* State, 95 Miss. 121, 48 So. 407. **Mo.**—State *v.* Brown, 104 Mo. 365, 16 S. W. 406. **Mont.**—State *v.* Gill, 21 Mont. 151, 53 Pac. 184. **Neb.**—Smith *v.* State, 72 Neb. 345, 100 N. W. 806. **Nev.**—State *v.* Switzer, 38 Nev. 108, 145 Pac. 925. **N. C.**—State *v.* Brown, 113 N. C. 645, 18 S. E. 51. **N. D.**—State *v.* Fordham, 13 N. D. 494, 101 N. W. 888. **Ohio.**—Boose *v.* State, 10 Ohio St. 575; Matthews *v.* State, 4 Ohio St. 539; Turner *v.* State, 1 Ohio St. 422. **P. I.** United States *v.* Gimeno, 3 Phil. Isl. 233. **Tex.**—Murphy *v.* State, 43 Tex. Crim. 515, 67 S. W. 108.

[a] **That the word "steal"** be used, not absolutely necessary. Keeton *v.* State, 70 Ark. 163, 66 S. W. 645.

21. See generally 12 STANDARD PROC. 387.

22. See **Ala.**—Churchwell *v.* State, 117 Ala. 124, 23 So. 72. **Cal.**—People *v.* Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080. **Ill.**—People *v.* Nolan, 250 Ill. 351, 95 N. E. 140, Ann. Cas. 1912B, 401, 34 L. R. A. (N. S.) 301 ("pin" is sufficient to prove "stud"); Burke *v.* People, 148 Ill. 70, 35 N. E. 376. **Ind.** Brennon *v.* State, 25 Ind. 403; Terry *v.* State, 13 Ind. 70. **Kan.**—State *v.* McAnulty, 26 Kan. 533. **Mich.**—Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314. **Mo.**—State *v.* Kroeger, 47 Mo. 530. **N. Y.**—People *v.* Loop, 3 Park. Cr. 559. **N. C.**—State *v.* Burke, 73 N. C. 83. **N. D.**—State *v.* Sanders, 14 N. D. 203, 103 N. W. 419. **Wash.**—State *v.* Johnson,

modern statutes it is sufficient to allege the taking of a specified sum of lawful money, without stating the coin, number, denomination or kind thereof;[23] but in the absence of such statutes a more specific description is necessary.[24] When a particular description of the property taken cannot be given, it is better pleading to add the averment that a further description is unknown.[25]

Ownership. — As a part of the description of the property and to aid in its identification[26] its ownership must be laid either in the person robbed,[27] or in some third person other than the defendant

19 Wash. 410, 53 Pac. 667. **W. Va.** State *v.* McCoy, 63 W. Va. 69, 59 S. E. 758.

[a] **An insufficient description** must be (1) taken advantage of by special demurrer (People *v.* Richards, 136 Cal. 127, 68 Pac. 477) and is too late after judgment. People *v.* Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080.

23. **Ala.**—Montgomery *v.* State, 169 Ala. 12, 53 So. 991; Boyd *v.* State, 153 Ala. 41, 45 So. 591; Smith *v.* State, 1 Ala. App. 140, 55 So. 449. And see Wesley *v.* State, 61 Ala. 282. *Compare* Burney *v.* State, 87 Ala. 80, 6 So. 391; State *v.* Williams, 19 Ala. 15, 54 Am. Dec. 184. **Cal.**—People *v.* Stevens, 141 Cal. 488, 75 Pac. 62; People *v.* Richards, 136 Cal. 127, 68 Pac. 477; People *v.* Howard, 3 Cal. App. 36, 84 Pac. 462. **Ga.**—Humphries *v.* State, 100 Ga. 260, 28 S. E. 25; Maxwell *v.* State, 9 Ga. App. 875, 72 S. E. 292. **Ill.**—Schroeder *v.* People, 196 Ill. 211, 63 N. E. 678; Burke *v.* People, 148 Ill. 70, 35 N. E. 376. **La.**—State *v.* Devine, 51 La. Ann. 1296, 26 So. 105. And see State *v.* Shonhausen, 26 La. Ann. 421; State *v.* Carro, 26 La. Ann. 377. **Mass.**—Com. *v.* Griffiths, 126 Mass. 252. **Mo.**—State *v.* Calvert, 209 Mo. 280, 107 S. W. 1078; State *v.* Rush, 95 Mo. 199, 8 S. W. 221; State *v.* Burnett, 81 Mo. 119. **Tex.** Noe *v.* State, 78 Tex. Crim. 661, 182 S. W. 1122; Bracher *v.* State, 72 Tex. Crim. 198, 161 S. W. 124; Compton *v.* State, 67 Tex. Crim. 15, 148 S. W. 580; Parrent *v.* State (Tex. Crim.), 76 S. W. 474; White *v.* State (Tex. Crim.), 57 S. W. 100; Colter *v.* State, 37 Tex. Crim. 284, 39 S. W. 576; Thompson *v.* State, 35 Tex. Crim. 511, 34 S. W. 629. See also Jackson *v.* State, 60 Tex. Crim. 273, 131 S. W. 1076; Gables *v.* State (Tex. Crim.), 68 S. W. 288; Moore *v.* State, 36 Tex. Crim. 88, 35 S. W. 668. *Compare* Ridgeway *v.* State, 41 Tex. 231; Martinez *v.* State, 41 Tex. 164; Winston *v.* State, 9 Tex. App. 143; Lavarre *v.* State, 1 Tex. App. 685, and Wade *v.* State, 35 Tex. Crim. 170, 32 S. W. 772, 60 Am. St. Rep. 31, as to description when money is that of a foreign country. **Utah.**—State *v.* La Chall, 28 Utah 80, 77 Pac. 3. **Wash.** State *v.* Johnson, 19 Wash. 410, 53 Pac. 667. **W. Va.**—See State *v.* Jackson, 26 W. Va. 250. *Compare* Fredrick *v.* State, 3 W. Va. 695. **Wis.**—See McEntee *v.* State, 24 Wis. 43.

See 12 STANDARD PROC. 388.

24. See 12 STANDARD PROC. 388, and also **U. S.**—United States *v.* Barry, 4 Cranch C. C. 606, 24 Fed. Cas. No. 14,530, as to bank note. **Ind.**—Arnold *v.* State, 52 Ind. 281, 21 Am. Rep. 175, the denomination of currency or money necessary. *Compare* McCarty *v.* State, 127 Ind. 223, 26 N. E. 665. **Kan.** State *v.* Segermond, 40 Kan. 107, 19 Pac. 370, 10 Am. St. Rep. 169, "twenty-five dollars in money" is sufficient description. **Tenn.** — State *v.* Longbottoms, 11 Humph. 39, ten dollars good and lawful money of the State of Tennessee insufficient.

25. **Ala.**—Brown *v.* State, 120 Ala. 342, 25 So. 182; Owens *v.* State, 104 Ala. 18, 16 So. 575; Burney *v.* State, 87 Ala. 80, 6 So. 391; see Smith *v.* State, 1 Ala. App. 140, 55 So. 449. **Mont.**—Territory *v.* Bell, 5 Mont. 562, 6 Pac. 60. **Tex.**—Ridgeway *v.* State, 41 Tex. 231.

26. Owen *v.* Com., 25 Ky. L. Rep. 466, 76 S. W. 3.

[a] **If the property is otherwise identified** an averment of ownership is unnecessary. Owen *v.* Com., 25 Ky. L. Rep. 466, 76 S. W. 3. See also State *v.* Eddy, 46 Ore. 625, 81 Pac. 941, 82 Pac. 707; Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525.

27. **U. S.**—United States *v.* McNemara, 2 Cranch C. C. 45, 26 Fed. Cas. No. 15,701. **Ala.**—Montgomery *v.* State, 169 Ala. 12, 53 So. 991. See Dorsey *v.* State, 134 Ala. 553, 33 So.

himself,[28] or it must be shown that the ownership is unknown if that is the fact.[29]

Value. — The statute may necessitate a showing that the property had some value;[30] but beyond that no specific allegation as to value is required,[31] except where it has some bearing on the punishment.[32]

f. *Carrying Away.* — A carrying away of the property need not be alleged, it being sufficient to allege a taking of the property.[33]

3. Joinder of Parties. — There may be a joint indictment against two or more persons, on the theory that each was actually present and aided the other in the execution of the common unlawful purpose.[34]

350. **Ark.**—Boles *v.* State, 58 Ark. 35, 22 S. W. 887. **Ia.**—State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125. **Mass.** Com. *v.* Clifford, 8 Cush. 215. **Mo.** State *v.* Williams, 183 S. W. 308; State *v.* Carroll, 214 Mo. 392, 113 S. W. 1051, 21 L. R. A. (N. S.) 311. **Tex.**—Smedley *v.* State, 30 Tex. 214; Barnes *v.* State, 9 Tex. App. 128. **Wash.**—State *v.* Morgan, 31 Wash. 226, 71 Pac. 723; State *v.* Deugel, 24 Wash. 49, 63 Pac. 1104. **Wyo.**—McGinniss *v.* State, 16 Wyo. 72, 91 Pac. 936.

[a] **If the allegation as to ownership be omitted,** it may be inserted by amendment. State *v.* Moberly, 90 Kan. 837, 136 Pac. 324.

[b] **Property taken from an officer** having exclusive possession under execution, ownership in him may be properly alleged. Bell *v.* State, 77 Tex. Crim. 146, 177 S. W. 966.

28. **U. S.**—United States *v.* McNemara, 2 Cranch C. C. 45, 26 Fed. Cas. No. 15,701. **Ark.**—Boles *v.* State, 58 Ark. 35, 22 S. W. 887. **Cal.**—People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15; People *v.* Vice, 21 Cal. 344. But see *In re* Myrtle, 2 Cal. App. 383, 84 Pac. 335. **Ia.**—State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125. **Mass.**—Com. *v.* Clifford, 8 Cush. 215. **Tex.**—Smedley *v.* State, 30 Tex. 214; Barnes *v.* State, 9 Tex. App. 128. **Wash.**—State *v.* Morgan, 31 Wash. 226, 71 Pac. 723; State *v.* Deugel, 24 Wash. 49, 63 Pac. 1104. **Wyo.**—McGinniss *v.* State, 16 Wyo. 72, 91 Pac. 936.

[a] **It is sufficient to allege facts** which negative the idea that the property taken belonged to some person other than the defendant. State *v.* Brill, 21 Idaho 269, 121 Pac. 79.

29. State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125.

30. **Ala.**—Jackson *v.* State, 69 Ala. 249. See Brown *v.* State, 120 Ala. 342, 25 So. 182. **Cal.**—People *v.* Stevens, 141 Cal. 488, 75 Pac. 62. **Tex.**—Williams *v.* State, 34 Tex. Crim. 523, 31 S. W. 405; Williams *v.* State, 10 Tex. App. 8. **Eng.**—Rex *v.* Bingley, 5 Car. & P. 602, 24 E. C. L. 729.

31. **Ky.**—See Baldwin *v.* Com., 2 Ky. L. Rep. 439. **Me.**—State *v.* Perley, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564. **Mass.**—Com. *v.* Burke, 12 Allen 182. **Mo.**—State *v.* Howerton, 58 Mo. 581. **N. C.**—State *v.* Brown, 113 N. C. 645, 18 S. E. 51. **Utah.**—State *v.* La Chall, 28 Utah 80, 77 Pac. 3

But *compare* State *v.* Sagermond, 40 Kan. 107, 19 Pac. 370, 10 Am. St. Rep. 169.

[a] **When several articles are taken** an allegation of the collective or aggregate value is sufficient, though the better practice is to allege the value of each article separately. Jackson *v.* State, 69 Ala. 249.

32. See State *v.* Perley, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564; Williams *v.* State, 34 Tex. Crim. 523, 31 S. W. 405; Williams *v.* State, 10 Tex. App. 8.

33. **Ind.**—Terry *v.* State, 13 Ind. 70. **Tex.**—Thompson *v.* State, 35 Tex. Crim. 511, 34 S. W. 629. **Wash.**—State *v.* Smith, 40 Wash. 615, 82 Pac. 918.

Compare Com. *v.* Clifford, 8 Cush. (Mass.) 215.

[a] **When the indictment alleges a taking** of the property against the will of the person robbed, by putting him in fear, it is unnecessary to allege that the accused "did steal, take and carry away" such property. Keeton *v.* State, 70 Ark. 163, 66 S. W. 645.

34. People *v.* Roof, 138 App. Div. 633, 122 N. Y. Supp. 677. See 12 STANDARD PROC. 495, and the title **"Accessories and Accomplices."**

B. TRIAL. — **1. Province of Judge and Jury.**[35] — It is the province of the jury to ascertain from conflicting evidence the guilt or innocence of the accused.[36] The court must submit to them questions as to the identity of the accused[37] and of the property;[38] the employment of force,[39] the putting in fear of bodily harm,[40] the intent of accused,[41] and whether his participation in the robbery was voluntary.[42]

2. Instructions.[43] — The jury should be properly instructed upon the law applicable to the case including the elements of the crime,[44] such as the necessity of there being a taking from the person[45] by force or putting in fear,[46] and with intent to deprive the owner of

35. See generally the title "**Province of Judge and Jury.**"

36. Ware *v.* State, 12 Ala. App. 101, 67 So. 763; Hughes *v.* Com. (Ky.), 124 S. W. 788.

37. Smith *v.* People, 39 Colo. 202, 88 Pac. 1072; State *v.* Sullivan, 9 Mont. 174, 22 Pac. 1088.

38. Com. *v.* Tolliver, 119 Mass. 312.

39. **Cal.**—People *v.* Church, 116 Cal. 300, 48 Pac. 125. **Ia.**—State *v.* Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252. **Ky.**—King *v.* Com., 25 Ky. L. Rep. 713, 76 S. W. 341. **Tex.** Palmer *v.* State, 71 Tex. Crim. 335, 160 S. W. 349; Thompson *v.* State (Tex. Crim.), 26 S. W. 1081.

40. Palmer *v.* State, 71 Tex. Crim. 335, 160 S. W. 349; Thompson *v.* State (Tex. Crim.), 26 S. W. 1081.

41. **Ky.**—Triplett *v.* Com., 122 Ky. 35, 91 S. W. 281. **N. Y.**—Bloomer *v.* People, 1 Abb. Dec. 146, 3 Keyes 9. And see Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460. **N. C.**—State *v.* Sowls, 61 N. C. 151.

42. State *v.* Wegener, 180 Iowa 102, 162 N. W. 1040.

43. See generally the title "**Instructions.**"

44. **Ga.**—Grant *v.* State, 125 Ga. 259, 54 S. E. 191; Clay *v.* State, 122 Ga. 136, 50 S. E. 56; Nelms *v.* State, 18 Ga. App. 92, 88 S. E. 917; Harrison *v.* State, 12 Ga. App. 552, 77 S. E. 830. **Ia.** State *v.* Atkins, 122 Iowa 161, 97 N. W. 996. **Ky.**—Hamilton *v.* Com., 12 Ky. Op. 613. **Mo.**—State *v.* Alexander, 184 Mo. 266, 83 S. W. 753. **Okla.**—Axhelm *v.* United States, 9 Okla. 321, 60 Pac. 98. **Tenn.**—Miller *v.* State, 12 Lea 223. **Tex.**—Green *v.* State, 66 Tex. Crim. 446, 147 S. W. 593; Robinson *v.* State, 62 Tex. Crim. 645, 138 S. W. 704; Brown *v.* State, 61 Tex. Crim. 334, 136 S. W. 265; see Burnsides *v.* State, 51 Tex. Crim. 399, 102 S. W. 118. **W. Va.** State *v.* McCoy, 63 W. Va. 69, 59 S. E. 758.

[a] **In defining the crime of robbery** it is sufficient for the court to give the statutory definition. People *v.* White, 5 Cal. App. 329, 90 Pac. 471. And see People *v.* Scarbak, 245 Ill. 435, 92 N. E. 286.

[b] **When the indictment charges robbery by sudden snatching** of property, the court should confine its instructions to that offense, and it is error to instruct them as to other acts which might also constitute robbery. Grant *v.* State, 125 Ga. 259, 54 S. E. 191; Pride *v.* State, 124 Ga. 791, 53 S. E. 192; Blackshear *v.* State, 20 Ga. App. 87, 92 S. E. 547.

45. **Cal.**—People *v.* Stevens, 141 Cal. 488, 75 Pac. 62. **Ia.**—State *v.* Taylor, 140 Iowa 470, 118 N. W. 747. **Mo.**—State *v.* Davidson, 38 Mo. 374.

46. **Cal.**—People *v.* Ferrara, 31 Cal. App. 1, 159 Pac. 621. **Ga.**—Moore *v.* State, 20 Ga. App. 190, 92 S. E. 963; see Carter *v.* State, 3 Ga. App. 477, 60 S. E. 216. **Ia.**—State *v.* Miller, 83 Iowa 291, 49 N. W. 90. **Mont.**—State *v.* Johnson, 26 Mont. 9, 66 Pac. 290. **Tex.**—Palmer *v.* State, 71 Tex. Crim. 335, 160 S. W. 349; Powell *v.* State, 60 Tex. Crim. 201, 131 S. W. 590; State *v.* Parsons, 44 Wash. 299, 87 Pac. 349, 120 Am. St. Rep. 1003, 7 L. R. A. (N. S.) 566.

[a] **Degree of Force.**—It is not error to charge the jury to the effect that the degree of force used is immaterial as long as it was sufficient to compel the prosecuting witness to part with his property. State *v.* Parsons, 44 Wash. 299, 87 Pac. 349, 120 Am. St. Rep. 1003, 7 L. R. A. (N. S.) 566.

it.[47] It is proper, also, to instruct the jury as to effect of unexplained possession by defendant, of the fruits of the robbery.[48] When an offense of a lower grade is necessarily included in the offense charged, the court should instruct the jury that they may convict of such lower grade,[49] but such instruction should not be given when under the evidence the jury can only properly return a verdict of robbery or one of not guilty.[50] Instructions pointing out what inferences may or should be drawn from the facts,[51] or assuming the truth of any controverted facts,[52] are erroneous as invading the province of the jury.

3. Verdict. — The verdict must be responsive to the indictment.[53] The accused may be convicted of a lesser degree of offense included in

47. **Cal.**—See People *v.* White, 5 Cal. App. 329, 90 Pac. 471. **Ga.** Sledge *v.* State, 99 Ga. 684, 26 S. E. 756; Blackshear *v.* State, 20 Ga. App. 87, 92 S. E. 547. **Ill.**—Turley *v.* People, 188 Ill. 628, 59 N. E. 506. **Miss.** Jones *v.* State, 95 Miss. 121, 48 So. 407. **Mo.**—State *v.* Graves, 185 Mo. 713, 84 S. W. 904; State *v.* McLain, 159 Mo. 340, 60 S. W. 736; State *v.* Brown, 104 Mo. 365, 16 S. W. 406. **Mont.**—State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018. **N. D.**—State *v.* Fordham, 13 N. D. 494, 101 N. W. 888. **Pa.**—Com. *v.* White, 133 Pa. 182, 19 Atl. 350, 19 Am. St. Rep. 628. **Tex.** Green *v.* State, 66 Tex. Crim. 446, 147 S. W. 593; Carr *v.* State, 55 Tex. Crim. 352, 116 S. W. 591; Bollen *v.* State, 48 Tex. Crim. 70, 86 S. W. 1025; Smith *v.* State (Tex. Crim.), 81 S. W. 712. *Compare* Walling *v.* State, 55 Tex. Crim. 254, 116 S. W. 813. **W. Va.**—State *v.* McCoy, 63 W. Va. 69, 59 S. E. 758.

[a] It is unnecessary (1) to use the word "feloniously" in the instructions (State *v.* Spray, 174 Mo. 569, 74 S. W. 846; State *v.* Rowland, 174 Mo. 373, 74 S. W. 622; State *v.* Brown, 104 Mo. 365, 16 S. W. 406), but (2) if used, it should be defined. State *v.* Brown, 104 Mo. 365, 16 S. W. 406. But see Keeton *v.* State, 70 Ark. 163, 66 S. W. 645; Com. *v.* White, 133 Pa. 182, 19 Atl. 350, 19 Am. St. Rep. 628, that there must be an instruction as to felonious intent.

[b] **It is not for the court to instruct the jury what facts** would establish criminal intent. State *v.* West, 157 Mo. 309, 57 S. W. 1071.

48. **Cal.**—People *v.* Wilson, 135 Cal. 331, 67 Pac. 322; People *v.* Hallam, 6 Cal. App. 331, 92 Pac. 190. **Ill.** People *v.* Hansen, 263 Ill. 44, 104 N. E. 1069. **Ia.**—State *v.* Harris, 97 Iowa 407, 66 N. W. 728. **Mont.**—State *v.* Sullivan, 9 Mont. 174, 22 Pac. 1088. **Tex.**—Ford *v.* State, 41 Tex. Crim. 1, 51 S. W. 935, 53 S. W. 869. But see Tabor *v.* State, 52 Tex. Crim. 387, 107 S. W. 1116.

[a] **Effect of Evidence.**—The question whether the possession tended strongly or lightly to show guilt was a matter for the jury. State *v.* Sullivan, 9 Mont. 174, 22 Pac. 1088.

49. **Ala.**—Autney *v.* State (Ala. App.), 74 So. 397. **Cal.**—People *v.* Robinson, 65 Cal. 136, 3 Pac. 607. **Ind.** Duffy *v.* State, 154 Ind. 250, 56 N. E. 209. **Ia.**—State *v.* Taylor, 140 Iowa 470, 118 N. W. 747; State *v.* Duffy, 124 Iowa 705, 100 N. W. 796. **Ky.** Richards *v.* Com., 24 Ky. L. Rep. 14, 67 S. W. 818. And see Com. *v.* Prewitt, 82 Ky. 240, 6 Ky. L. Rep. 195. **Mo.**—State *v.* Weinhardt, 253 Mo. 629, 161 S. W. 1151.

See 12 STANDARD PROC. 568, 597.

50. **Cal.**—People *v.* O'Brien, 88 Cal. 483, 26 Pac. 362. **Ia.**—State *v.* Stanley, 109 Iowa 142, 80 N. W. 228. **Kan.** State *v.* Clough, 70 Kan. 510, 79 Pac. 117. **Mo.**—State *v.* Coffee, 158 Mo. 568, 59 S. W. 964; State *v.* Whalen, 148 Mo. 286, 49 S. W. 989; State *v.* Brown, 104 Mo. 365, 368, 168 S. W. 406. **N. C.** State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813. **Tex.**—Long *v.* State, 47 Tex. Crim. 296, 83 S. W. 384.

51. Haley *v.* State, 49 Ark. 147, 4 S. W. 746.

52. **Ia.**—State *v.* Bailey, 54 Iowa 414, 6 N. W. 589. **Tex.**—Bradshaw *v.* State, 44 Tex. Crim. 222, 70 S. W. 215. **Va.**—Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

53. See generally the title "Ver-

the crime charged,[54] but the verdict must specifically state the offense of which they find the defendant guilty.[55] A general verdict of guilty is a conviction of the highest grade of offense charged in the indictment.[56] When the evidence tends to establish either that the defendant is guilty of robbery or not guilty, the court is not required to furnish to the jury any other forms of verdict.[57]

C. JUDGMENT.[58] — The judgment must correspond with the verdict.[59] In some jurisdictions it should provide for the return of the property stolen or that defendant pay the owner the value thereof.[60] If an erroneous judgment be entered the defendant is entitled to have it corrected.[61]

D. REVIEW.[62] — Because of rules fixed either by state constitutions or statutes, a judgment of conviction will not be reversed for errors which were not prejudicial to the defendant.[63] A reversal will not be ordered for alleged errors in the instructions if all the evidence is not before the court.[64]

II. ATTEMPTS TO ROB, AND ASSAULTS WITH INTENT TO ROB. — A. INDICTMENT AND INFORMATION. — An indictment or information for assault with intent to commit robbery must contain every element necessary to constitute the offense,[65] but the same particularity is not required as when robbery is charged.[66] The language of the statute or equivalent language may as a rule be employed in

dict'' and Rex *v.* Edmonstone, 13 Can. Cr. Cas. 125.

[a] **When the indictment charges a robbery by the use of a deadly weapon** and also uses terms indicating a charge of simple robbery and the court instructs the jury as to both offenses, a verdict for simple robbery is responsive. Tabor *v.* State, 52 Tex. Crim. 387, 107 S. W. 1116.

54. See *supra* 1, B, 2 and 12 STANDARD PROC. 568, 597.

[a] **When brigandage is charged** a conviction for robbery is proper. United States *v.* Ortega, 4 Phil. Isl. 314. See also 12 STANDARD PROC. 585.

55. People *v.* Gilbert, 60 Cal. 108.

56. **Cal.**—People *v.* Gilbert, 60 Cal. 108. **Ga.**—See Harris *v.* State, 1 Ga. App. 136, 57 S. E. 937. **Mo.**—State *v.* Steptoe, 65 Mo. 640, *affirming* 1 Mo. App. 19.

[a] **Surplusage.**—When a general verdict is returned, and the jury also find the defendant guilty of an aggravated degree of robbery, the latter finding if imperfect may be stricken out as surplusage. People *v.* Boer, 262 Ill. 152, 104 N. E. 162.

57. State *v.* Clough, 70 Kan. 510, 79 Pac. 117.

58. See the title **''Sentence and Judgment.''**

59. People *v.* Boer, 262 Ill. 152, 104 N. E. 162.

60. United States *v.* Pareja, 5 Phil. Isl. 576.

61. People *v.* Boer, 262 Ill. 152, 104 N. E. 162.

62. See the title **''Review''** and also the titles **''Appeals;''** **''Writ of Error.''**

63. See the title **''Review''** and also **Ark.**—Benson *v.* State, 103 Ark. 87, 145 S. W. 883. **Neb.**—Bunge *v.* State, 87 Neb. 557, 127 N. W. 899. **Okla.**—See Rasberry *v.* State, 4 Okla. Crim. 613, 103 Pac. 865. **Tex.**—Green *v.* State, 32 Tex. Crim. 298, 22 S. W. 1094. **Wash.**—State *v.* Brache, 63 Wash. 396, 115 Pac. 853.

64. White *v.* State (Tex. Crim.), 53 S. W. 631.

65. **Ill.**—Conolly *v.* People, 4 Ill. 474. **Md.**—Hollohan *v.* State, 32 Md. 399. **Mass.**—Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575; Com. *v.* Mowry, 11 Allen 20. **Wash.**—State *v.* Fenton, 30 Wash. 325, 70 Pac. 741; State *v.* Costello, 29 Wash. 366, 69 Pac. 1099. **Wis.** See Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986. **Eng.**—Reg. *v.* Huxley, 1 C. & M. 596, 41 E. C. L. 324.

66. Traver *v.* State, 72 Ark. 524, 81 S. W. 615. See 12 STANDARD PROC. 469.

charging the offense.[67] It is necessary to allege the intent with which the act was done.[68] The particular property intended to be taken need not be described,[69] nor the ownership[70] or value[71] of the property, nor that defendant intended to deprive the owner of its value.[72]

B. TRIAL. — **1. Questions for Jury.** — Question of intent is for the jury[73] as well as the general issue as to his guilt.[74]

2. Instructions. — The court should instruct the jury that the assault must have been committed with intent to rob,[75] and that force or intimidation must have been used.[76] Where the fact that accused was armed with a dangerous weapon is part of the charge, the jury should be instructed as to what constitutes a dangerous weapon.[77] They should also be instructed as to their right to convict for a lesser included offense as in the case of a charge of robbery.[78]

67. **Ind.**—Corneille *v.* State, 16 Ind. 232. **Md.**—Hollohan *v.* State, 32 Md. 399. **Tex.**—Runnells *v.* State, 34 Tex. Crim. 431, 30 S. W. 1065; Atkinson *v.* State, 34 Tex. Crim. 424, 30 S. W. 1064. **Wash.**—State *v.* Bohn, 19 Wash. 36, 52 Pac. 325.

See 12 STANDARD PROC. 447.

68. **Ill.**—Conolly *v.* People, 4 Ill. 474. **Md.**—Hollohan *v.* State, 32 Md. 399. **S. D.**—State *v.* Shields, 13 S. D. 464, 83 N. W. 559. **Tex.**—See Adams *v.* State (Tex. Crim.), 62 S. W. 1059 and 12 STANDARD PROC. 402.

69. **Ark.**—Traver *v.* State, 72 Ark. 524, 81 S. W. 615. **Ind.**—Dickinson *v.* State, 70 Ind. 247. **Kan.**—State *v.* Roberts, 67 Kan. 631, 73 Pac. 905. **Ky.** Taylor *v.* Com., 3 Bush 508. **Miss.** Grogan *v.* State, 63 Miss. 147. **Okla.** Tyson *v.* United States, 7 Okla. Crim. 433, 122 Pac. 733. **Tex.**—Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

70. **Ark.**—Traver *v.* State, 72 Ark. 524, 81 S. W. 615. **Ia.**—State *v.* Gulliver, 163 Iowa 123, 142 N. W. 948. **Mo.**—State *v.* Carroll, 214 Mo. 392, 113 S. W. 1051, 21 L. R. A. (N. S.) 311. **Okla.**—Tyson *v.* United States, 7 Okla. Crim. 433, 122 Pac. 733. **Ore.**—State *v.* Dilley, 15 Ore. 70, 13 Pac. 648.

[a] **Mere possession sufficient.** Traver *v.* State, 72 Ark. 524, 81 S. W. 615.

71. Buntin *v.* State, 68 Ind. 38.

72. Traver *v.* State, 72 Ark. 524, 81 S. W. 615; Tyson *v.* United States, 7 Okla. Crim. 433, 122 Pac. 733.

73. Tyson *v.* United States, 7 Okla. Crim. 433, 122 Pac. 733.

74. State *v.* Lewis, 173 Iowa 643, 154 N. W. 432, Ann. Cas. 1918A, 403.

75. Axhelm *v.* United States, 9 Okla. 321, 60 Pac. 98.

76. State *v.* Lewis, 173 Iowa 643, 154 N. W. 432, Ann. Cas. 1918A, 403.

77. Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986.

78. See *supra*, I, B, 2, and People *v.* Fitts, 4 Cal. App. 432, 91 Pac. 536; People *v.* Brockett, 195 Mich. 169, 161 N. W. 991.

RULE.— See **Motions; Orders.**

RULES OF COURT. — See **Courts.**

SABBATH. — See **Sunday and Holidays.**

SALARY. — See **Garnishment; Mandamus.**

SALES

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CROSS-REFERENCES:

Choice and Election of Remedies;
Factors and Brokers;
Fraud and Deceit;
Frauds, Statute of;
Implied and Express Agreements;
Infants;
Intoxicating Liquors;
Judicial Sales;
Rescission and Cancellation;
Vendor and Purchaser.

For forms in addition to those in this article, see 9 STANDARD PROC. 1104, 1259.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INTRODUCTION. — A. SCOPE OF ARTICLE. — The scope of the article here presented includes a discussion of the remedies of the seller and of the buyer in connection with the sale of personal property, together with the practice and procedure incidental to such remedies.

B. THE UNIFORM SALES ACT. — No present day discussion of the law of sales can safely ignore the uniform sales act. The fact that it has already been adopted in eighteen jurisdictions, including many of the most important of our great commercial states, makes frequent reference to it, in an article upon sales, imperative. The jurisdictions and the dates of its adoption are set out in the notes.[1] The provisions

1. Ariz., 1913; Conn., 1907; Md., 1908; Nev., 1915; N. J., 1907; N. Y., 1910; Mass., 1908; Mich., 1913; Minn., 1911; N. D., 1917; Ohio, 1908; Pa., 1917; Miss. (with slight modifications), 1915; R. I., 1908; Utah, 1917; Wis.

of the act have changed or modified, in some particulars, the former law in some of these jurisdictions. It regulates remedies, and for this purpose frequent reference is made to it in the present article.

II. SELLER'S REMEDIES. — A. WHAT REMEDIES MAINTAINABLE. — **1. In General.** — The remedies of a seller of personal property are conveniently divided into three classes, namely, remedies against the goods, the remedy of rescission, and remedies against the buyer. These remedies, however, are governed by various considerations, such as the status of the title, whether it has or has not passed, also the possession and deliverable condition of the goods.[2]

2. Remedies Against the Goods. — The seller has under certain circumstances remedies which he may enforce against the goods themselves. Where he has a lien for the price he may resort to its enforcement;[3] in case of the insolvency of the buyer he may exercise his right of stoppage in transitu,[4] and upon actual breach by the buyer he may resell the goods.[5] The procedure in connection with these remedies is discussed in a subsequent section.[6]

3. Rescission. — a. *In General.* — Where the goods have not been delivered to the buyer, and the buyer has wrongfully repudiated the contract to sell or the sale,[7] or has manifested his inability to perform

1911; Wyo., 1917; and Alaska, 1913.

2. See the following discussion.

3. **U. S.**—Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. 879. **Ala.** Montgomery Furniture Co. *v.* Hardeway, 104 Ala. 100, 16 So. 29. **Mo.** Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171. **Tex.**—Wright *v.* Texas Moline Plow Co., 40 Tex. Civ. App. 434, 90 S. W. 905. **W. Va.**—Cole *v.* Smith, 24 W. Va. 287.

4. **Ala.**—Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114. **Ga.**—Branan *v.* Atlanta & W. P. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26. **Ill.**—Delta Bag Co. *v.* Kearns, 112 Ill. App. 269. **Ia.**—Greve & Co. *v.* Dunham, 60 Iowa 108, 14 N. W. 130. **Me.**—Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50; Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489. **Mich.**—Gustine *v.* Phillips, 38 Mich. 674. **Mont.**—Walsh *v.* Blakely, 6 Mont. 194, 9 Pac. 809. **Neb.**—Schuster *v.* Carson, 28 Neb. 612, 44 N. W. 734. **N. H.**—Inslee *v.* Lane, 57 N. H. 454. **N. Y.**—Stevens *v.* Wheeler, 27 Barb. 658. **Ohio.**—Jordan, Ellis & Co. *v.* James, 5 Ohio 88. **W. Va.**—Cole *v.* Smith, 24 W. Va. 287. **Wis.**—James Music Co. *v.* Bridge, 134 Wis. 510, 114 N. W. 1108.

5. State *v.* Mason, 96 Mo. 127, 132, 9 S. W. 19; Parker *v.* Rodes, 79 Mo. 88, 91; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Huelet *v.* Reyns, 1 Abb. Pr. N. S. (N. Y.) 27.

6. See *infra*, II, B, 4.

7. **U. S.**—Alpena Portland Cement Co. *v.* Backus, 156 Fed. 944, 84 C. C. A. 444, holding that failure to give seller advance notice of shipment as agreed is equivalent to a failure to accept the goods. **Ala.**—Stafsgy *v.* Southern Ry. Co., 143 Ala. 272, 39 So. 132. **Ill.** Wight *v.* Gardner, 66 Ill. 94; Middle Div. Elevator Co. *v.* Vandeventer, 80 Ill. App. 669; John A. Roebling's Sons Co. *v.* Lock Stitch Fence Co., 28 Ill. App. 184. **Mass.**—Ballou *v.* Billings, 136 Mass. 307, seller may rescind for an anticipatory repudiation. **Mich.**—Winchester *v.* King, 46 Mich. 102, 8 N. W. 722. **N. Y.**—Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Supp. 235, 16 N. Y. St. 453.

[a] **Anticipatory Breach of Executory Contract.**—In the case of Roehm *v.* Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953, the supreme court of the United States declared that after a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract by a refusal on the part of one party to perform it, the court holds that the rule laid down in Hochster *v.* De La Tour, 2 El. & B. 678, 75 E. C. L. 678, 118 Eng. Reprint 922, is a reasonable and proper rule to be applied in the case then being considered, and that

his obligations thereunder,[8] or has committed a material breach thereof,[9] as, for example, in refusing to accept the goods,[10] the seller may totally rescind the contract.[11] A repudiation, however, of the contract by one party, not acquiesced in by the other, does not amount to a rescission but only to a breach,[12] and the seller receiving notice of the repudiation may, if he wishes, continue to treat the contract as still in force, providing he does nothing to increase the damages of the defaulting party.[13]

rule is, that, after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option.

[b] **May Rescind and Sue for Damages.**—Where a buyer wholly repudiates a contract, the seller may rescind and sue for damages arising from the complete breach. Wester *v.* Casein Co., 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377.

8. See *infra,* this note.

[a] **Party Unable to Perform.**—(1) Where a liquor dealer had obtained the exclusive agency of the sale of a certain brew of beer, his failure to pay his license and file his bond required by law renders him unable to perform and the brewing company may rescind the contract. Niagara Falls Brewing Co. *v.* Wall, 98 Mich. 158, 57 N. W. 99, (2) Likewise, it has been held that the inability of the purchaser to pay, on account of his insolvency, will justify a rescission. See Stratton *v.* California Land & Timber Co., 86 Cal. 353, 24 Pac. 1065, a sale of real property. See, however, *infra,* II, A, 3, c. (3) In Abney *v.* Brounlee, 1 A. K. Marsh (Ky.) 240, it is held that a total inability in one party to comply with his part of a contract absolves the other party from a compliance.

[b] **Impossibility of Performance.** Where a sale was made on credit to a certain firm but under the condition that a particular member of the firm should have charge of the sale of the goods, the death of the particular partner will warrant the rescission of the contract. Fulton Hensley & Co. *v.* Thompson, 18 Tex. 278.

[c] **Buyer Imposing New Terms.**—If the buyer refuses to accept the goods unless new terms and conditions not contemplated by the contract are imposed, the seller may rescind the sale. **Del.**—Hartnett *v.* Baker, 4 Penne. 431, 56 Atl. 672; **Ill.**—Wight *v.* Gardner, 66 Ill. 94. **Me.**—Dwinel *v.* Howard, 30 Me. 258. **Mich.**—West *v.* Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. **N. C.**—Hurlburt *v.* Simpson, 25 N. C. 233.

9. **U. S.**—Alpena Portland Cement Co. *v.* Backus, 156 Fed. 944, 84 C. C. A. 444. **Ia.**—Hayden *v.* Reynolds, 54 Iowa 157, 6 N. W. 180. **Mass.**—Goodrich *v.* Lafflin, 1 Pick. 57. **Mich.**—Winchester *v.* King, 46 Mich. 102, 8 N. W. 722. **Wis.**—Jung Brewing Co. *v.* Konrad, 137 Wis. 107, 118 N. W. 548.

10. **Cal.**—Hill *v.* McKay, 94 Cal. 5, 29 Pac. 406. **Ill.**—Wight *v.* Gardner, 66 Ill. 94; Middle Division Elev. Co. *v.* Vandeventer, 80 Ill. App. 669; John A. Roebling's Sons Co. *v.* Lock Stitch Fence Co., 28 Ill. App. 184. **N. Y.**—McEachron *v.* Randles, 34 Barb. 301. **N. C.** Hurlburt *v.* Simpson, 25 N. C. 233. **Vt.** Tyson *v.* Doe, 15 Vt. 571. **Va.**—Smyth *v.* Sutton, 24 Gratt. (65 Va.) 191.

11. See *infra,* this note.

[a] **Uniform Sales Act.**—Such are the express provisions of the Uniform Sales Act. See Sec. 65. This section of the act authorizes the rescission of all contractual obligation between the parties, and is intended to express the existing American law upon the subject.

12. Nebraska *v.* Nebraska City H. Gaslight & C. Co., 9 Neb. 339, 2 N. W. 870; Danforth & Co. *v.* Walker, 37 Vt. 239.

13. **U. S.**—Roehm *v.* Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953. **Ill.** Anglo American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157; John A. Roebling Son's Co. *v.* Lock Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Kadish *v.* Young, 108 Ill. 170, 43 Am. Rep. 548. **Eng.**—Leigh *v.* Paterson, 8

b. *Non-payment.* — Where a sale is for cash, that is, where the delivery of the goods and the payment of the price are concurrent conditions, or where the payment by stipulation is to be made in advance, the failure of the buyer to pay in accordance with the contract is held a breach of a material part of the contract, and the seller may rescind.[14] Likewise, in connection with instalment deliveries and payments, the contract providing that the buyer shall pay for each instalment when delivered, many cases hold that each payment is a condition and that a default in any payment, without legal justification therefor, entitles the seller to rescind, and to refuse further deliveries.[15] On the other hand, many other cases hold that a mere failure to pay for a single delivery, accompanied by no evidence of intention by the buyer to repudiate the entire contract, does not justify a rescission by the seller.[16] There must be in such cases,

Taunt. 540, 4 E. C. L. 267, 2 Moore 588, 129 Eng. Reprint 493.

[a] **Necessity of Seller's Assent.** Neither a countermand of the order for the shipment of the goods, nor a notice by the purchaser to the seller that he will not accept and receive them, is effectual to cause a rescission of the contract. Such a result cannot be accomplished without the assent of the seller. Oklahoma Vinegar Co. *v.* Carter, 116 Ga. 140, 42 S. E. 378, 94 Am. St. Rep. 112, 59 L. R. A. 122.

14. Cal.—Beauchamp *v.* Archer, 58 Cal. 431, 41 Am. Rep. 266. **Ill.**—Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281. **Mich.**—Jenness *v.* Shaw, 35 Mich. 20. **N. Y.**—American Broom & Brush Co. *v.* Addickes, 19 Misc. 36, 42 N. Y. Supp. 871. **Va.**—Smyth *v.* Sutton, 24 Gratt. (65 Va.) 191. **Eng.** Withers *v.* Reynolds, 2 B. & Ad. 882, 22 E. C. L. 370, 109 Eng. Reprint 1370. **Can.**—Paton *v.* Currie, 19 U. C. Q. B. 388.

[a] **Refusal to pay except upon new conditions** not contained in the contract, justifies rescission. King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

15. U. S.—Hull Coal & Coke Co. *v.* Empire Coal & Coke Co., 113 Fed. 256, 51 C. C. A. 213; Youghiogheny & O. Coal Co. *v.* Verstine, H. & Co., 176 Fed. 972. **Ark.**—Eastern Arkansas Hedge-Fence Co. *v.* Tanner, 67 Ark. 156, 53 S. W. 886. **Fla.**—Stokes *v.* Baars, 18 Fla. 656. **Ill.**—W. H. Purcell Co. *v.* Sage, 200 Ill. 342, 65 N. E. 723; George H. Hess Co. *v.* Dawson, 149 Ill. 138, 36 N. E. 557; Burt *v.* Garden City Sand Co., 141 Ill. App. 603. **Ind.**—Ohio Valley Buggy Co. *v.* Anderson Forging Co., 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045. **Md.**—McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Baltimore *v.* Schaub Bros., 96 Md. 534, 54 Atl. 106. **Mass.**—Eastern Forge Co. *v.* Corbin, 182 Mass. 590, 66 N. E. 419. **Mich.**—Jenness *v.* Shaw, 35 Mich. 20. **Minn.**—Peet *v.* East Grand Forks, 101 Minn. 518, 112 N. W. 1003. **Mo.**—Strother *v.* McMullen Lumb. Co., 200 Mo. 647, 98 S. W. 34; Bean *v.* Miller, 69 Mo. 384. **N. Y.**—Price *v.* New York, 104 App. Div. 198, 93 N. Y. Supp. 967; New Publication Co. *v.* Stern, 127 N. Y. Supp. 393; Bright *v.* Dean, 2 City Ct. R. 433, 2 N. Y. Supp. 658, 18 N. Y. St. 1019. **Pa.**—Rugg *v.* Moore, 110 Pa. 236, 1 Atl. 320; Reybold *v.* Voorhees, 30 Pa. 116; Granite Mills *v.* Keystone Oil Cloth Co., 15 Montg. Co. Rep. 36. **Eng.** Bloomer *v.* Bernstein, L. R. 9 C. P. 588, 43 L. J. C. P. 375, 31 L. T. N. S. 306, 23 Wkly. Rep. 238.

[a] **Delay in Payment.**—Where by the terms of the contract, coal deliverable at different times was to be paid for on the 10th of the following month, and a check for coal delivered in August was not mailed until Sept. 11, the seller, having reserved the right to cancel the contract for failure to pay as stipulated, was entitled to rescind. Moreover, whether the seller's action was taken only on account of the delay, or whether it was taken for other reasons, or for the delay combined with other reasons, cannot be considered by the court. Southern Coal & Coke Co. *v.* Bowling Green Coal Co. 161 Ky. 477, 170 S. W. 1185.

16. Ala.—Rock Island Sash & Door Works *v.* Moore, Handley Hardware Co., 147 Ala. 581, 41 So. 806. **Cal.** Flinn *v.* Mowry, 131 Cal. 481, 63 Pac.

it is held, an actual repudiation of the contract in order to justify rescission, and a mere failure to pay does not warrant such a conclusion.[17]

In some states, by express statute, even in an executed contract, the goods being undelivered, upon a failure of the buyer to pay the price, the seller may rescind the sale, or may enforce his lien for the price.[18] Moreover, under the provisions of the uniform sales act, an unpaid seller having a right of lien or having stopped the goods in transit, may rescind the transfer of title and resume the property in the goods where the buyer has been in default in the payment of the price an unreasonable time.[19] Where, however, the contract is

724, 1006. **Ia.**—Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787; Osgood *v.* Bauder, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 655; Hansen *v.* Consumer's Steam Heating Co., 73 Iowa 77, 34 N. W. 495. **Ky.**—Collins *v.* Swan-Day Lumb. Co., 158 Ky. 231, 164 S. W. 813. **N. J.**—Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 612, 30 L. R. A. 61; Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; Empire Rubber Mfg. Co. *v.* Morris, 77 N. J. L. 498, 72 Atl. 1009.

17. **U. S.**—Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523. **Del.**—Johnson Forge Co. *v.* Leonard, 3 Penne. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225. **Ia.**—Quarton *v.* American Law Book Co., 143 Iowa 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1. **Mich.**—West *v.* Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. **Mo.**—Casey *v.* Gunn, 29 Mo. App. 14.

18. **Cal.**—Civ. Code, §1749. See, also, Minaker *v.* California Canneries Co., 138 Cal. 239, 71 Pac. 110; Beauchamp *v.* Archer, 58 Cal. 431, 41 Am. Rep. 266. **Mont.**—Rev. Civ. Code §5096. **N. D.**—Rev. Civ. Code, §5410. **S. D.**—Rev. Civ. Code, §1314.

[a] **Agreement to Sell.**—The provision of the California code does not apply, however, to an agreement to sell personal property, where the buyer has paid a part of the price, and agrees to pay the balance at a future time when a bill of sale is to be given. Rayfield *v.* Van Meter, 120 Cal. 416, 52 Pac. 666.

19. Sec. 61 (1). These statutory provisions settle in the states that have enacted them the long mooted question of the seller's right to rescind an executed contract for non-payment of the price. These statutes do not, however, express the English law, under which doctrine the seller cannot rescind, for non-payment, an executed contract. See Martindale *v.* Smith, 1 Q. B. 389, 41 E. C. L. 592, 113 Eng. Reprint 1181.

[a] **In the leading American case,** Dustan *v.* McAndrew, 44 N. Y. 72, it was said: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." It would seem from the above quotation that the court was referring to an executed contract, although the case in issue was based upon an executory contract. Moreover, the question of the vendor's keeping the goods for himself did not arise in the facts of the case, and the court's language, in that particular, was merely dictum. In the later case of Hayden *v.* Demets, 53 N. Y. 426, it was further said that these remedies applied not only to cases where the title passed at once, but also to cases where the contract was executory where there had been a valid tender and refusal. See, also, Van Brocklen *v.* Smeallie, 140 N. Y. 70, 73, 35 N. E. 415. There have been numerous other dicta to the same effect, and the language of the Dustan *v.* McAndrew case has been quoted, more or less literally, in a number of cases, regard-

fully executed, and the goods have been delivered to the buyer, the failure of the buyer to pay at the stipulated time, does not, unless the right has been expressly reserved,[20] give the seller a right to rescind.[21] Where, however, the buyer gets possession of the goods by fraud, the seller may rescind for non-payment, by reason of the fraud.[22]

c. *Fraud.* — The seller may rescind the contract to sell or the sale for fraud on the part of the buyer,[23] and although the mere fact of the buyer's insolvency does not constitute fraud for which a rescission may be made,[24] yet when an insolvent purchaser secures credit

less of whether the contract in view was executed or executory. See, for example, Habeler *v.* Rogers, 131 Fed. 43, 45, 65 C. C. A. 281; Ames *v.* Moir, 130 Ill. 582, 591, 22 N. E. 535; Bagley *v.* Findlay, 82 Ill. 524; Putnam *v.* Glidden, 159 Mass. 47, 49, 34 N. E. 81, 38 Am. St. Rep. 394; Ackerman *v.* Rubens, 167 N. Y. 405, 408, 60 N. E. 750, 82 Am. St. Rep. 728, 53 L. R. A. 867; Van Brocklen *v.* Smeallie, 140 N. Y. 70, 73, 35 N. E. 415; Bridgford *v.* Crocker, 60 N. Y. 627; Hayden *v.* Demets, 53 N. Y. 426; Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Ballentine *v.* Robinson, 46 Pa. 177; Neis *v.* O'Brien, 12 Wash. 358, 41 Pac. 59, 50 Am. St. Rep. 894; Pratt *v.* S. Freeman & Sons Mfg. Co., 115 Wis. 648, 654, 92 N. W. 368. While the rule has been severely criticised, yet it is a convenient and fair one, and is, as stated above, now the law by express statute in many states.

20. See, *infra,* II, A, 3, d.

21. **Fla.**—Godwin *v.* Phifer, 51 Fla. 441, 41 So. 597. **Ia.**—Kramer *v.* Messner, 101 Iowa 88, 69 N. W. 1142; Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217. **Mich.**—Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413. **Mo.**—Roberts *v.* Boulton, 56 Mo. App. 405. **Wis.**—Pratt *v.* S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

22. See, *infra,* II, A, 3, c.

23. **Ark.**—Southern Lumber Co. *v.* Colvin, 104 Ark. 130, 148 S. W. 496. **Conn.**—Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121. **Ga.**—Newman *v.* H. B. Claflin Co., 107 Ga. 89, 32 S. E. 943. **Ill.**—Hacker *v.* Munroe, 176 Ill. 384, 52 N. E. 12; Bowen *v.* Schuler, 41 Ill. 192. **Ind.**—Brower *v.* Goodyer, 88 Ind. 572. **Ia.**—Deere *v.* Morgan, 114 Iowa 287, 86 N. W. 271; Kearney Milling & E. Co. *v.* Union Pac. Ry. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434. **Ky.** Bradbury *v.* Keas, 5 J. J. Marsh. 446; Crawford *v.* Hurd, 32 Ky. L. Rep. 636, 106 S. W. 849. **Mass.**—Steel *v.* Webster, 188 Mass. 478, 74 N. E. 686; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105. **Mo.**—Blackman *v.* McAdams, 131 Mo. App. 408, 111 S. W. 599; Gratton & Knight Mfg. Co. *v.* Troll, 77 Mo. App. 339. **Mont.**—Richardson-Roberts-Byrne Dry Goods Co. *v.* Goodkind, 22 Mont. 462, 56 Pac. 1079. **Neb.**—Pekin Plow Co. *v.* Wilson, 66 Neb. 115, 92 N. W. 176. **N. Y.**—Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759; Sheffield *v.* Mitchell, 31 App. Div. 266, 52 N. Y. Supp. 925. **N. C.**—Blake *v.* Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566. **Ore.**—Crossen *v.* Murphy, 31 Ore. 114, 49 Pac. 858; Craig *v.* California Vineyard Co., 30 Ore. 43, 46 Pac. 421. **Pa.**—Zeeman *v.* Saleburg, 25 Pa. Super. 423; Davis *v.* Cosel, 4 Pa. Super. 519. **Tex.**—Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379. **Vt.** Loomis *v.* Wainwright, 21 Vt. 520. **Wis.** Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

24. **Ark.**—Roberts Cotton Oil Co. *v.* F. E. Morse & Co., 97 Ark. 513, 135 S. W. 334. **Del.**—Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948. **Ind.**—West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506; Levi *v.* Bray, 12 Ind. App. 9, 39 N. E. 754; Holmes *v.* Henderson, 12 Ind. App. 698, 40 N. E. 151. **Ia.**—J. J. Smith Lumb. Co. *v.* Scott County Garbage Reducing & Fuel Co., 149 Iowa 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184. **La.** Jaffray *v.* Moss, 41 La. Ann. 548, 6 So. 520. **Mo.**—Stein *v.* Hill, 100 Mo. App. 38, 71 S. W. 1107; Gratton & Knight Mfg. Co. *v.* Troll, 77 Mo. App. 339; Reid, Murdock & Co. *v.* Lloyd, 67 Mo. App. 513. **Mich.**—Illinois Leather Co. *v.* Flynn, 108 Mich. 91, 65 N. W. 519. **N. Y.**—Pinckney *v.* Darling, 158 N. Y. 728, 53 N. E. 1130; Hirsch Lumb. Co. *v.* Hubbell, 143 App. Div. 317, 128 N. Y. Supp. 85. **Pa.**—Johnson *v.* Groff, 22

through fraudulent concealment of his insolvency, or with intention not to pay, the seller may rescind.[25]

d. *Right Reserved.* — In all cases, where a right to rescind has been expressly reserved by the seller in case of a certain event, he may exercise the right upon the happening of such event.[26]

e. *Election of Other Remedy.* — Where other remedies are open to the seller, an election of another remedy inconsistent with the theory of rescission, will constitute a waiver of, or a bar to, the right of rescission. For example, an action for the purchase price amounts to an affirmation of the sale, and will be a bar to rescission.[27] The seller will not be barred, however, from his right to rescind by bringing an action upon the contract, where he had no knowledge, at the time,

Pa. Super. 85; Paul *v.* Eurich, 3 Pa. Super. 299. **Tex.** — Slayden-Kirksey Woolen Mills *v.* Weber, 46 Tex. Civ. App. 433, 102 S. W. 471. **Va.**—University of Virginia *v.* Snyder, 100 Va. 567, 42 S. E. 337. **Wis.**—German Nat. Bank *v.* Princeton State Bank, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556, 8 Ann. Cas. 502.

25. **U. S.**—Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Montgomery *v.* Bucyrus Mach. Works, 92 U. S. 257, 23 L. ed. 656; *In re* K. Marks & Co., 218 Fed. 453, 134 C. C. A. 253; Halsey *v.* Diamond Distilleries Co., 191 Fed. 498, 112 C. C. A. 142; Haywood Co. *v.* Pittsburg Industrial Iron Works, 163 Fed. 799; William Openhym & Sons *v.* Blake, 157 Fed. 536, 87 C. C. A. 122. **Ala.** McKensie *v.* Rothschild, 119 Ala. 419, 24 So. 716. **Ark.**—Bugg *v.* Wertheimer Schwartz Shoe Co., 64 Ark. 12, 40 S. W. 134. **Del.**—Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948. **Ill.**—Hacker *v.* Munroe, 176 Ill. 384, 52 N. E. 12. **Ind.** Curme, Dunne & Co. *v.* Rauh, 100 Ind. 247; Peninsular Stove Co. *v.* Ellis, 26 Ind. App. 491, 51 N. E. 105. **Ia.**—P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316. **Ky.**—Lowry *v.* Hitch's Assignee, 33 Ky. L. Rep. 573, 110 S. W. 833, 17 L. R. A. (N. S.) 1032; Reager *v.* Kendall, 19 Ky. L. Rep. 27, 39 S. W. 257. **Mich.**—Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413. **Mo.**—Stein *v.* Hill, 100 Mo. App. 38, 71 S. W. 1107; Gratton & Knight Mfg. Co. *v.* Troll, 77 Mo. App. 339. **N. H.**—Stewart *v.* Emerson, 52 N. H. 301. **N. Y.**—Roth *v.* Palmer, 27 Barb. 652. **N. D.**—Ditton *v.* Purcell, 21 N. D. 648, 132 N. W. 347, 36 L. R. A. (N. S.) 149. **Pa.**—Davis *v.* Cosel, 4 Pa. Super. 519. **Tenn.**—Richardson *v.* Vick, 125 Tenn. 532, 145 S. W. 174; Wertheimer-Swartz Shoe Co. *v.* Faris (Tenn.), 46 S. W. 336. **Tex.**—B. F. Avery & Sons *v.* Dickson (Tex. Civ. App.), 49 S. W. 662. **Wash.**—Goodyear Rubber Co. *v.* Schreiber, 29 Wash. 94, 69 Pac. 648. **Wis.**—German National Bank *v.* Princeton State Bank, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556, 8 Ann. Cas. 502.

26. Southern Coal & C. Co. *v.* Bowling Green Coal Co., 161 Ky. 477, 170 S. W. 1185 (holding that when the seller rescinds in accord with his express rights, the courts are not authorized to inquire into the seller's motives); Russell *v.* Stewart, 204 Pa. 211, 53 Atl. 771.

[a] **Uniform Sales Act.**—See Sec. 61 (1) where it provides that "an unpaid seller having a right of lien or having stopped the goods in transit, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default."

27. **Ark.**—Bank of Little Rock *v.* Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65; Bryan-Brown Shoe Co *v.* Block, 52 Ark. 458, 12 S. W. 1073. **Conn.**—Bulkley *v.* Morgan, 46 Conn. 393. **Ill.**—Streator Tile Works *v.* Coe, 53 Ill. App. 483; Hanchett *v.* Riverdale Distillery Co., 15 Ill. App. 57. **Mich.** Galloway *v.* Holmes, 1 Doug. 330. **Mo.** Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305; Mapes *v.* Burns, 72 Mo. App. 411. **Neb.**—First Nat. Bank of Chadron *v.* Tootle, 59 Neb. 44, 80 N. W. 264. **Tex.**—Allyn & Co. *v.* P. J. Willis & Bro., 65 Tex. 65; Wachsmuth *v.* Sims (Tex. Civ. App.), 32 S. W. 821. **Eng.**—Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L. 661, 7 L. J. K. B. O. S. 139, 109 Eng. Reprint 23.

of the facts justifying a rescission.[28] Moreover, an action at law for deceit is not necessarily an election to affirm the sale, so as to preclude the plaintiff from maintaining a subsequent suit in equity to rescind the sale.[29]

f. *Effect of Rescission.* — When a rescission has been effected either by the act of the parties or a decree of court, the parties are restored to their former positions as if the contract had never been made.[30] The rights under the contract being ended, the title to the subject matter of the sale revests in the seller,[31] and, as owner, he is entitled to the recovery of the possession of the goods, and an action of trespass cannot be sustained against him for taking them.[32] He may, also, proceed to recover the goods by replevin,[33] or their value in trover and conversion.[34] While the seller is entitled to a return of the goods, the buyer is also entitled to a return of whatever consideration was paid by him,[35] although the seller is entitled to a reasonable allowance for the use of the goods while in the possession of the buyer.[36] After the rescission of a contract it may be renewed,

See generally the title "**Choice and Election of Remedies.**"

28. **Ga.**—Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6. **Ia.**—Deere *v.* Morgan, 114 Iowa 287, 86 N. W. 271. **Minn.**—Kraus *v.* Thompson, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182. **N. Y.**—Rochester Distilling Co. *v.* Devendorf, 72 Hun 428, 25 N. Y. Supp. 200, 54 N. Y. St. 871. **Wis.**—Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436.

29. Emma Silver Min. Co. *v.* Emma Silver Min. Co., 7 Fed. 401.

30. **Ala.**—Milner & Kettig Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63. **Ill.** Follansbee *v.* Adams, 86 Ill. 13; Foster *v.* Smith, 56 Ill. 209. **Md.**—Mitchell *v.* Wedderburn, 68 Md. 139, 11 Atl. 760. **Mich.**—American White Bronze Co. *v.* Gillette, 88 Mich. 231, 50 N. W. 136, 26 Am. St. Rep. 286; Todd *v.* Everett, 78 Mich. 595, 44 N. W. 583. **Neb.** Backes *v.* Schlick, 82 Neb. 289, 117 N. W. 707. **Wis.**—Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992.

31. **Ala.**—Milner & Kettig Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63. **Ill.** Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500. **Ky.**—Duncan *v.* Baird & Co., 8 Dana 101. **La.**—Nixon *v.* Bozeman, 11 La. Ann. 750; Derepas *v.* Shallus, 15 La. 371. **Mo.**—Kloes *v.* Wurmser, 34 Mo. App. 453. **N. Y.**—Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Supp. 235, 16 N. Y. St. 453. **S. C.**—Carter *v.* Walker, 2 Rich. L. 40. **Vt.**—Martin *v.* Eames, 26 Vt. 476. **Eng.**—Read *v.* Hutchinson, 3 Campb. 352.

32. Shipman *v.* Horton, 17 Conn. 481.

33. Wilmot *v.* Lyon, 11 Ohio C. C. 238, 7 Ohio Cir. Dec. 394.

34. Gottlieb *v.* Peck & Mack Co., 125 N. Y. Supp. 829.

35. **Cal.**—Luitweiler Pumping Engine Co. *v.* Ukiah Water & Imp. Co., 16 Cal. App. 198, 116 Pac. 707. **Colo.** Falke *v.* Brule, 17 Colo. App. 499, 68 Pac. 1054. **Ind.**—Fruits *v.* Pearson, 25 Ind. App. 235, 57 N. E. 158. **Ia.**—Redman *v.* Malvin, 23 Iowa 296. **La.**—Moreau *v.* Chauvin, 8 Rob. 157; Donavan *v.* Mooney, 5 La. 57. **Mass.**—Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143, 60 N. E. 473; Attleborough Nat. Bank *v.* Rogers, 125 Mass. 339. **Mo.** White *v.* Salisbury, 33 Mo. 150; Shannon *v.* Abell, 169 Mo. App. 598, 155 S. W. 62; Spangler *v.* Kite, 47 Mo. App. 230. **N. Y.**—Loader *v.* Brooklyn Chair Co., 64 App. Div. 615, 72 N. Y. Supp. 297; Higgins *v.* Crouse, 63 Hun 134, 17 N. Y. Supp. 696; Raymond *v.* Bearnard, 12 Johns. 274, 7 Am. Dec. 317. **Pa.**—Lare *v.* Westmoreland Specialty Co., 155 Pa. 33, 25 Atl. 812; Terry *v.* Wenderoth, 147 Pa. 519, 23 Atl. 763; Laubach *v.* Laubach, 73 Pa. 387. **Tenn.** Williams *v.* Hurt, 2 Humph. 68.

36. **Ga.**—Dawson Mfg. Co. *v.* Brunswick & A. R. Co., 51 Ga. 136. **Ky.** Nichols & Shepard Co. *v.* Caldwell, 26 Ky. L. Rep. 136, 80 S. W. 1099. **Eng.** King *v.* Price, 2 Chit. 416, 18 E. C. L. 714.

of course, by the express agreement of the parties, but it cannot be reinstated without the mutual consent of both parties,[37] and after the contract has been rescinded there can be no action based upon it, either for the price of the goods or on a note given for the price.[38]

4. Remedies Against the Buyer. — a. *Action for Damages.* — As in other contracts, when the purchaser of goods wrongfully fails to keep his agreement, the seller has his remedy against him in an action for damages.[39] Where, for example, the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.[40]

37. **Ala.**—Green & Sons *v.* Lineville Drug Co., 167 Ala. 372, 52 So. 433. **Del.** Delaware Marine S. Mfg. Co. *v.* Philadelphia Lamp Mfg. Co., 5 Boyce 524, 95 Atl. 235. **N. Y.**—Kinney *v.* Kiernan, 49 N. Y. 164.

38. **Ill.**—Foster *v.* Smith, 56 Ill. 209; Jacquin *v.* Warren, 40 Ill. 459. **N. Y.** Kinney *v.* Kiernan, 49 N. Y. 164; Hart *v.* Haight, 57 Hun 591, 10 N. Y. Supp. 798. **Wis.**—Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992. **Eng.**—Hewison *v.* Ricketts, 63 L. J. Q. B. 711, 71 L. T. N. S. 191, 10 Reports, 558.

[a] **Note for Price.**—Where the contract between the parties is rescinded, every part of it fails, and there would be no more liability upon a note given for a part of the price than there would be for the balance of the purchase money. Dickey *v.* Smith, 127 Ga. 645, 56 S. E. 756.

39. **Ala.**—Wheeler *v.* Cleveland, 170 Ala. 426, 54 So. 277; Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014. **Ark.**—Rodgers *v.* Wise, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009. **Colo.**—Leeper *v.* Schroeder, 24 Colo. App. 164, 132 Pac. 701. **Conn.**—House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80. **Ill.**—Morier *v.* Moran, 58 Ill. App. 235. **Minn.**—Geiser Mfg. Co. *v.* Holzer, 110 Minn. 138, 124 N. W. 827. **Mo.** Outcault Advertising Co. *v.* Wilson, 186 Mo. App. 492, 172 S. W. 394. **N. Y.** Poel *v.* Brunswick-Balke-Collender Co., 159 App. Div. 365, 144 N. Y. Supp. 725; Underhill *v.* North American Kerosene Gas Light Co., 36 Barb. 354. **Tex.** Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165. **Wis.**—Lincoln *v.* Charles Alshuler Mfg. Co., 142 Wis. 475, 125 N. W. 908, 28 L. R. A. (N. S.) 780.

40. **Ala.**—St. Louis Hay & Grain Co. *v.* American Cast Iron Pipe Co., 167 Ala. 442, 52 So. 904. **Ga.**—Maddox *v.* Washburn-Crosby Mill Co., 135 Ga. 539, 69 S. E. 821. **Ill.**—United Flour Mills Co. *v.* Kryda, 185 Ill. App. 610; Pittsburgh & I. Coal Co. *v.* Hostler etc. Co., 147 Ill. App. 387; Morier *v.* Moran, 58 Ill. App. 235; Thorn *v.* Danzinger, 50 Ill. App. 306. **Ky.**—Jones *v.* Strode, 19 Ky. L. Rep. 117, 41 S. W. 562. **Me.**—Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371. **Mich.**—Thick *v.* Detroit etc. Ry., 137 Mich. 708, 101 N. W. 64, 109 Am. St. Rep. 694. **Mo.**—Roaring Fork Potato Growers' Assn. *v.* Clemens Produce Co., 185 Mo. App. 1, 171 S. W. 584. **Neb.** Trinidad Asphalt Mfg. Co. *v.* Buckstaff Bros. Mfg. Co., 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710. **N. Y.** Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648; Storm *v.* Rosenthal, 156 App. Div. 544, 141 N. Y. Supp. 339; National Cash Register Co. *v.* Schmidt, 48 App. Div. 472, 62 N. Y. Supp. 952; Underhill *v.* North American Kerosene Gas Light Co., 36 Barb. 354; Rusch *v.* Klausner, 117 N. Y. Supp. 1074. **N. D.**—Hart-Parr Co. *v.* Finley, 31 N. D. 130, 153 N. W. 137, Ann. Cas. 1917E, 706, L. R. A. 1915E, 851. **Ore.**—Daniels *v.* Morris, 65 Ore. 289, 130 Pac. 397, 132 Pac. 958. **S. C.**—Huguenot Mills *v.* Jempson & Co., 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673. **Tex.**—Sonka *v.* Chatham, 2 Tex. Civ. App. 312, 21 S. W. 948. **Va.**—American Hide & Leather Co. *v.* Chalkley & Co., 101 Va. 458, 44 S. E. 705. **W. Va.**—Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719. **Wis.**—Hauter *v.* Marty, 156 Wis. 208, 145 N. W. 775. **Eng.**—Rabe *v.* Otto, 89 L. T. N. S. 562.

[a] **Sales Acts.**—Such are the provisions of the sales acts. See Uniform Sales Act, Sec. 64 (1); English Sale of Goods Act, 50 (1).

[b] **Goods to Be Received and Tested.**—Where the prospective buyer

Likewise, when the buyer unreasonably delays acceptance,[41] or where, in general, the buyer refuses to perform any condition of the contract,[42] an action for damages lies against him. In the case of executory sales, a buyer, in the absence of fraud, mistake, or other legal reason, cannot arbitrarily repudiate the contract, and thereby escape all liability,[43] but his cancellation or repudiation of his contract will render him liable in damages.[44] Consequently, where the buyer repudiates the contract before the goods have been appropriated to the contract,[45] or repudiates, without cause, an agreement to buy

agrees to receive and test the goods, although there is to be no sale unless the goods are found satisfactory, a refusal to accept the goods upon approval gives rise to an action for damages. Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014.

[c] **Buyer May Resell the Goods.** Where a buyer wrongfully refuses to accept the goods, the seller, in possession, may resell and recover the difference between the contract price and the price received on a resale and expenses for the storage and insurance of the goods pending a resale; the seller acting in good faith and exercising reasonable diligence to effect a sale at the best price. Piowaty *v.* Sheldon, 167 Mich. 218, 132 N. W. 517, Ann. Cas. 1913A, 610.

41. Alleghany Iron Co. *v.* Tedford, 96 Va. 372, 31 S. E. 525.

42. **Ill.**—Anaconda Copper Min. Co. *v.* Houston, 107 Ill. App. 183. **Ind.** Indianapolis, P. & C. R. Co. *v.* McGuire, 62 Ind. 140; McMahan *v.* Stewart, 23 Ind. 590. **Neb.**—Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Neb. 279, 62 N. W. 480; Backes *v.* Black, 5 Neb. (Unof.) 74, 97 N. W. 321.

43. Bowman *v.* Ayers, 2 Idaho 465, 21 Pac. 405; McGregor-Noe Hdw. Co. *v.* Livesay, 85 Mo. App. 271.

44. **U. S.**—Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19. **Ky.**—Blish Mill. Co. *v.* Detherage, 155 Ky. 319, 159 S. W. 816; Jones *v.* Strode, 19 Ky. L. Rep. 1117, 41 S. W. 562. **Miss.**—American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117. **N. Y.**—Wester *v.* Casein Co., 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914 B, 377. **Tex.**—Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165. **Vt.**—Parker *v.* McKannon Bros. & Co., 76 Vt. 96, 56 Atl. 536. **W. Va.**—Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719. **Can.**—Periard *v.* Bergeron, 47 Can. Sup. Ct. 289.

[a] **Repudiation May Be Treated as Breach.**—In Alger-Fowler Co. *v.* Tracy, 98 Minn. 432, 107 N. W. 1124, the plaintiff engaged the defendant as a grain broker to sell for it sixty thousand bushels of wheat for future delivery. The defendant sold the wheat, and later the plaintiff repudiated the contract. Prior to the time for delivery the plaintiff brought suit against the defendant to recover certain sums of money, and the defendant set up a counterclaim for the loss incurred in carrying out the plaintiff's contract for the sale of wheat. The court said; "There is a conflict of judicial opinion as to the relative rights and liabilities of the parties to a contract where one of them before performance is due unqualifiedly repudiates the contract and gives notice that he will not perform it. After a somewhat extended examination of the question, we are of the opinion, and we so hold, upon principle and the weight of judicial authority, that as a rule, if one party to an executory contract, before performance is due, expressly renounces the contract and gives notice that he will not perform it, his adversary, if he so elects, may treat the renunciation as a breach of the contract."

45. Unexcelled Fire Works Co. *v.* Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this case it was held that where goods were ordered under a simple contract of bargain and sale and notice was given by the buyer to the seller not to ship them, in advance of delivery and before they were separated from the bulk and set apart to the buyer, such notice is not only a repudiation of the contract but also a revocation of the carrier's agency to receive them; and the refusal of the buyer to receive the goods when delivery is tendered by the carrier does not make him liable for their contract price, but only for special damages for the refusal to receive them. Clark, J.,

an article to be manufactured,[46] a right of action for damages arises in favor of the seller. Moreover, by the great weight of authority, the seller is limited to this action for damages in case of the breach of an executory contract, and cannot maintain an action for the price,[47] except in cases where by agreeement of the parties the price is payable irrespective of the delivery.[48] On the other hand, however, it is said that the notice of an intended breach will operate as a breach only if accepted and acted upon as such by the other party, who may if he pleases, disregard the notice of repudiation and insist upon performance according to the contract.[49] Under this doctrine, the seller, despite the buyer's repudiation, may complete the goods according to the terms of the contract, and, thereupon, sue him for the contract price.[50] Moreover, some cases hold that, upon the breach

said: "It is plain that the notice given to the plaintiffs by the defendants not to ship the goods was a repudiation of the contract: it was not a rescission, for it was not in the power of anyone of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant; the direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs thereby had notice of the revocation. * * * The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered."

46. **Ill.**—Thorn *v.* Danzinger, 50 Ill. App. 306. **Mich.**—Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716. **Tex.** Tufts *v.* Laurence, 77 Tex. 526, 14 S. W. 165.

[a] **Article to Be Manufactured.**—In such a case the remedy of the seller is not for goods sold or for labor and materials, but an action for the breach of the contract. Oklahoma Vinegar Co. *v.* Carter, 116 Ga. 140, 42 S. E. 378, 94 Am. St. Rep. 112, 59 L. R. A. 122 and cases cited.

[b] **Seller Not Bound to Go On.** As said by the Supreme Court of the United States: "The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails; and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present." Hinckley *v.* Pittsburgh etc. Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. ed. 967.

47. See *infra*, II, A, 4, b.

[a] **Title Must Have Passed.**—In Benjamin on Sales, §1117, the rule is thus stated: "When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract as has been explained in Book II, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer is for damages for nonacceptance. He can in general only recover the damage that he has sustained, not the full price of the goods." Quoted and approved in Fairbanks, Morse & Co. *v.* Heltsley & Co., 135 Ky. 397, 122 S. W. 198, 26 L. R. A. (N. S.) 248, and note.

48. See *infra*, II, A, 4, b, (V).

49. Leake's Digest of the Law of contracts, 872. See Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384.

50. **U. S.**—Hughes *v.* United States, 4 Ct. Cl. 64. **Conn.**—House Cold Tire

of the executory contract, the seller may sell the goods and sue for the difference between the amount thus received and the contract price.[51] Also, under the rule that permits the unpaid seller to keep the goods for himself, he may recover whatever damages he may have suffered by the breach of the buyer.[52]

Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80. **Del.**—Darby *v.* Hall, 3 Penne. 25, 50 Atl. 64; Barr *v.* Logan, 5 Harr. 52. **Ill.**—Bagley *v.* Findlay, 82 Ill. 524. **Ia.**—McAlister *v.* Safley, 65 Iowa 719, 23 N. W. 139. **Ky.**—Cook *v.* Brandeis, 3 Metc. 555. **Miss.**—American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117. **Mo.**—J. E. Stewart Produce Co. *v.* Gamble-Robinson Comm. Co., 189 Mo. App. 654, 175 S. W. 319; Roaring Fork Potato Growers' Assn. *v.* C. Clemens Produce Co., 185 Mo. App. 1, 171 S. W. 584; Koenig *v.* Truscott Boat Mfg. Co., 155 Mo. App. 685, 135 S. W. 514; Dobbins *v.* Edmonds, 18 Mo. App. 307. **N. Y.**—Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190; Bridgford *v.* Crocker, 60 N. Y. 627; Hayden *v.* Demets, 53 N. Y. 426; Dustan *v.* McAndrew, 44 N. Y. 72; Baumann *v.* Moseley, 63 Hun 492, 18 N. Y. Supp. 563, 45 N. Y. St. 344; Merriam *v.* Kellogg, 58 Barb. 445; Levy *v.* Glassberg, 92 N. Y. Supp. 50; Silver *v.* Connolly, 46 Hun 679, 12 N. Y. St. 616. **Onio.**—Hadly *v.* Pugh, Wright 554. **Pa.** Clarke *v.* Dill, 8 Sad. 164, 11 Atl. 82. **Tex.**—Leventhal *v.* Hollamon (Tex. Civ. App.), 165 S. W. 6. **Wis.**—McMillen *v.* Strange, 159 Wis. 271, 150 N. W. 434.

See *infra*, II, A, 4, b.

51. Scribner *v.* Schenkel, 128 Cal. 250, 60 Pac. 860; Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Levis *v.* Royal Packing & Drying Co., 1 Cal. App. 241, 81 Pac. 1086.

[a] **Seller's Election of Remedies.** Upon the breach of contract of sale by the purchaser, the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title to the purchaser, he may store or retain it for the purchaser, or he may resell it as agent for the purchaser. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between the contract price and the net proceeds of the sale. But it is not obligatory upon him to adopt either of these courses, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract. Every seller, however, may not pursue all three of these remedies. He cannot, for instance, pursue the first or second, unless the subject matter of the sale is identified or in some manner appropriated to the contract, because in the one case he holds the property as agent for the purchaser, and in the other he sells it as agent for the purchaser, and unless the property is identified, or in some way appropriated to the contract, it can neither be held nor sold. Pabst Brewing Co. *v.* E. Clemens Horst Co., 229 Fed. 913, 917, 144 C. C. A. 195.

52. See *infra*, this note.

[a] **Under the so-called New York doctrine** of the seller's remedies, often quoted in other states, it is said that when a vendee returns or declines to receive property sold him the vendor has his choice of either one of three methods to indemnify himself: First, he may store or retain property for the vendee, and sue him for the entire purchase price; second, he may sell the property, acting as an agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, third, he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price. Dustan *v.* McAndrew, 44 N. Y. 72, 78. See, also, **Ill.**—Bagley *v.* Findlay, 82 Ill. 524. **Ky.**—Cook *v.* Brandeis, 3 Metc. 555. **Mich.**—Holland *v.* Rea, 48 Mich. 218, 224, 12 N. W. 167. **N. H.**—Haines *v.* Tucker & Co., 50 N. H. 307, 313. **Pa.**—Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327. **Va.**—Rosenbaums *v.* Weeden, 18 Gratt. (59 Va.) 785, 98 Am. Dec. 737.

[b] **The Uniform Sales Act**, Sec. 61 (1), provides in such case that "The seller shall not thereafter be liable to the buyer upon the contract to sell or

b. *Action for Price.* — **(I.) In General.** — Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.[53] While it is essential that the transaction should be a sale in order to maintain an action for the price,[54]

the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or of the sale.''

[c] **Seller Keeping Goods as His Own.**—In the case of Stafsky *v.* Southern Ry. Co., 143 Ala. 272, 39 So. 132, the court held that the seller might keep the goods as his own. The action was in trover brought by the buyer against the carrier who had, upon failure of the buyer to receive the goods within a reasonable time, shipped them back to the seller in compliance with his orders. In affirming judgment for the defendant, the court said: ''It is true that the seller might have sued the buyer (plaintiff in this case) for the contract price at which the goods were sold and there would have been no good defense to the suit, but the goods not having passed into the actual possession of the purchaser, the seller might, upon the vendee not taking and paying for them, keep them as his own, and recover the difference between the market price at the time and place of delivery and the contract price.—Benj. on Sales (6th ed.), Sec. 788, p. 769, and authorities cited under note z; The Schooner Treasurer, 1 Sprague 473; Kearney *v.* Union Pacific Ry. Co., 59 Am. St. Rep. 434.''

53. **Ala.**—Vinegar Bend Lumb. Co. *v.* Soule Steam Feed Wks., 182 Ala. 146, 62 So. 279. **Colo.**—Leeper *v.* Schroeder, 24 Colo. App. 164, 132 Pac. 701. **Del.** Levy *v.* Gillis, 1 Penne. 119, 39 Atl. 785. **Ga.**—Maddox *v.* Washburn Crosby Mill. Co., 135 Ga. 539, 69 S. E 821; Hodges *v.* Smith, 118 Ga. 789, 45 S. E. 617. **Ind.**—Bicknell *v.* Buck, 58 Ind. 354; Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382. **Kan.** Southwestern Stage Co. *v.* Peck, 17 Kan. 271. **La.**—Van Wart Son & Co. *v.* Hopkins, 5 La. Ann. 266. **Mich.** Davis *v.* Maltz, 57 Mich. 496, 24 N. W. 861; Carpenter *v.* Butterfield, 34 Mich. 97. **Mo.**—Riddle *v.* Foreman (Mo. App.), 178 S. W. 227. **N. Y.**—Bridgford *v.* Crocker, 60 N. Y. 627; Storm *v.* Rosenthal, 156 App. Div. 544, 141 N. Y. Supp. 339; Nichols *v.* Scranton Steel Co., 64 Hun 632, 18 N. Y. Supp. 623, 46 N. Y. St. 58 (*affirmed* in 137 N. Y. 471, 33 N. E. 561); Stocksdale *v.* Schuyler, 55 Hun 610, 8 N. Y. Supp. 813 (*affirmed* in 130 N. Y. 674, 29 N. E. 1034); Rusch *v.* Klausner, 117 N. Y. Supp. 1074. **Pa.** Millard *v.* Morse, 32 Pa. 506. **Tex.** Corbett *v.* Sayers, 29 Tex. Civ. App. 68, 69 S. W. 108. **Vt.**—Hawley *v.* Moody, 24 Vt. 603. **Va.**—American Hide & Leather Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705. **Eng.**—Mackay *v.* Dick, 6 App. Cas. 251, 29 Wkly. Rep. 541; Garey *v.* Pyke, 10 Ad. & El. 512, 37 E. C. L. 277, 113 Eng. Reprint 193; Scott *v.* England, 2 Dow. & L. 520, 14 L. J. Q. B. 43; Alexander *v.* Gardner, 1 Bing. (N. C.) 671, 27 E. C. L. 812, 1 Scott 630, 1 Hodges 147, 3 D. P. C. 146, 4 L. J. C. P. 223, 131 Eng. Reprint 1276.

[a] **The statement in the text follows the English** Sale of Goods Act (Sec. 49 [1]), which is merely declaratory of the common law. The Uniform Sales Act provides as follows: ''Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods,'' Sec. 63 (1). It will be noted that the American act substitutes for the words ''contract of sale'' in the English act, the words ''a contract to sell or a sale.'' This was done to meet the case of a conditional sale where the price may be payable irrespective of the transfer of title. See explanation of the draftsman of the act in Williston on Sales, §560.

Where sale is conditional, see *infra,* IV.

54. **Ga.**—Blumenfeld *v.* Palmer Hardware Co., 8 Ga. App. 79, 68 S. E. 618, no sale under the statute of frauds. **Ill.**—Burnham *v.* Roberts, 70 Ill. 19. **Mich.**—Griffin *v.* Gratwick, S. & F. Lumb. Co., 97 Mich. 557, 56 N. W.

yet when the property in the goods has passed, then, regardless of whether there has been an actual delivery, providing the seller is ready to deliver in case delivery has not been made, and provided further that the seller has performed his whole duty, an action may be maintained for the contract price.[55]

(II.) Executory Sales. — In many jurisdictions, except in the case of conditional sales,[56] the passing of the property in the goods is a necessary condition precedent to an action for the price, and such an action, in absence of an express stipulation to the contrary, in case of the buyer's breach of a mere executory contract, is not maintainable.[57] Even the seller's insistence upon the completion and de-

1034. **N. Y.**—Southard *v.* Walsh, 77 N. Y. 301. **Eng.**—Parsons *v.* Saxter, 2 C. & K. 266, 61 E. C. L. 265; Clark *v.* Bulmer, 1 D. & L. 367, 12 L. J. Exch. 463, 11 M. & W. 243.

55. **Ill.**—Sanborn *v.* Benedict, 78 Ill. 309. **Ia.**—Sedgwick *v.* Pottingham, 54 Iowa 512, 6 N. W. 738. **Md.**—Armstrong *v.* Turner, 49 Md. 589. **Mass.** Weld *v.* Came, 98 Mass. 152. **W. Va.** Bloyd *v.* Pollock, 27 W. Va. 75.

See *infra,* II, B, 3, b, (II).

[a] **Transfer of Possession Not Essential.**—There may be a bargain and sale of goods sufficient to transfer the title, and thus to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession. The former is quite consistent with the vendor's retaining a lien for the price, and thus retaining possession till the price is paid. Frazier *v.* Simmons, 139 Mass. 531, 2 N. E. 112, *citing* Safford *v.* McDonough, 120 Mass. 290; Haskins *v.* Warren, 115 Mass. 514; Morse *v.* Sherman, 106 Mass. 430; Simmons *v.* Swift, 5 Barn. & C. 857, 11 E. C. L. 712, 108 Eng. Reprint 319.

[b] **It is only necessary to prove a valid sale,** not to prove a delivery. Doremus *v.* Howard, 23 N. J. L. 390.

56. See *infra,* IV, B, 4.

57. **Ark.**—Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384, holding that an action for the price will not lie unless the seller informs the buyer that the seller elects to treat the executory contract as an absolute sale. **Ga.**—Oklahoma Vinegar Co. *v.* Carter, 116 Ga. 140, 42 S. E. 378, 94 Am. St. Rep. 112, 59 L. R. A. 122. **Kan.**—John Deere Plow Co. *v.* Gorman, 9 Kan. App. 675, 59 Pac. 177. **Ky.**—Indiana Tie Co. *v.* Phelps, 124 S. W. 833; Fairbanks, Morse & Co. *v.* Heltsley & Co., 135 Ky. 397, 122 S. W. 198, 26 L. R. A. (N. S.) 248; Singer Mfg. Co. *v.* Cheney, 21 Ky. L. Rep. 550, 51 S. W. 813. **Minn.**—Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101. **Mo.**—Frederick *v.* Willoughby, 136 Mo. App. 244, 116 S. W. 1109. **Neb.**—See Funke *v.* Allen, 54 Neb. 407, 74 N. W. 832. But see Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Neb. 279, 62 N. W. 480. **N. J.** Massman *v.* Steiger, 79 N. J. L. 442, 75 Atl. 746. **Ore.**—Herring-Marvin Co. *v.* Smith, 43 Ore. 315, 72 Pac. 704, 73 Pac. 340. **Va.**—American Hide & Leather Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705. **Eng.**—Boswell *v.* Kilborn, 15 Moo. P. C. C. 309, 8 Jur. (N. S.) 443, 6 L. T. N. S. 79, 10 Wkly. Rep. 517; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 142, 108 Eng. Reprint 1046. Sale of Goods Act, §49 (1) (2).

[a] **No Action For Price.**—As said in the case of Fairbanks, Morse & Co. *v.* Heltsley & Co., 135 Ky. 397, 122 S. W. 198, 26 L. R. A. (N. S.) 248: "Here there was a contract to make a gasoline engine, and to deliver it on board the cars at Elkton, Ky. Before the manufacturer had shipped the engine, and before it had been seen, tendered, or delivered to the purchaser, he notified the seller that he would not take it. The property in the engine had not passed. The engine remained at the manufacturer's factory. It was its property, and was subject to its control. The plaintiff had in no manner released its control of the engine. If the engine had been destroyed, it would have been at the plaintiff's loss, and any insurance upon it would have belonged to the plaintiff. That in such a state of case an action for the price cannot be maintained is sustained by the great weight of American authority."

livery of the goods followed by a refusal of the buyer to receive the goods when delivery is tendered does not make the buyer liable for the contract price.[58] On the other hand, many authorities hold that the seller may, upon a valid tender of specified goods, treat the goods as belonging to the buyer upon his refusal to accept them, and sue for and recover the contract price.[59] Such a right of action very

[b] "**If the possession and the title remain in the seller,** and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained." McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393.

58. See *infra*, this note.

[a] **Acceptance Necessary.**—In an ordinary contract of sale, the payment and the transfer of the goods are to be concurrent acts; and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and, although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

59. **U. S.**—Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281; Kinkead *v.* Lynch, 132 Fed. 692; Bookwalter *v.* Clark, 10 Fed. 793, 11 Biss. 126. **Ala.** St. Louis Hay & Grain Co. *v.* American Cast Iron Pipe Co., 167 Ala. 442, 52 So. 904. **Cal.**—See Martyn *v.* Western Pac. R. Co., 21 Cal. App. 589, 132 Pac. 602. **Colo.**—Bond *v.* Bourk, 54 Colo. 51, 129 Pac. 223, Ann. Cas. 1914C, 581, 43 L. R. A. (N. S.) 97; Leeper *v.* Schroeder, 24 Colo. App. 164, 132 Pac. 701. **Del.**—Phoenix Lock Works *v.* Capelle Hdw. Co., 9 Houst. 232, 32 Atl. 79. **Ga.**—Castlen *v.* Marshburn, 8 Ga. App. 400, 69 S. E. 317. **Ill.**—International Filter Co. *v.* Hartman, 141 Ill. App. 239. **Ia.**—McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33. **Mass.**—Mitchell *v.* Le Clair, 165 Mass. 308, 43 N. E. 117; White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537. **Mich.**—National Cash Register Co. *v.* Dehn, 139 Mich. 406, 102 N. W. 965. **Minn.**—Wood *v.* Michaud, 63 Minn. 478, 65 N. W. 963. **Mo.**—McCormack *v.* Gilliland, 76 Mo. 655; Koenig *v.* Truscott Boat Mfg. Co., 155 Mo. App. 685, 135 S. W. 514; Walker *v.* Nixon, 65 Mo. App. 326; Dobbins *v.* Edmonds, 18 Mo. App. 307. **N. Y.**—Gourd *v.* Healy, 206 N. Y. 423, 99 N. E. 1099; Mersereau *v.* L. K. Hirsch Co., 136 App. Div. 271, 121 N. Y. Supp. 11; Kokomo Straw Board Co. *v.* Inman, 58 Hun 603, 11 N. Y. Supp. 329, 33 N. Y. St. 1008 (*affirmed*, 134 N. Y. 92, 31 N. E. 248). **N. C.**—National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100. **N. D.** Hart-Parr Co. *v.* Finley, 31 N. D. 130, 153 N. W. 137, Ann. Cas. 1917E, 706, L. R. A. 1915E, 851. **Ohio.**—Hadly *v.* Pugh, Wright 554. **Ore.**—Daniels *v.* Morris, 65 Ore. 289, 130 Pac. 397, 132 Pac. 958. **Pa.**—Henderson *v.* Jennings, 228 Pa. 188, 77 Atl. 453, 30 L. R. A. (N. S.) 827; Ballentine *v.* Robinson, 46 Pa. 177. **Wash.**—Caldwell Bros. & Co. *v.* Coast Coal Co., 58 Wash. 461, 108 Pac. 1075.

[a] **Examination of the Cases.** While there are many loose expressions in the books and dicta in the cases relative to the right of the seller to maintain an action for the price, in case of the buyer's breach, although the contract is executory and the goods not delivered, yet an examination of the decision will show that very rarely has it been held, in such a case, that the seller can recover the contract price, his remedy being limited to an action for damages. In the cases where under a so-called executory contract, the seller has maintained an action for the price, it will be found that the seller has fully performed his part of the contract and that the contract has for the purpose of the action been regarded as executed. In connection with an able review of the cases, the court in Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807, says: "It is important also to observe and remember that an executory

appropriately applies, according to some of the cases, to breaches of contract for the sale of corporate shares of stock,[60] and, especially,

contract, under which the title does not pass until the seller has done certain things, by way of preparation of the subject-matter of the contract for delivery, or the identification thereof, or the performance of a condition precedent, such as putting it on board the cars for shipment or depositing it in a specified place from which the purchaser is to take it, may become executed by the performance of all these things before the purchaser has dissented from or renounced or repudiated his contract or given notice that he will not accept. In cases of this kind, the measure of relief ought to be, and is, the same as in the case of an executed contract of sale. This conclusion is reconcilable to legal principles. . . . Therefore, if before the purchaser under an executory contract of sale repudiates it or gives notice of his intention not to accept, the seller performs all the antecedent things stipulated to be done on his part, he thereby accepts and takes advantage of the standing offer of acceptance made by the purchaser, and completely closes the executory contract and makes it an executed one, passing the title into the purchaser. Then he may clearly sue for the purchase price. The property has become that of the purchaser, who owes the seller the purchase money, a debt pure and simple, the amount whereof is fixed by the contract, and is not merely liable for damages for the breach of a contract. In such case, it is not an action for damages for refusing to accept the goods. . . . The classification of the cases, made by the text-writers, is, in some instances, inaccurate. The writers seem not to have observed in all instances the distinctions and tests above mentioned. In other words, they have frequently classed cases in which the title had passed, or in which there was evidence from which the jury might have found the fact, as cases in which it had not passed. In other instances, they have failed to observe that the executory contract had become executed so as to pass the title before any renunciation was made by the vendee. Indeed, there are very few cases in which the seller has been allowed to recover the purchase price when the title to the property had not passed to the buyer."

[b] **For rule in Georgia,** see Rounsaville *v.* Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030; Oklahoma Vinegar Co. *v.* Carter, 116 Ga. 140, 42 S. E. 378, 94 Am. St. Rep. 112, 59 L. R. A. 122.

[c] **Under the so-called New York doctrine,** as enunciated in Dustan *v.* McAndrew, 44 N. Y. 72, 78, and quoted in many cases, in connection with either executed or executory contracts. "The vendor or personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price." See, also, Hayden *v.* Demets, 53 N. Y. 426. This enunciation of remedies is, practically, a choice of methods in liquidation of damages (see Duryea, Watts & Co. *v.* Rayner, 11 Misc. 294, 32 N. Y. Supp. 247), and the seller may elect to sue for the price even if the goods are perishable. He is not bound to resell them. Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

[d] **Oregon.**—On the refusal of a purchaser to accept goods, the vendor may either hold the property for the purchaser and recover the entire purchase money, or sell the goods after notice to the purchaser, as his agent, and recover the difference between the contract price and the selling price, or may retain them as his own, and recover the difference between the contract and market prices at the time and place of delivery. Krebs Hop Co. *v.* Livesley, 59 Ore. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758.

60. White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; Pearson *v.* Mason, 120 Mass. 53; Thorn-

when the subject matter of the sale is made for a specific purpose, a special order of the buyer, and something that cannot readily be resold on the market for a reasonable price.[61] Such a right of action has in fact become established in those states which have adopted the uniform sales act.[62]

(III.) Contract Payable in Installments. — Where goods are to be paid for in installments as they are delivered from time to time, each default in payment may be the subject of an independent action.[63] In such a case, the seller has an election of remedies. He may treat the contract as broken, upon a default in one payment, and sue for damages for the breach, or he may treat the contract as in force and sue for the price of the installment due.[64]

(IV.) Partial Performance by the Seller. — An action upon a contract of sale for the purchase price may be maintained, it is said, by one who has substantially, but not completely performed it, if the purchaser has retained the benefits of that performance. The amount of recovery, however, will be the contract price less the damages sustained by the defendant from the failure of the plaintiff to complete the performance.[65]

(V.) Express Stipulation. — Irrespective of the transfer of title, the buyer may by express agreement to pay for the goods at a certain time render himself liable to an action for the price.[66] This is the

dike *v.* Locke, 98 Mass. 340; Thompson *v.* Alger, 12 Metc. (Mass.) 428, 443.

61. **Ark.**—Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384. **Conn.** Allen *v.* Jarvis, 20 Conn. 38. **Ia.** McCormick Harvesting Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33. **Mo.** Black River Lumb. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210. **Ohio.**—Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313. **Ore.** — Smith Bros. *v.* Wheeler, 7 Ore. 49, 33 Am. Rep. 698. **Pa.**—Ballentine *v.* Robinson, 46 Pa. 177.

[a] **Goods Manufactured After Special Design.**—If a purchaser wrongfully refuses to accept an article when tendered, such as a soda fountain, manufactured to his order after a special design, the seller may elect to hold the property for the purchaser and recover the contract price, as the article is presumed not to have a market value because of its being specially made. Bond *v.* Bourk, 54 Colo. 51, 129 Pac. 223, Ann. Cas. 1914C, 581, 43 L. R. A. (N. S.) 97.

62. See §63 (3).

63. **Conn.**—House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80; Burritt *v.* Belfy, 47 Conn. 323, 329, 36 Am. Rep. 79. **Ill.**—Barrie *v.* Jerome, 112 Ill. App. 329, books to be delivered a volume at a time. **Ky.** See Glenn *v.* Miller, 18 Ky. L. Rep. 1022, 38 S. W. 1086. **Mass.**—Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611. **N. Y.**—Lorillard *v.* Clyde, 122 N. Y. 41, 45, 25 N. E. 292, 19 Am. St. Rep. 470.

64. House Cold Tire Setter Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80; Alpha Portland Cement Co. *v.* Oliver, 125 Tenn. 135, 140 S. W. 595, Ann. Cas. 1913C, 120, 38 L. R. A. (N. S.) 416.

65. **U. S.**—Springfield Milling Co. *v.* Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; German Sav. Inst. *v.* De La Vergne Refrigerating Mach. Co., 70 Fed. 146, 17 C. C. A. 34, 38. **N. Y.**—Howard *v.* Hayes, 15 Jones & S. 89, 103. **Vt.**—Hammond *v.* Buckmaster, 22 Vt. 375.

66. White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

[a] **Absolute Promise To Pay.**—In Tufts *v.* Griffin, 107 N. C. 47, 12 S. E. 68, 22 Am. St. Rep. 863, 10 L. R. A. 5, 26, there was an absolute promise to pay although title had been reserved in the vendor until full payment had been made. Accordingly, it was held, upon the destruction of the goods by fire, that the vendor could recover. See, also, Burnley *v.* Tufts, 66 Miss.

express provision of both the English and American sales act.[67]

(VI.) Fraud of Buyer. — Where the unpaid seller has fully performed and later discovers fraud on the part of the buyer, the seller may waive the fraud and sue for the price.[68]

c. *Recovery of Goods or Proceeds.* — **(I.) In General.** — If the title has passed unconditionally, and there is no question of fraud, the seller cannot recover possession of the goods;[69] nor can he do so if the goods have lost their identity by being commingled with other goods.[70] But in case the goods would have been recoverable, the proceeds of goods sold can be recovered if they are capable of being followed and identified.[71]

(II.) Executory Contracts. — Where the title has not passed but the prospective seller has delivered the goods into the possession of the buyer, the seller, upon any breach of condition connected with the delivery, may rescind the contract and recover his goods.[72] Thus, when the goods are placed in the possession of the buyer, not for the purpose of transferring the title but with the understanding that they

48, 5 So. 627, 14 Am. St. Rep. 540; Tufts *v.* Wynne, 45 Mo. App. 42, and *infra*, IV, B, 4.

[b] **Action on Note for Price.**—Although a promissory note given for the purchase of goods is not, in the absence of agreement, payment, yet the note being based upon a valuable consideration may sustain an action upon it even though the goods were never delivered or the title thereto had never passed. Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807.

67. Uniform Sales Act, §63 (2); English Sale of Goods Act, §49 (2). See, also, Dunlop *v.* Grote, 2 C. & K. 153, 61 E. C. L. 152.

68. **Cal.**—Seligman *v.* Kalkman, 8 Cal. 207. **Ill.**—Fisher *v.* Brown, 111 Ill. App. 486. **Ky.**—Dietz's Assignee *v.* Sutcliffe, 80 Ky. 650. **Me.**—Hervey *v.* Harvey, 15 Me. 357. **N. Y.**—Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 (*reversing* 33 App. Div. 311, 53 N. Y. Supp. 841); Wigand *v.* Sichel, 4 Abb. Dec. 592, 3 Keyes 120, 33 How. Pr. 174. **Okla.**—Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496. **S. C.**—Bunch *v.* Smith, 4 Rich. L. 581. **Wash.**—Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

69. **Colo.**—Persse *v.* Atlantic-Pacific R. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951. **Del.**—Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948. **Ill.**—McNail *v.* Ziegler, 68 Ill. 224; Richelieu Wine Co. *v.* Ragland, 43 Ill. App. 257. **Ind.** Rechtin *v.* McGary, 117 Ind. 132, 19 N. E. 731. **Ky.**—Bartlett & Co. *v.* Newcomb, 4 Ky. Op. 699. **La.**—Dennistoun *v.* Malard, 2 La. Ann. 14. **Mich.**—Sullivan *v.* Sullivan, 76 Mich. 101, 42 N. W. 1090. **Miss.**—Hazlehurst Lumber Co. *v.* J. A. Fay etc. Co., 18 So. 485. **N. Y.**—Northern Grain Co. *v.* Wiffler, 168 App. Div. 95, 153 N. Y. Supp. 723; Alvord *v.* Latham, 31 Barb. 294; Durbrow *v.* McDonald, 5 Bosw. 130; Caldwell *v.* Bartlett, 3 Duer. 341. **N. C.** McCraw *v.* Gilmer, 83 N. C. 162. **Ohio.** Johnson *v.* Hays, 5 Ohio St. 101. **Pa.** Dicken *v.* Winters, 169 Pa. 126, 32 Atl. 289; Freedman *v.* Morrow Shoe Mfg. Co., 122 Pa. 25, 15 Atl. 690; Wylie's Appeal, 90 Pa. 210. **Tenn.**—Woods *v.* Burrough, 2 Head 202. **Vt.**—Redington & Co. *v.* Roberts, 25 Vt. 686.

70. Newman *v.* Cannon, 43 La. Ann. 712, 9 So. 439; Kingsley *v.* McGrew, 48 Neb. 812, 67 N. W. 787.

71. **U. S.**—*In re* Midland Motor Co., 224 Fed. 368, 140 C. C. A. 54. **Ill.** Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390. **N. Y.**—Sheffield *v.* Mitchell, 31 App. Div. 266, 52 N. Y. Supp. 925. **Pa.**—Sheffer *v.* Montgomery, 65 Pa. 329.

72. **Colo.**—Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667. **Ill.**—Newell *v.* Grant Locomotive Works, 50 Ill. App. 611. **Ia.**—Mowbray *v.* Cady, 40 Iowa 604. **La.**—Marshall *v.* Morehouse, 14 La. Ann. 689. **Mass.**—Phelps *v.* Willard, 16 Pick. 29; Young *v.* Austin, 6 Pick. 280. **N. Y.** Smith *v.* Clews, 58 Hun 609, 12 N. Y. Supp. 471, *affirmed* in 124 N. Y. 664, 27 N. E. 854. **R. I.**—Blair-Baker

shall be paid for immediately as a condition precedent to the transfer of title, the seller, upon the buyer's failure to pay, may reclaim the goods or their proceeds either from the buyer,[73] or from creditors of, or subsequent purchasers from, the buyer.[74] Likewise the goods may be recovered from third persons where there has been no acceptance of the goods by the buyer.[75]

Horse Co. *v.* Hennessey, 36 R. I. 132, 89 Atl. 299.

73. **U. S.**—Sprague Canning Mach. Co. *v.* Fuller, 158 Fed. 588, 86 C. C. A. 46. **Ala.**—Shines *v.* Steiner, 76 Ala. 458. **Cal.**—Sere *v.* McGovern, 65 Cal. 244, 3 Pac. 859. **Ill.**—Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Schumacher *v.* Edward P. Allis Co., 70 Ill. App. 556; Wells *v.* Merle etc. Mfg. Co., 66 Ill. App. 292; Harrison Mach. Works *v.* Miller, 29 Ill. App. 567; Hide & Leather Nat. Bank *v.* West, 20 Ill. App. 61. **Kan.**—People's State Bank *v.* Brown, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824. **Minn.**—Welch Co. *v.* Lahart El. Co., 122 Minn. 432, 142 N. W. 828. **Mo.**—Strauss Pritz & Co. *v.* Hirsch & Co., 63 Mo. App. 95; Hall *v.* Missouri Pac. Ry. Co., 50 Mo. App. 179; J. M. Brunswick & Balke Co. *v.* Martin, 20 Mo. App. 158. **N. H.**—Paul *v.* Reed, 52 N. H 136. **N. Y.** Osborn *v.* Gantz, 60 N. Y. 540 (*affirming* 6 Jones & S. 148); Russell *v.* Minor, 22 Wend. 659. **Ore.**—Johnson *v.* Iankovetz, 57 Ore. 24, 102 Pac. 799, 110 Pac. 398. **Wis.**—Goldsmith *v.* Bryant, 26 Wis. 34. **Can.**—Smith *v.* Hamilton, 29 U. C. Q. B. 394.

74. **U. S.**—Kelly *v.* Deming, 5 Fed. 677, 2 McCrary 453; Maddux *v.* Usher, 2 Hask. 261, 16 Fed. Cas. No. 8,936; Sawyer *v.* Turpin, 2 Low. 29, 21 Fed. Cas. No. 12,410. **Ala.**—Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93; Lehman *v.* Warren, 53 Ala. 535. **Cal.** Roberts *v.* Evans, 43 Cal. 380. **Del.** Fait & Slagle Co. *v.* Truxton, 1 Penne. 24, 39 Atl. 457. **Ga.**—Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765. **Ill.** Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390. **Ind.**—Peters Box & Lumb. Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; Lanman *v.* McGregor, 94 Ind. 301. **Kan.**—Schulein *v.* Hainer, 48 Kan. 249, 29 Pac. 171. **La.**—Allen, Nugent & Co. *v.* Buisson, 35 La. Ann. 108; Burckett *v.* Hopson, 19 La. Ann. 489; Miller *v.* Schneider, 19 La. Ann. 300, 92 Am. Dec. 535; Johnson *v.* Bloodworth, 12 La. Ann. 699; Fetter *v.* Field, 1 La. Ann. 80; Copley *v.* Flint, 6 Rob. 54. **Mass.**—Armour *v.* Pecker, 123 Mass. 143; Haskell *v.* Rice, 11 Gray 240; Whitewell *v.* Vincent, 4 Pick. 449, 16 Am. Dec. 355. **Minn.**—Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402. **Miss.** Hart *v.* Livermore Foundry & M. Co., 72 Miss. 809, 17 So. 769. **Mo.**—State *v.* Green Tree Brewery Co., 32 Mo. App. 276; Thomas *v.* Freligh, 9 Mo. App. 151. **Neb.**—Henry *v.* Vliet, 36 Neb. 138, 54 N. W. 122, 19 L. R. A. 590. **N. Y.**—Tuthill *v.* Bogart, 79 N. Y. 215; Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101 (*affirming* 2 Daly 432); Adams *v.* Roscoe Lumb. Co., 2 App. Div. 47, 37 N. Y. Supp. 265, 72 N. Y. St. 591 (*affirmed*, 159 N. Y. 176, 53 N. E. 805); Ricks *v.* Cleveland, 39 Barb. 573; Clark *v.* Lynch, 4 Daly 83; Bates *v.* New Orleans, J. & Gt. N. R. Co., 4 Abb. Pr. 72, 13 How. Pr. 516; Acker *v.* Campbell, 23 Wend. 372; Haggerty *v.* Palmer, 6 Johns. Ch. 437; Keeler *v.* Field, 1 Paige 312. **Ohio.**—Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio C. C. 301, 2 Ohio Cir. Dec. 558. **Okla.**—Browning *v.* De Ford, 8 Okla. 239, 60 Pac. 534. **Pa.**—Sheffer *v.* Montgomery, 65 Pa. 329; Ewing *v.* Musser, 42 Pa. Super. 177. **Tex.**—Morrison *v.* Adoul, 76 Tex. 255, 13 S. W. 166; Hall *v.* Hargadine-McKittrick Dry Goods Co., 23 Tex. Civ. App. 149, 55 S. W. 747; Wilson *v.* Carroll (Tex. Civ. App.), 50 S. W. 222. **Wis.**—Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384. **Can.**—Polson *v.* Degeer, 12 Ont. 275.

75. **Ill.**—Gilbert *v.* Forest City Furniture Co., 72 Ill. App. 186; Sweet *v.* Scherber, 38 Ill. App. 578. **Ia.**—Alsberg Jourdan & Co. *v.* Latta, 30 Iowa 442; Cox *v.* Burns, 1 Iowa 64. **Mass.** Lane *v.* Jackson, 5 Mass. 157. **Mich.** Shipman *v.* Graves, 41 Mich. 675, 3 N. W. 177. **Mo.**—W. Irving Schermerhorn Bros. Co. *v.* Herold, 81 Mo. App. 461. **Neb.**—Graves *v.* Morse, 45 Neb. 604, 63 N. W. 841; Hershiser *v.* Delone, 24 Neb. 380, 38 N. W. 863. **N. Y.**—Porter Mfg. Co. *v.* Edwards, 29 Hun 509;

(III.) Fraud. — In case of fraudulent misrepresentation on the part of the buyer whereby the goods are delivered to him, the seller may recover the goods.[76] While fraud may arise by the misrepresentations of the buyer as to his ability to pay,[77] yet a mere false statement by him as to his financial condition, not made with fraudulent intent, is mere opinion and not fraud.[78] If the buyer obtains the goods, intending, at the time, not to pay for them, he is guilty of fraud,[79] although his mere insolvency at the time of the contract does not amount to fraud.[80] Generally, in case of fraud, the seller may

Kubersky *v.* Sohon, 143 N. Y. Supp. 1062.

[a] **Cash sales** are not upon credit, and the buyer has no right to the use or enjoyment of the property until the money is paid. Such sales, therefore, are not included in the provisions of statutes requiring the recording of "conditional sales" in order to protect the seller. **Mo.**—Johnson-Brinkman Co. *v.* Central Bank, 116 Mo. 558, 571, 22 S. W. 813, 38 Am. St. Rep. 615. **N. H.**—Hart *v.* Boston & Maine R. R., 72 N. H. 410, 56 Atl. 920. **N. J.** Hirsch *v.* Leatherbee Lumb. Co., 69 N. J. L. 509, 55 Atl. 645.

As to conditional sales, see *infra,* IV, B, 3, b.

76. **U. S.**—Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; *In re* Johnson, 208 Fed. 164; *In re* Marengo County Mercantile Co., 199 Fed. 474; *In re* Hildebrant, 120 Fed. 992; Jaffrey *v.* Brown, 29 Fed. 476. **Ala.**—McCormick *v.* Joseph, 77 Ala. 236; Spira *v.* Hornthall, 77 Ala. 137. **Conn.**—Morrill *v.* Blackman, 42 Conn. 324. **Ga.** Silvey & Co. *v.* Tift, 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386; Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6; Johnson & Co. *v.* O'Donnell, 75 Ga. 453. **Ill.**—Hayes *v.* Houston, 86 Ill. 487; American Merchants' Union Exp. Co. *v.* Willsie, 79 Ill. 92; Patton *v.* Campbell, 70 Ill. 72. **Ind.** Brower *v.* Goodyer, 88 Ind. 572; West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383. **Ky.**—Kirkpatrick's Exr. *v.* Rehkoph Saddlery Co., 144 Ky. 129, 137 S. W. 862. **La.**—Prall *v.* Peet's Curator, 3 La. 274. **Me.**—Wheelden *v.* Lowell, 50 Me. 499. **Mass.** Dow *v.* Sanborn, 3 Allen 181; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105. **Mich.**—Silberman *v.* Munroe, 104 Mich. 352, 62 N. W. 555; Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78; Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60. **Minn.**—Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402. **Miss.**—Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297, 22 So. 952. **Mo.**—Kemper, H. & M. Dry Goods Co. *v.* Kidder Sav. Bank, 72 Mo. App. 226; Goebel *v.* Troll, 71 Mo. App. 123; Swafford Bros. Dry Goods Co. *v.* Jacobs, 66 Mo. App. 362, 2 Mo. App. Rep. 1334. **Neb.** Field *v.* Morse, 54 Neb. 789, 75 N. W. 58. **N. Y.**—Hennequin *v.* Naylor, 24 N. Y. 139; Van Neste *v.* Conover, 20 Barb. 547; King *v.* Phillips, 8 Bosw. 603. **N. C.**—Wilson, Palmer & Co. *v.* White, 80 N. C. 280. **Tex.**—Hall & Brown Woodworking Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715; Gainesville Nat. Bank *v.* Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; Morrison *v.* Adoue, 76 Tex. 255, 13 S. W. 166. **Utah.**—Belleville Pump & Skein Works *v.* Samuelson, 16 Utah 234, 52 Pac. 282. **Wis.**—Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

77. **Conn.**—Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40. **Mass.**—Morse *v.* Shaw, 124 Mass. 59. **Md.**—Standard Horseshoe Co. *v.* O'Brien, 91 Md. 751, 46 Atl. 346. **Neb.**—Work *v.* Jacobs, 35 Neb. 772, 53 N. W. 993.

78. **U. S.**—South Branch Lumb. Co. *v.* Ott, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. ed. 1136. **Pa.** — Dilworth *v.* Bradner, 85 Pa. 238. **R. I.**—White *v.* Fitch, 19 R. I. 687, 36 Atl. 425.

79. **Mass.**—Watson *v.* Silsby, 166 Mass. 57, 43 N. E. 1117. **Mich.**—Frisbee *v.* Chickering, 115 Mich. 185, 73 N. W. 112. **N. Y.**—Hall *v.* Naylor, 18 N. Y. 588, 75 Am. Dec. 269.

80. **U. S.**—Hill Veneer Co. *v.* Monroe, 189 Fed. 834; Conyers *v.* Ennis, 2 Mason 236, 6 Fed. Cas. No. 3,149. **Ala.**—Johnson *v.* Bent, 93 Ala. 160, 9 So. 581. **Ark.**—Mack *v.* Adler, 48 Ark. 70, 2 S. W. 345. **Colo.**—Burchinell *v.* Hirsh, 5 Colo. App. 500, 39 Pac. 352. **Ill.**—Brown *v.* Bierman, 24 Ill. App. 574. **Ind.**—Sweet *v.* Campbell, 14 Ind. App.

recover the goods from the attaching creditors of the buyer,[81] and from subsequent vendees with notice.[82]

(IV.) Waiver of Right To Recover Goods. — The seller's right to recover the goods may be waived. For example, if the seller waives his right to a cash payment, he cannot recover the goods for such failure to pay,[83] and where the sale is executed and credit is given,

570, 43 N. E. 236. **Miss.**—Klein *v.* Rector, 57 Miss. 538. **Mo.**—Gratton & Knight Mfg. Co. *v.* Troll, 77 Mo. App. 339; Sweet, Dempster & Co. *v.* Sullivan, 77 Mo. App. 128. **Pa.**—Reed *v.* Flemlee, 25 Pa. Super. 37. **Tex.**—Walsh *v.* Leeper Hardware Co. (Tex. Civ. App.), 50 S. W. 630. **Wis.**—Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384.

81. **U. S.**—Browning *v.* De Ford, 178 U. S. 196, 20 Sup. Ct. 876, 44 L. ed. 1033 (*affirming* 8 Okla. 239, 60 Pac. 534); Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Shoe Co. *v.* Ward, 187 Fed. 982; Jaffrey *v.* Brown, 29 Fed. 476. **Ala.**—Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643. **Cal.** Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118. **Colo.**—Reid, Murdoch & Co. *v.* Bird, 15 Colo. App. 116, 61 Pac. 353. **Del.**—Fait & Slagle Co. *v.* Truxton, 1 Penne. 24, 39 Atl. 457. **Ga.** Landauer & Bro. *v.* Cochran, McLean & Co., 54 Ga. 533. **Ill.**—Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500; Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390. **Ia.**—Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53. **Kan.**—Wafer *v.* Harvey County Bank, 46 Kan. 597, 26 Pac. 1032. **Ky.**—Hopkins County Bank *v.* Coffman, 22 Ky. L. Rep. 141, 56 S. W. 718; Carstairs *v.* Charles A. Kelley Co., 17 Ky. L. Rep. 309, 29 S. W. 622. **La.**—Gasquet & Co. *v.* Johnston, 2 La. 514. **Me.**—Jordan *v.* Parker, 56 Me. 557; Hawes *v.* Dingley, 17 Me. 341. **Md.**—Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158. **Mass.** Atwood *v.* Dearborn, 1 Allen 483, 79 Am. Dec. 755; Wiggin *v.* Day, 9 Gray 97; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97. **Mich.**—Shipman *v.* Seymour, 40 Mich. 274. **Mo.**—Hartt *v.* McNeil, 47 Mo. 526; Bidault *v.* Wales & Sons, 20 Mo. 546, 64 Am. Dec. 205; Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305. **N. H.**—Bradley *v.* Obear, 10 N. H. 477. **N. J.**—Collins *v.* Cooley (N. J. Eq.), 14 Atl. 574; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311. **N. Y.**—Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Joslin *v.* Cowee, 60 Barb. 48; Bliss *v.* Cottle, 32 Barb. 322; Lloyd *v.* Brewster, 4 Paige 537, 27 Am. Dec. 88; Durell *v.* Haley, 1 Paige 492, 19 Am. Dec. 444. **Ohio.**—Goldsmith, Klaw & Co. *v.* Hain, 1 Ohio C. C. 333, 1 Ohio Cir. Dec. 185. **Pa.**—Pottinger *v.* Hecksher, 2 Grant Cas. 309; Ensign *v.* Hoffield, 2 Sad. 504, 4 Atl. 189. **Tex.** Friedman *v.* Boyd (Tex. Civ. App.), 31 S. W. 531; Williams *v.* Kohn (Tex. Civ. App.), 28 S. W. 920. **Vt.**—Poor *v.* Woodburn, 25 Vt. 234; Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46. **Wis.**—Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

82. **Ga.**—Wolfe *v.* Clafin, 81 Ga. 64, 6 S. E. 599. **Ill.**—Huthmacher *v.* Lowman's Sons, 66 Ill. App. 448; Wiener *v.* Straus, 66 Ill. App. 110; Morrill *v.* Corbin, 13 Ill. App. 81. **Ind.**—Peters Box & Lumb. Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506; Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028. **La.**—Parmele *v.* McLaughlin, 9 La. 436. **Me.** Herrick *v.* Kingsley, 12 Me. 278; Seaver *v.* Dingley, 4 Me. 306. **Md.**—Hyde *v.* Ellery, 18 Md. 496. **Mass.**—Manning *v.* Albee, 11 Allen 520; Dow *v.* Sanborn, 3 Allen 181. **Minn.**—Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402. **Mo.**—Wingate *v.* Buhler, 62 Mo. App. 418; Reid, Murdock & Co. *v.* Lloyd, 52 Mo. App. 278. **N. J.**—Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311. **N. Y.**—Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Coursey *v.* Coe, 24 App. Div. 271, 48 N. Y. Supp. 495; Grossman *v.* Walters, 58 Hun 603, 11 N. Y. Supp. 471, *affirmed*, 132 N. Y. 594, 30 N. E. 1151. **Tex.**—Walsh *v.* Leeper Hdw. Co. (Tex. Civ. App.), 50 S. W. 630.

83. **U. S.**—Halliday *v.* Hamilton, 11 Wall. 560, 20 L. ed. 214. **Ill.**—Richelieu Wine Co. *v.* Ragland, 43 Ill. App. 257. **Ky.**—Ford *v.* Sproule, 2 A. K. Marsh. 528, 12 Am. Dec. 439. **La.** Lee *v.* Galbraith, 5 La. Ann. 343; Hill *v.* Morgan, 4 Mart. (N. S.) 475. **Me.** Mixer *v.* Cook, 31 Me. 340. **Md.**—Na-

the seller cannot recover goods from third persons although the original purchaser has not paid for them.[84] Moreover, where the seller has parted with his goods upon credit to a fraudulent buyer, the seller's acceptance of security, upon discovery of the fraud, will defeat his right to reclaim the goods,[85] as will also his voluntary acceptance of payment on the goods.[86] Again, a seller who wishes to avoid a sale on the ground of fraud, cannot do so if, with knowledge of the fraud, he brings suit upon the contract. Having made his election of remedies, he will be bound thereby.[87] The bringing, however, of an action for the price of a part of the goods sold by the buyer, is not a bar to an action to recover the residue of the goods in the possession of the defendant,[88] and in case an action for the price is brought before the seller discovers the fraud, he may, nevertheless, upon obtaining knowledge of the facts, change his remedy and sue for the recovery of the goods.[89] In case the seller would recover the goods from third persons who have purchased the goods from a fraudulent buyer, the seller must within a reasonable time, after his discovery of the facts, disaffirm such sale, or else he will be presumed to have acquiesced in it.[90]

tional Bank of Bristol *v.* Baltimore & O. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. Rep. 443, 1 L. R. A. 767. **Mass.**—Freeman *v.* Nichols, 116 Mass. 309. **Mo.**—Skinner & Kennedy Stationery Co. *v.* Lammert Furn. Co., 182 Mo. App. 549, 166 S. W. 1079. **N. J.** Leatherbury *v.* Connor, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. Rep. 672. **N. Y.**—Furniss *v.* Hone, 8 Wend. 247; Buck *v.* Grimshaw, 1 Edw. Ch. 140. **Pa.**—Thompson *v.* Taylor, 15 Phila. 250; Landry *v.* Thomas, 3 Phila. 300. **Tenn.**—Smith *v.* Atkinson, 4 Heisk. 625.

84. **La.**—Lalance-Grosjean Mfg. Co. *v.* Wolff, 28 La. Ann. 942. **Me.** Southwick *v.* Smith, 29 Me. 228. **Mass.** Blanchard *v.* Fitzpatrick, 146 Mass. 24, 14 N. E. 919. **Mo.**—Steinwender *v.* Creath, 44 Mo. App. 356.

85. Joslin *v.* Cowee, 52 N. Y. 90.

86. Overton *v.* Brown, 63 Mo. App. 49.

87. **U. S.**—Dibblee *v.* Sheldon, 10 Blatchf. 178, 7 Fed. Cas. No. 3,889. **Ala.**—Fuller *v.* Eames, 108 Ala. 464, 19 So. 366. **Cal.**—Seligman *v.* Kalkman, 8 Cal. 207. **Conn.**—Crompton *v.* Beach, 62 Conn. 24, 25 Atl. 446, 36 Am. St. Rep. 323, 18 L. R. A. 187. **Ga.** Fowler *v.* Britt-Carson Shoe Co., 137 Ga. 40, 72 S. E. 407. **Ia.**—Seeley *v.* Seeley-Howe-Le Vane Co., 128 Iowa 294, 103 N. W. 961. **Ky.**—Dietz's Assignee *v.* Sutcliffe, 80 Ky. 650. **Mass.** Bailey *v.* Hervey, 135 Mass. 172. **Neb.** Hughes *v.* Coburn, 35 Neb. 526, 53 N. W. 388. **N. J.**—Heller *v.* Elliott, 45 N. J. L. 564. **N. Y.**—Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Beloit Bank *v.* Beale, 34 N. Y. 473. **Tex.**—Krause *v.* Marx, 5 Tex. Civ. App. 397, 23 S. W. 708. **Wash.** Schroeder *v.* Hotel Commercial Co., 84 Wash. 685, 147 Pac. 417. **Wis.**—Weed *v.* Page, 7 Wis. 503.

88. **U. S.**—*In re* Hildebrant, 120 Fed. 992. **Conn.**—Morford *v.* Peck, 46 Conn. 380. **Mass.**—Browning *v.* Bancroft, 8 Metc. 278. **N. H.**—Sleeper *v.* Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377. **N. Y.**—Schoeneman *v.* Chamberlin, 55 App. Div. 351, 67 N. Y. Supp. 284; Hersey *v.* Benedict, 15 Hun 282. **Tex.**—Raby *v.* Sweetzer, 12 Tex. Civ. App. 380, 34 S. W. 779; Manhattan Cloak & Suit Co. *v.* Marx (Tex. Civ. App.), 23 S. W. 707; Heinze *v.* Marx, 4 Tex. Civ. App. 599, 23 S. W. 704.

89. **Ky.**—Wright *v.* George W. McAlpin Co., 18 Ky. L. Rep. 226, 35 S. W. 1039. **Mo.**—Goodger *v.* Finn, 10 Mo. App. 226. **N. Y.**—Hays *v.* Midas, 104 N. Y. 602, 11 N. E. 141; Underhill *v.* Ramsey, 50 Hun 601, 2 N. Y. Supp. 451, *affirmed*, 125 N. Y. 681, 26 N. E. 750.

90. **Ga.**—Windsor *v.* Cruise, 79 Ga.

B. Procedure in Connection With Remedies. — **1. Rescission.** a. *Jurisdiction.* — Where an action is necessary to obtain a rescission of a contract, or the cancellation of written documents pertaining thereto, a suit in equity is the proper remedy.[91] While a court of law may award damages for breach of a contract, or for fraud in connection therewith, yet it cannot rescind a contract,[92] although the effect of rescission may be indirectly obtained in a legal action.[93]

b. *Pleading.* — The pleadings in a suit for rescission must be in accord with the rules elsewhere treated.[94]

c. *Judgment or Decree.* — When the contract is rescinded it must be rescinded upon equitable terms, and, so far as practicable, the court must place the parties in statu quo.[95] When courts, however, cannot place parties wholly in statu quo, they are not thereby precluded from granting relief. They may proceed to do so and make compensation.[96] Thus if it appears that the defendant has disposed of the property, the court may decree that he restore the value thereof.[97]

635, 7 S. E. 141. **Neb.**—Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796. **N. Y.**—Hallahan *v.* Webber, 7 App. Div. 122, 40 N. Y. Supp. 103, *reversing* 15 Misc. 327, 37 N. Y. Supp. 613, 2 N. Y. Ann. Cas. 333.

91. **Ky.**—Wood *v.* Yeatman, 15 B. Mon. 270; Bohannon *v.* Kerr, 1 B. Mon. 87; Bradberry *v.* Keas, 5 J. J. Marsh. 446. **Md.**—Baltimore Sugar Refining Co. *v.* Campbell Zell Co., 83 Md. 36, 34 Atl. 369; Taymon *v.* Mitchell, 1 Md. Ch. 496. **N. Y.**—Smith *v.* Ryan, 191 N. Y. 452, 84 N. E. 402, 123 Am. St. Rep. 609, 19 L. R. A. (N. S.) 461, 14 Ann. Cas. 505; Mayne *v.* Griswold, 3 Sandf. 463.

See generally the title "**Rescission and Cancellation.**"

92. Riverside Residence Co. *v.* Husted, 109 Va. 688, 64 S. E. 958; Newberry *v.* Ruffin, 102 Va. 73, 78, 45 S. E. 733.

93. See *infra*, this note.

[a] **Remedies at Law and in Equity.** A court of equity entertains a suit for the express purpose of procuring the contract or conveyance to be cancelled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and, although nothing is said concerning it, either in the pleadings or the judgment, a contract or a conveyance, as the case may be, is virtually rescinded; the recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place. Here the remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action. It is true, the equitable remedy is much broader in its scope, and more complete in is relief; for its effects are not confined to the particular action, but by removing the obnoxious instrument they extend to all future claims and actions based upon it. Pom. Eq. Jur., Vol. I, p. 117, 3d ed. And see State *v.* Snyder, 66 Tex. 687, 18 S. W. 106.

94. See the titles "**Bills and Answers;**" "**Rescission and Cancellation;**" and also Houghtaling *v.* Hills, 59 Iowa 287, 13 N. W. 305; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53; Dorman *v.* Weakley (Tenn. Ch.), 39 S. W. 890.

95. Nichols & Shepard Co. *v.* Caldwell, 26 Ky. L. Rep. 136, 80 S. W. 1099, the court adding, "the parties cannot, by previous contract, tie the chancellor's conscience and require him to do what is inequitable when he rescinds the contract."

[a] **Goods Worthless.**—A judgment of rescission involves the obligation to restore the status, unless the subject matter of the sale is worthless. Harris *v.* Daly, 121 Ga. 511, 49 S. E. 609.

96. Myrick *v.* Jacks, 33 Ark. 425; Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663.

97. **U. S.**—Warner *v.* Daniels, 1 Woodb. & M. 90, 29 Fed. Cas. No. 17,

2. Action for Damages. — a. *Prerequisites to Action.* — In order to maintain an action for damages for breach of the contract, the seller must show a performance of all conditions precedent or acts concurrent.[98] In other words, he must, as a rule, show due performance of, or an offer to perform, or a readiness and willingness to perform, whatever terms or conditions the contract calls for on his part.[99] Where, however, the buyer countermands wrongfully an order for merchandise to be procured or goods to be manufactured, and declares he will not take the goods,[1] or where through the fault of the

181. **Ore.**—Crossen *v.* Murphy, 30 Ore. 114, 49 Pac. 858. **Wis.**—Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666.

As to effect of rescission, see *supra,* II, A, 3, f.

98. Southern Lumb. Co. *v.* Mercantile Lumb. and Supply Co., 89 Mo. App. 141; Graves *v.* Legg, 9 Exch. 709, 2 C. L. R. 1266, 23 L. J. Ex. 228, names of ships to be declared on shipment.

[a] **Compliance With Terms of Shipment.**—The seller must comply with the terms as to shipment. As said in Southern Lumber Co. *v.* Lumber, etc., Co., *supra,* "As we read the contract disclosed by the correspondence between the parties, the plaintiff bound itself to ship the lumber to defendant and to send to it directly the bill of lading and invoice, and this the undisputed evidence shows it did not do. The plaintiff had no right under the contract to make the shipment to itself, draw a draft on defendant for eighty per cent of the contract price, with the bill of lading attached, and to require the payment of such draft before delivering the lumber or the bill of lading therefor. The shipment of the lumber to defendant, the sending directly to it the invoice and bill of lading, were requirements of the contract in the nature of conditions precedent, and unless a performance of such acts, or an offer to perform them, were shown, as was not the case, the plaintiff was in no position to complain of the defendant's refusal to accept the cars."

99. **U. S.**—Quinn Const. Co. *v.* James B. Clow & Sons, 183 Fed. 353, 105 C. C. A. 573; Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24. **Ala.**—Davis *v.* Adams, 18 Ala. 264. **Ark.**—Rodgers *v.* Wise, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009. **Cal.**—Barron *v.* Frink, 30 Cal. 486; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288. **Ga.** American Mfg. Co. *v.* Champion Mfg. Co., 13 Ga. App. 551, 79 S. E. 485. **Idaho.**—Sweetser *v.* Mellick, 4 Idaho 201, 38 Pac. 403. **Ill.**—Lassen *v.* Mitchell, 41 Ill. 101; Franklin *v.* Krum, 70 Ill. App. 649. **Ind.**—Campbell *v.* Miller, Wils. 412; Gardner *v.* Caylor, 24 Ind. App. 521, 56 N. E. 134. **La.** Shreveport Cotton Oil Co. *v.* Friedlander, 112 La. 1059, 36 So. 853. **Mich.** Thick *v.* Detroit, etc., Ry. Co., 137 Mich. 708, 101 N. W. 64, 109 Am. St. Rep. 694. **Mo.**—Southern Lumber Co. *v.* Mercantile Lumb., etc., Co., 89 Mo. App. 141. **N. Y.**—Newbery *v.* Furnival, 56 N. Y. 638; Poppenberg *v.* R. M. Owen & Co., 84 Misc. 126, 146 N. Y. Supp. 478; Gallup *v.* Sterling, 22 Misc. 672, 49 N. Y. Supp. 942; Clark *v.* Fey, 51 Hun 639, 4 N. Y. Supp. 18, 21 N. Y. St. 250, *affirmed,* 121 N. Y. 470, 24 N. E. 703. **Ohio.**—Hounsford *v.* Fisher, Wright 580. **S. D.**—International Harv. Co. *v.* Hayworth, 23 S. D. 514, 122 N. W. 412. **Vt.**—Jones *v.* Marsh, 22 Vt. 144. **Tex.**—Kelly *v.* Webb, 27 Tex. 368; Shepard *v.* Weiss (Tex. Civ. App.), 28 S. W. 355.

[a] **Delivery.**—Thus, as a rule, the seller must be able to prove an offer, or a readiness and willingness to deliver the goods at the place, and at the time, fixed by the contract. Offutt *v.* Wells, 42 Ala. 199. And see cases cited in this note.

1. **U. S.**—Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281; Fisher Hydraulic Stone & Mach. Co. *v.* Warner, 188 Fed. 465; Watson, Preston & Co. *v.* Greenwood & Co., 164 Fed. 294. **Ala.**—Cassells' Mill *v.* Strater Bros. Grain Co., 166 Ala. 274, 51 So. 969. **Ark.**—Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384. **Mass.**—Willett *v.* Smith, 214 Mass. 494, 101 N. E. 1058. **Mich.**—Thick *v.* Detroit, etc., Ry. Co., 137 Mich. 708, 101 N. W. 64, 109 Am. St. Rep. 694. **Mo.**—Berthold *v.* St. Louis Electric Const. Co., 165 Mo. 280, 65 S. W. 784. **N. Y.**—Rubber Trad-

buyer due performance by the seller is prevented,[2] the latter will be relieved from his duty to tender the goods or to proceed further in the performance of the contract. In jurisdictions where upon repudiation by the purchaser the seller may continue to treat the contract as still in force,[3] if he does so elect, he must, upon bringing his action for the breach, show a performance of all the conditions of the contract,[4] or a legal excuse for non-performance on his part.[5] He must, also, if he refuses to accept the buyer's repudiation, tender the goods in order to authorize a recovery.[6] A resale by the vendor is not, however, a condition precedent to his action for the recovery of damages,[7] and even a sham resale does not preclude his action.[8] In actions for damages, however, a note taken in payment of the price of goods bought, unless the note is shown to be worthless, must be returned in order to maintain such actions.[9]

b. *Time To Sue.* — Upon the refusal of the buyer to accept the goods, the seller's right of action accrues at once.[10] Likewise, according to the rule recognized in some jurisdictions, in case of an anticipatory repudiation of the contract, the seller may, if he desires, treat the repudiation as a breach of the contract, and, at once, bring his action for damages, without waiting for the period for the delivery of the goods to elapse,[11] or he may decline to accept the buyer's notice of repudiation as a breach, and may insist that the contract shall be kept in force up to the time fixed for its final performance.[12] Although credit has been given, the seller, upon breach by the pur-

ing Co. *v.* Manhattan R. Mfg. Co., 164 App. Div. 477, 150 N. Y. Supp. 17. **N. D.**—Hart-Parr Co. *v.* Finley, 31 N. D. 130, 153 N. W. 137, Ann. Cas. 1917E, 706, L. R. A. 1915E, 851. **W. Va.**—Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719.

2. **Ill.**—Kingman & Co. *v.* Hanna Wagon Co., 176 Ill. 545, 52 N. E. 328. **Ky.**—Bell *v.* Hatfield, 121 Ky. 560, 89 S. W. 544, 72 L. R. A. (N. S.) 529. **N. Y.**—Duryea *v.* Bonnell, 18 App. Div. 151, 45 N. Y. Supp. 435.

3. See, *infra*, II, B, 2, b.

4. Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. 83, 8 C. C. A. 14, 16 U. S. App. 311, 320.

5. See Lake Shore & M. S. Ry. Co. *v.* Richards, 152 Ill. 59, 80, 38 N. E. 773, 30 L. R. A. 33.

6. See *infra*, this note.

[a] **Where the seller declines to accept a cancellation** of a contract for the sale of goods, and thereby keeps the contract in force, the notice of cancellation does not relieve the seller from the necessity of a tender of the goods as a condition precedent to a recovery for the buyer's breach of contract. Inman, Akers & Inman *v.* Elk Cotton Mills, 116 Tenn. 141, 92 S. W. 760.

7. Barbee *v.* Laws, 15 Ind. 109; White *v.* Kearney, 9 Rob. (La.) 495.

8. Barbee *v.* Laws, 15 Ind. 109.

9. Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79; Thomas *v.* Dickinson, 65 Hun 5, 19 N. Y. Supp. 600.

10. **U. S.**—Williams *v.* De Soto Oil Co., 213 Fed. 194, 129 C. C. A. 538. **Pa.**—Mountjoy *v.* Metzger, 9 Phila. 10, 21 Am. L. Reg. 442. **W. Va.** James *v.* Adams, 16 W. Va. 245.

11. **Ill.**—Lake Shore & M. S. Ry. Co. *v.* Richards, 152 Ill. 59, 80, 38 N. E. 773, 30 L. R. A. 33; John A. Roebling's Sons Co. *v.* Lock Stitch Fence Co., 130 Ill. 660, 666, 22 N. E. 518; Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548. **Mich.**—Barlow *v.* Lincoln-Williams Twist Drill Co., 186 Mich. 46, 152 N. W. 1034. **W. Va.**—Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719. **Eng.**—Johnstone *v.* Milling, 16 Q. B. Div. 460; Frost *v.* Knight, L. R. 7 Ex. 111, 112, 41 L. J. Ex. 78, 26 L. T. N. S. 77, 20 Wkly. Rep. 471.

12. Davis *v.* Bronson, 2 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16

chaser, may bring his action at once,[13] and the same rule applies where the purchaser refuses, upon tender of the goods, to execute a note, as agreed, in payment,[14] or to furnish security, if so promised.[15]

c. *Pleadings.* — (I.) Declaration, Complaint, or Petition. — Under the common law procedure, the proper action for damages for the refusal of the buyer to comply with the contract is assumpsit,[16] but the plaintiff must declare specially, since he cannot recover on the common counts,[17] and in jurisdictions where, in accord with the general rule, an action for the price cannot be maintained for breach of an executory contract,[18] neither an action for goods bargained and sold, nor for goods sold and delivered, will lie if the title to the goods has not passed to the buyer.[19] In framing the declaration, complaint, or petition, the contract must be set up,[20] also performance by the plaintiff, or his readiness and willingness to perform,[21] including an

L. R. A. 655. "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance." Per Cockburn, C. J., in Frost *v.* Knight, L. R. 7 Ex. 111. See, also, cases in preceding note.

13. Cook *v.* Stevenson, 30 Mich. 242; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

[a] **Distinguished From Action for Price.**—An action for damages, in distinction from an action for the price, may, after breach by the purchaser, be brought as soon as the damages are ascertained, although such time was before payment would have been due under the contract. Todd *v.* Grovier Produce Co., 98 Kan. 137, 157 Pac. 389.

14. **Ill.**—Manton *v.* Gammon, 7 Ill. App. 201. **Ind.**—Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79. **Mo.**—Aultman *v.* Doggs, 50 Mo. App. 280. **N. Y.** Yale *v.* Coddington, 21 Wend. 175; Hanna *v.* Mills, 21 Wend. 90, 34 Am. Dec. 216. **Ohio.**—Stephensen *v.* Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620. **Pa.**—Rinehart *v.* Olwine, 5 Watts & S. 157. **Tex.**—Young *v.* Dalton, 83 Tex. 497, 18 S. W. 819.

15. Orr *v.* Leathers, 27 Ind. App. 572, 61 N. E. 941; Barron *v.* Mullin, 21 Minn. 374.

16. **Conn.**—Allen *v.* Jarvis, 20 Conn. 38. **Mo.**—Kellerman Contracting Co. *v.* Chicago House Wrecking Co., 137 Mo. App. 392, 118 S. W. 99. **Pa.** Scott *v.* Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753.

See generally the title "**Assumpsit.**"

17. **Ill.**—Brand *v.* Henderson, 107 Ill. 141; Burnham *v.* Roberts, 70 Ill. 19. **Me.**—Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713. **N. J.**—Perdicaris *v.* Trenton City Bridge Co., 29 N. J. L. 367. **Va.**—American Hide & Leather Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

18. See *supra*, II, A, 4, b.

19. Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807.

20. **Cal.**—Habenicht *v.* Lissak, 77 Cal. 139, 19 Pac. 260. **Colo.**—Robinson Consol. Min. Co. *v.* Johnson, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769. **Ga.** Atlanta Buggy Co. *v.* Hess Spring & Axle Co., 124 Ga. 338, 52 S. E. 613, 4 L. R. A. (N. S.) 431. **N. Y.**—Duryea *v.* Rayner, 20 Misc. 544, 46 N. Y. Supp. 437.

See generally 11 STANDARD PROC. 981.

[a] **Ownership.**—An allegation of ownership of the goods at the date of the contract is immaterial. Kleeb *v.* Bard, 7 Wash. 41, 34 Pac. 138.

21. **Cal.**—Barron *v.* Frink, 30 Cal. 486. **Ill.**—Burnham *v.* Roberts, 70 Ill. 19; McPherson *v.* Nelson, 44 Ill. 124. **Ind.**—Fell *v.* Muller, 78 Ind. 507; Johnson *v.* Powell, 9 Ind. 566. **Ky.**—Goff *v.* Marsden Co., 22 Ky. L. Rep. 49, 56 S. W. 667. **N. Y.**—Howie *v.* Kasnowitz, 83 App. Div. 295, 82 N. Y. Supp. 42; Armstrong *v.* Heide, 47 Misc. 609, 94 N. Y. Supp. 434; Scheuer *v.* Rosenbaum, 33 Misc. 768, 67 N. Y. Supp. 936; Gallup *v.* Sterling, 22 Misc. 672, 49 N. Y. Supp. 942; Duryea *v.* Rayner, 20 Misc. 544, 46 N. Y. Supp. 437. **Vt.** Jones *v.* Marsh, 22 Vt. 144.

allegation of due performance of any condition precedent on the plaintiff's part if required by the contract.[22] If the contract calls for a delivery at a particular place and time, the complaint must allege not only readiness to deliver but also a tender.[23] The breach by the defendant,[24] and an allegation of damages, must also be made.[25] Ordinarily, a general allegation of damages will be sufficient,[26] but in case special damages are sought they must be duly alleged in the declaration or complaint.[27] The fact, however, that the damages are laid at the same amount as the contract price can exert no influence in determining the legal character of the action.[28]

How performance is alleged, see generally 11 STANDARD PROC. 998.

[a] **Allegation of Quality.**—Where the memorandum of the contract provided that plaintiff would sell and deliver to defendant all the barrels defendant should use for one year, "said barrels to be first class barrels," it was not necessary that plaintiff in his complaint, in an action to recover a balance due, should allege that the barrels were "first class." Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848.

22. James *v.* Adams, 16 W. Va. 245.

23. Lester *v.* Jewett, 11 N. Y. 453; Hagar *v.* King, 38 Barb. (N. Y.) 200.

[a] **After alleging readiness,** ability, and willingness to perform, the seller must allege either tender of performance or waiver thereof by the buyer. Riegal Sack Co. *v.* Tidewater Portland Cm. Co., 95 Misc. 202, 158 N. Y. Supp. 954.

24. **Ala.**—Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014. **Colo.** — Colorado Springs Live Stock Co. *v.* Godding, 2 Colo. App. 1, 29 Pac. 529. **Ind.**—Schreiber *v.* Butler, 84 Ind. 576; Vice *v.* Brown, 22 Ind. App. 345, 53 N. E. 776. **Me.**—Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713. **N. Y.**—Duryea *v.* Rayner, 20 Miss. 544, 46 N. Y. Supp. 437.

Necessity and manner of alleging breach see generally 11 STANDARD PROC. 1006.

[a] **Refusal To Accept.**—A mere allegation that the buyer refused to accept without an allegation that he refused to pay is not sufficient to show a breach. Mills *v.* Gould, 1 Abb. N. C. (N. Y.) 93.

[b] **Wrongful Cancellation Not Presumed.**—The court cannot presume, in favor of the complaint, that the buyer's cancellation of the contract alleged as breach, was wrongful. Riegal Sack Co. *v.* Tidewater Portland Cement Co., 95 Misc. 202, 158 N. Y. Supp. 954.

25. Colorado Springs Live Stock Co. *v.* Godding, 2 Colo. App. 1, 29 Pac. 529; Morrison *v.* American Dev. & Min. Co., 5 Idaho 77, 47 Pac. 94, holding insufficient an allegation of damages, and adding "Unless plaintiff shows that he has sustained injury by reason of the breach upon the part of defendant, he cannot recover." See generally 13 STANDARD PROC. 360, 378.

26. Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020; See generally 13 STANDARD PROC. 364.

[a] **Motion to Make More Certain.** The complaint should, however, show, in case of methods of liquidating damages, what method plaintiff has elected, otherwise it is subject to a motion to make it more definite and certain. Duryea, Watts & Co. *v.* Rayner, 11 Misc. 294, 32 N. Y. Supp. 247, 65 N. Y. St. 429, 20 Misc. 544, 46 N. Y. Supp. 437.

27. Miller *v.* Burch, 19 Ky. L. Rep. 629, 41 S. W. 307, holding that loss of profits must be specially pleaded. See, also, Turney *v.* Peoria Grape Sugar Co., 65 Ill. App. 656. See 13 STANDARD PROC. 365, 379.

[a] **Form — Allegation of Special Damages.**—See Albany & R. Iron & Steel Co. *v.* Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. ed. 982, a payment of freight charges.

28. Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014.

[a] **For various forms** (1) of an action for non-acceptance by the buyer see the following cases **Ind.**—Weir *v.* Hudnut, 115 Ind. 525, 18 N. E. 24. **Ohio.**—Davis *v.* Harness, 38 Ohio St. 397. **Pa.**—Martinez *v.* Earnshaw, 143 Pa. 479, 22 Atl. 668. See also 9 STANDARD PROC. 1108. (2) Privilege to deliver, see Berry *v.* Kowalsky, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101. (3) Time of delivery at option of buyer, see Posey *v.* Scales, 55 Ind. 282.

(II.) Plea or Answer.— The defendant may plead or answer in accordance with the general rules elsewhere treated.[29] He may set up the plaintiff's fraud in connection with the contract as a defense,[30] and may allege plaintiff's failure to comply with the terms of the contract.[31] All matters of special defense must, however, be specially pleaded, since they cannot be shown under the mere general issue or denial.[32] A plea, however, that defendant signed the contract without reading it, is demurrable.[33]

d. *Issues, Proof and Variance.*— In an action for damages for breach of a sale contract, the general rules as to issues, proof and variance prevail.[34]

e. *Trial.*— In accordance with the rules elsewhere treated,[35] questions of fact are for the jury. Thus it is ordinarily for the jury to determine whether the parties made any change in the original contract,[36] whether there was due performance on the seller's part,[37] whether there was a breach by the buyer,[38] whether a seller in making a resale exercised proper diligence;[39] also, in connection with damages, to determine the market value of the goods,[40] the reasonableness of certain expenses claimed by the plaintiff,[41] and, in general, the

(4) No specified time of delivery, see Pope *v.* Terre Haute C. & M. Co., 107 N. Y. 61, 13 N. E. 592.

29. See generally the titles "**Answers;**" "**Assumpsit;**" "**Confession and Avoidance;**" "**Denials.**" See also 13 STANDARD PROC. 1010, and titles dealings with specific kinds of pleas and defenses.

30. **Ind.**—Hummel *v.* Tyner, 70 Ind. 84. **Mo.**—Tait *v.* Locke, 130 Mo. App. 273, 109 S. W. 105. **Pa.**—Hardt *v.* Reeves, 4 Sad. 569, 8 Atl. 32.

See 11 STANDARD PROC. 1027, and the title "**Fraud and Deceit.**"

31. Elliott *v.* Howison, 146 Ala. 568, 40 So. 1018. See generally 13 STANDARD PROC. 1017.

32. Cleveland-Canton Springs Co. *v.* Goldsboro Buggy Co., 148 N. C. 533, 62 S. E. 637. See 13 STANDARD PROC. 1010, *et seq.*, and the titles "**Confession and Avoidance;**" "**Denials.**"

33. Stoddard Mfg. Co. *v.* Adams, 122 Ga. 802, 50 S. E. 915.

34. See generally the titles "**Assumpsit;**" "**Denials;**" "**Variance and Failure of Proof;**" and 11 STANDARD PROC. 1036.

[a] **Under a plea of non assumpsit,** defendant may show that he refused to accept the goods on the ground that the portion of them delivered did not conform to the contract. Scott *v.* Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753.

[b] **Where the answer is a mere general denial,** the defendant is not entitled to testify as to the circumstances under which he signed the contract. Such a defense should be affirmatively pleaded. Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993, *citing* Pollen *v.* LeRoy, 30 N. Y. 549, 559.

[c] **Any material variance** between the plaintiff's allegations and his proof will defeat his action. Nashville, C. & St. L. Ry. Co. *v.* Woods, 155 Ala. 263, 46 So. 561; Hart *v.* Tyler, 15 Pick. (Mass.) 171.

35. See the title "**Province of Judge and Jury,**" and 11 STANDARD PROC. 1054.

36. Phillips *v.* Arguimbau, 27 Jones & S. 189, 13 N. Y. Supp. 605, 37 N. Y. St. 890. See 11 STANDARD PROC. 1062.

37. Sloss Iron & S. Co. *v.* Jackson Architectural Iron Works, 103 App. Div. 316, 92 N. Y. Supp. 1056; Baylis *v.* Weibezahl, 42 Misc. 178, 85 N. Y. Supp. 355, 14 N. Y. Ann. Cas. 280. See 11 STANDARD PROC. 1064.

38. Lekas *v.* Schwartz, 56 Misc. 594, 107 N. Y. Supp. 145. See 10 STANDARD PROC. 1064, 1066.

39. Wonderly *v.* Holmes Lumber Co., 56 Mich. 412, 23 N. W. 79. And see Fox *v.* Woods, 96 N. Y. Supp. 117.

40. Kountz *v.* Kirkpatrick, 72 Pa. 376, 13 Am. Rep. 687.

41. Fox *v.* Woods, 96 N. Y. Supp. 117.

amount of the damages.[42]

As to instructions, the principles relating to contract actions in general apply.[43] They must be based upon the evidence,[44] and the pleadings[45] be correct as to the burden of proof,[46] and must correspond to the issues in the case.[47]

3. Action for Price. — a. *Prerequisites to Action.*— **(I.) In General.** In order to sustain an action for the price there must, according to the great weight of authority, have been a sale, that is, an executed contract whereby the title to the property has passed from the seller to the buyer.[48] Moreover, the seller on his part must have complied entirely with the contract,[49] and all conditions precedent stipulated in

42. **U. S.**—Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19. **N. Y.**—Dryfoos *v.* Uhl, 69 App Div. 118, 74 N. Y. Supp. 532. **Pa.**—Blair *v.* Ford China Co., 26 Pa. Super. 374, holding that disputed facts having any bearing on the measure of damages must be submitted to the jury.

43. See generally the title "**Instructions,**" and 11 STANDARD PROC. 1066.

44. **Ind. Ter.**—Baird Bros. *v.* Pratt & Co., 6 Ind. Ter. 38, 89 S. W. 648. **Ia.** Redhead Bros. *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144. **N. C.** Marshall *v.* Macon County Bank, 108 N. C. 639, 13 S. E. 182.

45. **Ark.**—Outcault Adv. Co. *v.* Hardware Co., 110 Ark. 123, 161 S. W. 142. **Cal.**—Baldwin *v.* Napa & Sonoma Wine Co., 1 Cal. App. 215, 81 Pac. 1037. **Tex.** Stafford *v.* Christian (Tex. Civ. App.), 79 S. W. 595. **Wis.**—Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666.

46. Duryea *v.* Rayner, 20 Misc. 544, 46 N. Y. Supp. 437.

47. **Ill.**—Iroquois Furnace Co. *v.* Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237; Jackson *v.* Du Quoin Coal Min. Co., 194 Ill. 177, 62 N. E. 540. **Ind.** Dwiggins *v.* Clark, 94 Ind. 49, 48 Am. Rep. 140. **Md.**—Walter *v.* Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433. **Va.** Norfolk & W. R. Co. *v.* Duke, 107 Va. 764, 60 S. E. 96; Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. 358. **Wis.**—Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

48. See *supra*, II, A, 4, b, where this question is considered. See, also, under that reference, as to the recovery of the price in some jurisdictions in connection with executory contracts where the seller has fully performed.

[a] **Must Be a Sale.**—A mere consignment of the goods to the defendant is not sufficient to support an action for the price. Shepard *v.* Palmer, 6 Conn. 95; Colman *v.* Price, 1 Blackf. (Ind.) 303.

[b] **Goods Bargained and Sold; or Sold and Delivered.**—A prerequisite to an action for goods bargained and sold is that the title should have passed to the buyer. **Ill.**—Seckel *v.* Scott, 66 Ill. 106. **N. H.**—Bailey *v.* Smith, 43 N. H. 141. **Eng.**—Elliott *v.* Pybus, 10 Bing. 512, 25 E. C. L. 245, 131 Eng. Reprint 993; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 142, 108 Eng. Reprint 1046.

[c] Likewise, in order to maintain an action for goods sold and delivered there must have been also a sale. The title must have passed. **Me.**—Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640. **N. H.**—Warren *v.* Buckminster, 24 N. H. 336. **N. J.**—Boswell *v.* Green, 25 N. J. L. 390. **Eng.**—Simmons *v.* Swift, 5 B. & C. 857, 11 E. C. L. 712, 108 Eng. Reprint 319.

49. **U. S.**—United States Sugar Refinery *v.* Edward P. Allis Co., 105 Fed. 881, 45 C. C. A. 108; Springfield Mining Co. *v.* Barnard etc. Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; Church *v.* Cheape, 64 Fed. 961. **Cal.**—Fowler *v.* Fisk, 12 Cal. 112. **Colo.**—Holt Live Stock Co. *v.* Watkins, 21 Colo. 531, 43 Pac. 121. **Ill.**—Monarch Lumber Co. *v.* Haskell & Barker Car Co., 178 Ill. App. 374; Havana Press Drill Co. *v.* Scurlock, 23 Ill. App. 426. **Ind.**—Shipps *v.* Atkinson, 8 Ind. App. 505, 36 N. E. 375. **Ky.**—Bartlett & Co. *v.* Newcomb, 4 Ky. Op. 699; Carson *v.* Allen, 6 Dana 395; Warner's Exrs. *v.* Reardon, 2 Dana 219. **Md.**—Mulliken *v.* Boyce, 1 Gill 60. **Mo.**—Hessig-Ellis Drug Co. *v.* Priesmeyer, 151 Mo. App. 484, 132 S. W. 329; McCormick Harvesting Mach. Co. *v.* Mackey, 100 Mo. App. 400, 74 S. W. 388. **N. M.**—Staab *v.* Ortiz, 3 N. M. 33, 1 Pac. 857. **N. Y.**—Dunham *v.* Pettee, 8 N. Y. 508, Seld Notes 154; Lackawanna Mills *v.* Weil, 78 Hun 348, 29 N. Y.

the contract on the part of the seller must have been performed, unless waived by the purchaser.[50] In case a note or other security has been executed in payment of the price, the seller must surrender, or offer to surrender it, before he is entitled to judgment in an action for the price,[51] unless the same was given in connection with a contract fraudulently procured by the purchaser.[52]

(II.) Delivery. — Although there are dicta that a delivery of the goods is necessary in order to maintain an action for the price,[53] and while the form of the action, as in goods sold and delivered, may require a delivery as a condition precedent,[54] yet a delivery of the goods is not essential to the passing of title, and there may be an action for the price although no delivery has been made,[55] as in case of the action for goods bargained and sold.[56] However, if delivery is expressly made an essential of the contract, this condition, like all other conditions, must be performed, or else there must be a legal

Supp. 114; Terry *v.* Haitz, 45 Hun 588, 9 N. Y. St. 649; Mead *v.* Degolyer, 16 Wend. 632; Joachimsthal *v.* Metal, etc. Co., 153 N. Y. Supp. 1002. **N. D.**—Sunshine Cloak & Suit Co. *v.* Roquette Bros., 30 N. D. 143, 152 N. W. 359. **Ohio.** Petersburg Fire Brick & Tile Co. *v.* American Clay Mach. Co., 89 Ohio St. 365, 106 N. E. 33, L. R. A. 1915B, 536; Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313. **Vt.**—New England Granite Works *v.* Bailey, 69 Vt. 257, 37 Atl. 1043. **Va.**—Page's Exr. *v.* Winston's Admr., 2 Munf. (16 Va.) 298. **Wash.**—North Idaho Grain Co. *v.* Callison, 83 Wash. 212, 145 Pac. 232. **Wis.** Badger State Lumb. Co. *v.* G. W. Jones Lumb. Co., 140 Wis. 73, 121 N. W. 933.

50. J. B. Ehrsam & Sons Mfg. Co. *v.* Jackman, 73 Kan. 435, 85 Pac. 559, 91 Pac. 486.

51. **Ia.**—Hoag *v.* Hay, 103 Iowa 291, 72 N. W. 525. **Me.**—Cushing *v.* Wyman, 38 Me. 589. **Mass.**—Estabrook *v.* Swett, 116 Mass. 303; Martin *v.* Roberts, 5 Cush. 126; Coolidge *v.* Brigham, 1 Metc. 547. **N. Y.**—Fisher *v.* Fredenhall, 21 Barb. 82; Baker *v.* Robbins, 2 Denio 136. **S. D.**—Maytag Co. *v.* Dinneen, 35 S. D. 329, 152 N. W. 111.

52. Crown Cycle Co. *v.* Brown, 39 Ore. 285, 64 Pac. 451.

[a] **Note Must Be Worthless.**—In Estabrook *v.* Swett, 116 Mass. 303, it was, however, held that where the seller of goods is induced by the fraud of the buyer to receive in payment thereof the note of a third party, he cannot without proving that the note is absolutely worthless, maintain an action on the original contract until he has reurned or offered to return the note to the buyer.

53. See *infra,* this note.

[a] **Delivery — Action for Price.** Before a seller, says the supreme court of Minnesota, can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title and vest the ownership of the property in the purchaser. If the possession and title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained. McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393.

54. See *infra,* II, B, 3, b.

55. See, in general, *supra,* II, A, 4, b. In many jurisdictions, as previously pointed out, an action for the price may, moreover, be maintained upon the breach of an executory contract.

[a] **It will be observed that the Uniform Sales Act** does not authorize an action for the price generally upon the offer of delivery, but only upon such qualifications as to the nature of the goods as are therein set forth. See §63(3).

Delivery Before Passing of Title. There may be a delivery even before the passing of the title. Such deliveries are usually made, however, in connection with the reservation of title until the price is paid, or with some other form of a conditional sale. See *infra,* IV.

56. See *infra,* II, B, 3, b, (II).

excuse for its non-performance, before an action for the price can be maintained,[57] and, in general, if the goods have not been delivered, there must have been a tender or an offer to tender, or, at least, the seller must have been ready and willing to perform.[58] Moreover, in an action for the price for goods sold and delivered there must have been an actual delivery of the goods, or what, in law, amounts to a delivery.[59] In such an action, mere proof of tender and refusal is not sufficient,[60] and the delivery must be such as to divest the seller of any lien for the price.[61]

(III.) Demand of Payment or Note. — Where no credit is given, a demand of payment is not prerequisite to an action for the price.[62] However, where goods are sold on credit, and the buyer agrees to give a note or other security for the price, an action for the price cannot ordinarily be maintained unless it is shown that the note was demanded and refused.[63] Particularly, in case the note of a third person is to be given in payment, a demand should be made for the

57. Creech *v.* Sutton, 13 Ky. L. Rep. 685; Southern Car M. & S. Co. *v.* Scullin-Gallagher, etc., Co., 38 Tex. Civ. App. 112, 85 S. W. 845.

[a] **Goods Must Answer Description.**—It is a condition precedent that the goods offered for delivery should answer the description when sold by a particular description. Fogg's Admr. *v.* Rodgers, 84 Ky. 558, 2 S. W. 248.

58. **Ala.**—McGowin *v.* Dickson, 182 Ala. 161, 62 So. 685. **Cal.**—Plath *v.* Kitzmuller, 52 Cal. 491. **Colo.**—Strauss *v.* Brier, 57 Colo. 65, 140 Pac. 183. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248. **Ind.**—Shipps *v.* Atkinson, 8 Ind. App. 505, 36 N. E. 375. **La.**—Benton *v.* Bidault & Co., 6 La. Ann. 30. **Miss.**—McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163; Farrar *v.* Gaillard's Admr., Walk. 269. **Mo.**—Koenig *v.* Truscott Boat Mfg. Co., 155 Mo. App. 685, 135 S. W. 514. **N. Y.**—Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Gross *v.* Ajello, 132 App. Div. 25, 116 N. Y. Supp. 380; Holmes & G. Mfg. Co. *v.* Morse, 53 Hun 58, 5 N. Y. Supp. 940; Kelley *v.* Upton, 5 Duer 336; Mackie *v.* Egan, 6 Misc. 95, 26 N. Y. Supp. 13, 55 N. Y. St. 493; Bement *v.* Smith, 15 Wend. 493. **Ore.**—Smith Bros. *v.* Wheeler, 7 Ore. 49, 33 Am. Rep. 698. **R. I.**—Hargraves *v.* A. B. Pitkin Mach. Co., 19 R. I. 426, 34 Atl. 738. **Tex.**—Keppert *v.* Aultman, M. & Co., 25 Tex. Civ. App. 495, 61 S. W. 410.

See *infra*, II, B, 3, f, (I), (B), (8).

59. See *infra*, this note and II. B, 3, b, (III).

[a] **In an action for goods sold and delivered,** there must have been a delivery. **Ill.**—Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85. **Me.**—Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640. **Md.**—Hewes *v.* Jordan, 39 Md. 472, 17 Am. Rep. 578. **Mass.**—Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112. **Wis.**—Ganson *v.* Madigan, 13 Wis. 67. **Eng.**—Goodall *v.* Skelton, 2 H. Bl. 316, 126 Eng. Reprint 570.

[b] **In an action for goods bargained and sold,** the goods must be ready for delivery. Pusey & Jones Co. *v.* Dodge, 3 Penne. (Del.) 63, 49 Atl. 248.

60. Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

61. Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

62. **Ariz.**—Agua Fria Copper Co. *v.* Bashford-Burmister Co., 4 Ariz. 203, 35 Pac. 983. **Ind.**—Rend *v.* Boord, 75 Ind. 307. **Ia.**—Davis Sewing Mach. Co. *v.* McGinnis, 45 Iowa 538. **La.** Reine *v.* C. H. Poumairat & Co., 8 La. Ann. 282. **N. Y.**—Locklin *v.* Moore, 5 Lans. 307, (*affirmed*, 57 N. Y. 360); Maguire *v.* Durant, 1 Misc. 509, 20 N. Y. Supp. 617, 48 N. Y. St. 937.

[a] **Commencement of the Action.** Ordinarily, the fact of the bringing of the action is a sufficient demand. Maguire *v.* Durant, 1 Misc. 509, 20 N. Y. Supp. 617, 48 N. Y. St. 937; Locklin *v.* Moore, 5 Lans. (N. Y.) 307.

63. **La.**—Offut *v.* Morancy, 12 Rob. 92. **Mich.**—Osborne & Co. *v.* Bell, 62 Mich. 214, 28 N. W. 841. **Mo.**—Russell *v.* Englehardt, 24 Mo. App. 36. **Vt.**

note before commencing the action,[64] unless the action is brought after the note would have become due, and the buyer has refused to make any payment at all.[65] Where, however, a seller requests the buyer to take the goods and to give a note or other security as agreed, upon the refusal of the buyer to do so, the seller may bring his action without a formal demand for the note.[66] If the payment is to be made in merchandise, it is also a condition precedent to the action that the merchandise be demanded and refused.[67]

b. *Form of Action.* — **(I.) In General.** — At common law, for the price or value of goods sold, assumpsit or debt will lie on a parol or written contract not under seal.[68] The action for the price may, according to the facts of the case, be an indebitatus assumpsit, either for goods bargained and sold,[69] or for goods sold and delivered;[70] while the reasonable value of the goods may be recovered under a quantum valebant.[71] In some cases, however, the plaintiff must sue in a special count on the contract.[72] Under the codes, it is the general rule that the common counts in assumpsit for goods sold and delivered may be employed to recover the price, even as at common law.[73]

Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120; Martin *v.* Fuller, 16 Vt. 108.

64. Osborne & Co. *v.* Bell, 62 Mich. 214, 28 N. W. 841.

65. Linderman *v.* Disbrow, 31 Wis. 465.

66. Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120.

67. **Del.**—Goldsmith *v.* Greenly, 7 Houst. 371, 32 Atl. 250. **N. Y.**—Hunt *v.* Westervelt, 4 E. D. Smith 225. **Wis.** McBain *v.* Austin, 16 Wis. 87, 82 Am. Dec. 705.

[a] **A proper demand** sufficient to sustain an action for the price of goods sold by a partnership, and to be paid for by a specific article, cannot be made by one partner without an order from his co-partner, if the latter made the sale, and stipulated with the buyer that the article should not be delivered except upon his order, and the buyer was unaware of the partnership. McBain *v.* Austin, 16 Wis. 87, 82 Am. Dec. 705.

68. Emery *v.* Fell, 2 T. R. 28, 100 Eng. Reprint 16. See the titles "**Assumpsit;**" "**Debt.**"

[a] **Written Contract.**—Where the contract is in writing, the plaintiff may sue either in assumpsit or specially. McRae *v.* Morrison, 35 N. C. 46.

[b] **Contract Under Seal.**—Where the contract is under seal and the goods have been partly delivered in performance, the plaintiff cannot sue in implied assumpsit. Wood *v.* Edwards, 19 Johns. (N. Y.) 205.

[c] **Terms Fixed by Written Contract.**—Where a written contract fixes the price and terms of sale of the articles specified, the action must be based on the written contract, and the seller cannot recover the reasonable value of the goods in an action on an open account. Over *v.* Byram Foundry Co., 37 Ind. App. 452, 77 N. E. 302, 117 Am. St. Rep. 327.

69. See *infra*, II, B, 3, b, (II).
70. See *infra*, II, B, 3, b, (III).
71. See *infra*, II, B, 3, b, (IV).
72. See *infra*, II, B, 3, b, (V).

73. **Cal.**—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172. **Colo.**—Wilcox *v.* Jamieson, 20 Colo. 158, 36 Pac. 902. **Ind.**—Curran *v.* Curran, 40 Ind. 473; Brown *v.* Perry, 14 Ind. 32; Kerstetter *v.* Raymond, 10 Ind. 199. **Kan.**—Emslie *v.* Leavenworth, 20 Kan. 562; Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476. **Minn.**—Pioneer Fuel Co. *v.* Hager, 57 Minn. 76, 58 N. W. 828, 47 Am. St. Rep. 574; Solomon *v.* Vinson, 31 Minn. 205, 17 N. W. 340. **N. Y.**—Hurst *v.* Litchfield, 39 N. Y. 377; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32. **Wis.**—Grannis *v.* Hooker, 29 Wis. 65.

See 3 STANDARD PROC. 215.

(II.) Goods Bargained and Sold. — Indebitatus assumpsit for goods bargained and sold lies, at common law, when there has been a valid sale, that is, a passing of the title, but the goods have not been delivered.[74] All that is necessary for the action is that the property in the specific goods should have passed.[75] The action does not lie unless there has been an actual sale of goods in existence at the time or later appropriated to the contract.[76]

(III.) Goods Sold and Delivered. — Where a contract of sale of personal property has been fully performed, and there has been a delivery and acceptance of the goods, the seller may recover the price for goods sold and delivered.[77] There must have been an actual de-

But see Bowen *v.* Emmerson, 3 Ore. 452; Blanchard *v.* Strait, 8 How. Pr. (N. Y.) 83.

74. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248. **Me.** Atwood *v.* Lucus, 53 Me. 508, 89 Am. Dec. 713. **N. H.**—Gordon *v.* Norris, 49 N. H. 376. **N. J.**—Doremus *v.* Howard, 23 N. J. L. 390. **N. C.**—Allman *v.* Davis, 24 N. C. 12. **Eng.**—Forbes *v.* Smith, 11 Wkly. Rep. 574.

[a] **To maintain an action for goods bargained and sold,** the property in the goods must have passed to the vendee though they are not delivered and the vendee must be in a position to recover in trover should any one take them away, or to sustain the loss if the goods should be stolen or destroyed by fire. Gordon *v.* Norris, 49 N. H. 376.

75. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248. **Ill.** Brand *v.* Henderson, 107 Ill. 141. **N. H.**—Clay *v.* Bohonon, 54 N. H. 474. **N. J.**—Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367; Doremus *v.* Howard, 23 N. J. L. 390. **W. Va.** Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807; Buskirk Bros. *v.* Peck, 57 W. Va. 360, 50 S. E. 432. **Eng.**—Atkinson *v.* Bell, 8 Barn. & C. 277, 15 E. C. L. 142, 2 M. & R. 298, 108 Eng. Reprint 1046; Rohde *v.* Thwaites, 6 Barn. & C. 388, 13 E. C. L. 181, 9 D. & R. 293, 108 Eng. Reprint 495; Simmons *v.* Swift, 5 Barn. & C. 857, 11 E. C. L. 712, 108 Eng. Reprint 319; Alexander *v.* Gardner, 1 Bing. (N. C.) 671, 27 E. C. L. 812, 131 Eng. Reprint 1276 (goods lost at sea); Kymer *v.* Suwercropp, 1 Camp. 109, 10 R. R. 664, goods stopped in transit.

[a] **It is not necessary to prove delivery** in an action for the price of goods bargained and sold, but only to prove a valid sale. Doremus *v.* Howard, 23 N. J. L. 390.

76. Atkinson *v.* Bell, 2 M. & R. 298, 8 B. & C. 277, 15 E. C. L. 142, 108 Eng. Reprint 1046; Elliott *v.* Pybus, 10 Bing. 512, 4 Moo. & S. 389, 3 L. J. C. P. 182, 25 E. C. L. 245, 131 Eng. Reprint 993.

[a] **Retention of Lien.**—But an action for goods bargained and sold is quite consistent with the seller's retaining a lien for the price. Frazier *v.* Simmons, 139 Mass. 531, 2 N. E. 112; Morse *v.* Sherman, 106 Mass. 430, 432; Simmons *v.* Swift, 5 B. & Cr. 857, 11 E. C. L. 712, 108 Eng. Reprint 319; Kymer *v.* Suwercropp, 1 Camp. 109, 10 R. R. 664.

77. **U. S.**—Hyde *v.* Liverse, 1 Cranch. C. C. 408, 12 Fed. Cas. No. 6,972. **Ala.**—Dukes *v.* Leowie, 13 Ala. 457. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248. **Fla.** Sullivan *v.* Boley, 24 Fla. 501, 5 So. 244. **Ill.**—Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709 (*affirming* 70 Ill. App. 72); Olcese *v.* Mobile Fruit, etc., Co., 112 Ill. App. 281, *affirmed*, 211 Ill. 539, 71 N. E. 1084. **Me.**—Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798; Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640. **Md.**—Hewes *v.* Jordan, 39 Md. 472, 17 Am. Rep. 578. **Mich.**—Hart *v.* Summers, 38 Mich. 399; Begole *v.* McKenzie, 26 Mich. 470. **Minn.**—Restad *v.* Engemoen, 65 Minn. 148, 67 N. W. 1146. **Me.**—Arons *v.* Cummings, 107 Me. 19, 78 Atl. 98, 31 L. R. A. (N. S.) 942. **N. H.**—Young *v.* Woodward, 44 N. H. 250; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241. **N. J.**—Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367. **N. Y.**—Harding *v.* El-

livery of the goods, or what, in law, amounts to a delivery,[78] and the delivery must be such as will divest the seller of all lien upon the goods.[79] It is not necessary that there should have been an express promise to pay, since the action lies although no price was agreed upon,[80] and it lies upon a contract of sale or return.[81] Assumpsit for goods sold and delivered will not lie, however, against one who tortiously converts the plaintiff's goods into money. In such a case,

liott, 47 App. Div. 624, 62 N. Y. Supp. 293; Bement *v.* Smith, 15 Wend. 493. **N. C.**—Allman *v.* Davis, 24 N. C. 12. **Vt.**—Manning Mfg. Co. *v.* Miller, 87 Vt. 455, 89 Atl. 479; Allen *v.* Thrall, 36 Vt. 711. **Wis.**—Ganson *v.* Madigan, 13 Wis. 67. **Eng.**—Elliott *v.* Heginbotham, 2 Car. & K. 545, 61 E. C. L. 543; Forbes *v.* Smith, 11 Wkly. Rep. 574.

78. See cases cited in the preceding note. And see, also, the following: **Ark.**—Gilliam *v.* Towles, 15 Ark. 64. **Ill.**—McEwen *v.* Morey, 60 Ill. 32; Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85; Ward *v.* Taylor, 56 Ill. 494. **Me.** Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371. **Mass.** Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112; Stern *v.* Filene, 14 Allen 9. **N. H.**—Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241. **Eng.** Cort *v.* Ambergate, N. & B. E. R. Co., 17 Q. B. 127, 79 E. C. L. 126, 117 Eng. Reprint 1229; Simmons *v.* Swift, 5 B. & C. 857, 11 E. C. L. 712, 108 Eng. Reprint 319; Smith *v.* Chance, 2 B. & Ald. 753, 106 Eng. Reprint 540.

[a] **Necessity of Delivery.** — In Spicers *v.* Harvey, 9 R. I. 582, the court says: "This is an action of assumpsit for the price of certain castings made by the plaintiffs for the defendant. The declaration contains counts on book accounts, for goods sold and delivered, for work and labor done, and other common counts, but no count for goods bargained and sold. . . . The plaintiffs are unquestionably entitled to recover the price of the castings which have been delivered; and also, in our opinion, the price of those which were made and retained, if there is any count in the declaration on which recovery can be had. The plaintiffs claim the right to recover on the counts on book account and for goods sold and delivered, which are in legal effect the same thing. We think, however, that the castings, though they may be considered as sold, cannot be considered as delivered and that, consequently, the plaintiffs are not entitled to recover the price of them on a count for goods sold and delivered."

[b] **Delivered After the Sale.**—An action lies for goods "sold and delivered" although the goods were manufactured after the contract to sell was made. Harding *v.* Elliott, 47 App. Div. 624, 62 N. Y. Supp. 293.

79. Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; Tufts *v.* Grewer, 83 Me. 407, 22 Atl. 382; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Gooch *v.* Holmes, 41 Me. 523, explaining Merrill *v.* Parker, 24 Me. 89.

[a] **Insufficient Delivery.**—In Boulter *v.* Arnott, 1 C. & M. 333, 3 Tyr. 267, 2 L. J. Ex. 97, goods sold for ready money were packed up in boxes of the vendee for him and in his presence, but remained on the premises of the vendor and it was held that goods sold and delivered would not lie. Also in Goodall *v.* Skelton, 2 H. Bl. 316, 126 Eng. Reprint 570, A. agreed to sell goods to B., who paid a certain sum as earnest; the goods were packed in cloths furnished by B., and deposited in a building belonging to A., till B. should send for them but A. declared at the same time that they should not be carried away till he was paid. It was held that A. could not maintain an action for goods sold and delivered, this not being a delivery to B.

80. Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Snodgrass *v.* Broadwell, 2 Litt. (Ky.) 353.

81. **Me.**—Perkins *v.* Douglass, 20 Me. 317; Dearborn *v.* Turner, 16 Me. 17, 33 Am. Dec. 630. **Mass.**—Meldrum *v.* Snow, 9 Pick. 441, 20 Am. Dec. 489. **Eng.**—Moss *v.* Sweet, 16 Q. B. 493, 71 E. C. L. 493, 15 Jur. 536, 20 L. J. Q. B. 167, 117 Eng. Reprint 968; Harrison *v.* Allen, 2 Bing. 4, 9 E. C. L. 456, 130 Eng. Reprint 205.

assumpsit for money had and received would be appropriate.[82]

(IV.) Reasonable Value. — In case of a partial delivery of the goods, accepted and retained by the purchaser, the plaintiff may recover their value on the count for goods bargained and sold, or on a quantum valebant,[83] as where, before full performance of the contract, the sale is mutually rescinded, and the buyer retains or has the benefit of the goods already delivered.[84] Likewise, in case of fraud on the part of the seller, if the buyer elects to keep the property, he is liable for its reasonable value.[85] Also, where the goods are defective in fitness or condition so that the purchaser would be justified in refusing acceptance, yet he retains them without timely objection, he will be liable for what they are reasonably worth.[86] However, if goods are sold for a fixed price, and there is no warranty, and no fraud on the part of the seller, the buyer is liable for the price, and cannot

82. **Ala.**—Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318. **Ill.**—Kellogg & Co. *v.* Turpie, 93 Ill. 265, 34 Am. Rep. 163. **Mass.**—Brown *v.* Holbrook, 4 Gray 102; Jones *v.* Hoar, 5 Pick. 285. **Mich.** Nelson *v.* Kilbride, 113 Mich. 637, 71 N. W. 1089; Coe *v.* Wager, 42 Mich. 49, 3 N. W. 248; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Watson *v.* Stever, 25 Mich. 386.

83. **Ala.**—Watson *v.* Kirby, 112 Ala. 436, 20 So. 624. **Cal.**—Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618. **Del.** Shimp *v.* Siedel, Hastings & Co., 6 Houst. 421. **Ga.**—Sentell *v.* Mitchell, 28 Ga. 196. **Mich.**—Gage *v.* Myers, 59 Mich. 300, 26 N. W. 522; Clark *v.* Moore, 3 Mich. 55.

[a] **Federal Court Rule.**—Upon this question, the court in United States *v.* Molloy, 127 Fed. 953, 62 C. C. A. 585, says: "If the defendant wrongfully broke said contract, plaintiff was discharged from further performance, and was entitled to sue on a quantum valebat for compensation for his partial performance. Clark on Contracts, 694. This cause of action is distinct from that arising out of the original contract, and is based upon the contract implied by law from the acceptance by the other party of the benefit of such performance. . . . The rule in the federal courts is stated as follows: 'When a party injured by the stoppage of a contract elects to rescind it, he recovers the value of his services actually performed, as upon a quantum meruit.' United States *v.* Behan, 110 U. S. 338, 345, 4 Sup. Ct. 81, 28 L. Ed. 168. Lovell *v.* St. Louis Mutual Life Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423. The cases bearing on this general subject are collected and discussed in the recent opinion of this court in *Re* Stern, 116 Fed. 604, 54 C. C. A. 60."

[b] **Partial Recovery Based on Price.**—The circumstances may be such as to entitle a recovery on the contract price. Thus, as said by the New York Court of Appeals: "The point that the plaintiffs should not have been permitted to recover anything on account of the goods delivered without proof as to their value is not well taken. The defendants claim on this proposition that the plaintiffs failed to comply with the terms of the contract in that they failed to deliver all the merchandise included in its terms, and by reason of such failure they are not entitled to recover the contract price of any goods which they did deliver, but are to be limited to a quantum meruit. The answer to this objection has, I think, already been given, and it consists in the fact which the jury were permitted to find from the evidence that the defendants waived the full performance of the contract by the plaintiffs and received the goods actually delivered as a delivery under such contract, and at the contract price, and they are, therefore, liable to pay such price after deducting defendants' damages." Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814.

84. Atlantic Coast Brewing Co. *v.* Donnelly, 59 N. J. L. 48, 35 Atl. 647, *affirmed*, 59 N. J. L. 438, 36 Atl. 883.

85. Thomas *v.* Grise, 1 Penne. (Del.) 381, 41 Atl. 883.

86. Birdsall Co. *v.* Palmer, 74 Md. 201, 21 Atl. 705; Wolverton *v.* McCabe, 81 Mich. 265, 45 N. W. 830.

limit the seller's recovery to the real value of the goods.[87] Moreover, although the goods were sold under an express contract fixing the price, the seller may sue on a quantum meruit and recover the price,[88] and, under code procedure, it may be advisable to combine allegations essential to an action for the price and also for the reasonable value of the goods, as a precaution against a possible failure of proof of an agreed price.[89]

(V.) Special Count. — To maintain the common counts, the entire price must be in money or in money's worth,[90] including cases where a note or draft was accepted in payment, the same being unpaid,[91] but where the goods are to be paid for in other goods, or partly in goods to be delivered and partly in money, or in labor, the seller must declare specially.[92] Also, where there is a collateral promise guaranteeing payment of goods sold to a third person, the declaration must be special.[93] In case of a resale by the vendor, after the purchaser refuses to accept the goods, it has been held that an action for goods bargained and sold will not lie, a special action for breach of contract being alone maintainable,[94] although the contrary has also been held.[95] No recovery under the common counts,[96] or for the price at all can be maintained on a purely executory contract of sale, the declaration being special in such cases,[97] although, as previously

87. Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960; Smalley *v.* Hendrickson, 29 N. J. L. 371.

88. C. B. Keogh Mfg. Co. *v.* Eisenberg, 7 Misc. 79, 27 N. Y. Supp. 356, 57 N. Y. St. 91.

89. See Meissner *v.* Brennan, 15 N. Y. Supp. 671, 39 N. Y. St. 443, 21 Civ. Proc. 36.

90. **Ala.**—Pope *v.* Robinson, 1 Stew. 415. **Conn.**—Moppin *v.* Aetna Axle, etc., Co., 41 Conn. 27. **Ind.**—Monticello *v.* Grant, 104 Ind. 168, 1 N. E. 302.

91. **U. S.**—Slocomb *v.* Lurty, Hempst. 431, 22 Fed. Cas. No. 12,949. **Conn.** Cummings *v.* Gleason, 72 Conn. 587, 45 Atl. 353. **Ill.**—Dwyer *v.* Duquid, 70 Ill. 307; McMillan *v.* Bethold, 35 Ill. 250. **Ind.**—Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841. **Ia.** Hall *v.* Hunter, 4 G. Gr. 539. **Me.**—Pool *v.* Tuttle, 11 Me. 468, 26 Am. Dec. 552. **Mass.**—Gray *v.* White, 108 Mass. 228. **Mich.**—Stone *v.* Nichols, 43 Mich. 16, 4 N. W. 545; Gibbs *v.* Blanchard, 15 Mich. 292; Gardner *v.* Gorham, 1 Doug. 507. **Mo.**—Sweeney *v.* Willing, 6 Mo. 174. **N. H.**—Chamberlin *v.* Perkins, 55 N. H. 237. **N. Y.**—Guilford *v.* Mulkin, 85 Hun 489, 33 N. Y. Supp. 134; Corlies *v.* Gardner, 2 Hall 345; Johnson *v.* Smith, Anth. N. P. 81; Kingman *v.* Hotaling, 25 Wend. 423. **Pa.**—Reid *v.* Morrison, 2 Watts & S. 401; Leas *v.* James, 10 Serg. & R. 307.

92. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248; Goldsmith *v.* Greenly, 7 Houst. 371, 32 Atl. 250. **Me.**—Slayton *v.* McDonald, 73 Me. 50. **Mass.**—Baylies *v.* Fettyplace, 7 Mass. 325. **Mich.**—Pierson *v.* Spaulding, 61 Mich. 90, 27 N. W. 865. **Mo.** Galway *v.* Shields, 66 Mo. 313, 27 Am. Rep. 351. **N. H.**—Ranlett *v.* Moore, 21 N. H. 336; Mitchell *v.* Gile, 12 N. H. 390. **Eng.**—Rees *v.* Manners, 3 Smith K. B. 119.

93. Bickham *v.* Irwin, 3 Yeates (Pa.) 66.

94. Acebal *v.* Levy, 4 Moo. & Sc. 217, 10 Bing. 376, 25 E. C. L. 180, 131 Eng. Reprint 949; Hagedorn *v.* Laing, 6 Taunt. 162, 1 E. C. L. 557, 128 Eng. Reprint 996.

95. Merters *v.* Adcock, 4 Esp. (Eng.) 251.

96. Perdicaris *v.* Trenton City Bridge Co., 29 N. J. L. 367.

97. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248. **Kan.** John Deere Plow Co. *v.* Gorman, 9 Kan. App. 675, 59 Pac. 177. **N. H.**—Clay *v.* Bohonon, 54 N. H. 474. **Ore.**—Herring-Hall-Marvin Co. *v.* Smith, 43 Ore. 315, 72 Pac. 704, 73 Pac. 340.

See *supra*, II, A, 4, a; II, B, 2.

[a] **Remedy is Action for Damages.**

stated, some jurisdictions permit an action for the price where the seller has fully performed and has made a due tender of the goods.[98] In general, however, where the contract is executed, and the seller has fully performed his part, he may elect to bring an action for the price under the common counts, or he may declare specially,[99] and even if the contract in such a case be special, the plaintiff, on the other hand, is not required to declare specially but may pursue his remedy in assumpsit.[1]

(VI.) Splitting Cause of Action. — Recovery on part of a running account will bar a recovery on the remaining portion.[2] Although it is held that, in order to bring an action within the jurisdiction of a justice's court, separate actions may be maintained on each item of an account of goods sold at different times providing the account has not become an account stated.[3]

c. *Venue and Jurisdiction.* — At common law, actions for the price are transitory actions as in other actions on contract generally, but the local statute may prescribe that the action shall be brought in the county where the sale is made or the buyer resides.[4] If the sale is legal where made, an action for the price may ordinarily, in absence

Except where the purchase price of goods is payable irrespective of their delivery, if the buyer repudiates the sale while it is executory, and prevents the seller from performing on his part by making a delivery of the goods, the seller cannot maintain an action on the contract for the purchase price. His only remedy in such a case is an action for damages for a breach of the contract. Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101.

[b] **Order for a Particular Article.** If A employs B to make a particular article for A, out of materials furnished by B, and during the progress of the work, and before it has assumed the character contracted for, or has been accepted by A, or appropriated to his use, the work is stopped by him; B cannot maintain against A a general action of indebitatus assumpsit for work and labor done and material furnished; the proper remedy for B, in such case, being a special action for refusing to accept the article, or for preventing its completion. Allen *v.* Jarvis, 20 Conn. 38.

98. See *supra*, II, A, 4, b, and McCormick Harv. Machine Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33.

99. Pusey & Jones Co. *v.* Dodge, 3 Penne. (Del.) 63, 49 Atl. 248.

1. **Ala.**—Vinegar Bend Lumb. Co. *v.* Soule Steam Feed Wks., 182 Ala. 146, 62 So. 279; Maas *v.* Montgomery Iron Wks., 88 Ala. 323, 6 So. 701. **Ga.** Schmidt *v.* Wambacker, 62 Ga. 321. **Ill.**—Eggleston *v.* Buck, 24 Ill. 262; McIlvrid *v.* Murphy, 190 Ill. App. 515; Smith *v.* Eitel, 121 Ill. App. 464. **Md.** Hartlove *v.* Durham, 86 Md. 689, 39 Atl. 617. **Mass.**—Knight *v.* New England Worsted Co., 2 Cush. 271. **Mich.** Yeiter *v.* Campau, 174 Mich. 94, 140 N. W. 479. **Mo.**—Sweeney *v.* Willing, 6 Mo. 174. **N. Y.**—Swan Lamp Mfg. Co. *v.* Brush-Swan Electric Light Co., 29 Jones & S. 11, 18 N. Y. Supp. 869, 46 N. Y. St. 535; C. B. Keogh Mfg. Co. *v.* Tisenberg, 7 Misc. 79, 27 N. Y. Supp. 356, 57 N. Y. St. 91, (*affirmed*, 149 N. Y. 592, 44 N. E. 1123); Clark *v.* Fairchild, 22 Wend. 576. **N. C.** McRae *v.* Morrison, 35 N. C. 46.

2. Bolen Coal Co. *v.* Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810; Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151. See generally the title "**Successive Suits.**"

3. Simpson *v.* Elwood, 114 N. C. 528, 19 S. E. 598; Marks *v.* Ballance, 113 N. C. 28, 18 S. E. 75.

4. **Ia.**—See Eastern Granite Co. *v.* Heim, 89 Iowa 698, 57 N. W. 437. **Tex.** See Russell & Co. *v.* Heitmann & Co. (Tex. Civ. App.), 86 S. W. 75. **Vt.** See Richardson *v.* Stevens, 41 Vt. 120, and Stone *v.* Hazen, 25 Vt. 178, as to suits in a justice's court.

See generally the title "**Venue.**"

of a statute to the contrary, be brought in another state, although the sale would have been illegal in such latter state.[5] Questions of jurisdiction are elsewhere treated.[6]

d. *Time To Sue.* — Where title to the goods has passed, and the seller has fully performed, or is ready and willing to perform, and no credit has been given, he may upon the refusal or failure of the buyer to pay, sue at once for the price.[7] If, however, credit has been given the action cannot be maintained until the credit period has expired,[8] although it may be brought at once if the credit itself was procured by fraud.[9] Where, however, the contract, irrespective of the credit, is procured by the fraud of the buyer, the prevailing rule is that the buyer, if he elects to waive the fraud, cannot sue for the price before the expiration of the credit period.[10] Likewise, where a note has been given for the price, an action for the price does not lie before the maturity of the note.[11] In case, however, the buyer,

5. Torrey *v.* Corliss, 33 Me. 333.

6. See the titles "**Jurisdiction;**" "**Justices of the Peace.**"

7. **Mo.**—Brewington *v.* Mesker, 51 Mo. App. 348; Ozark Lumb. Co. *v.* Chicago Lumb. Co., 51 Mo. App. 555. **N. Y.**—Hobkirk *v.* Green, 26 Misc. 18, 55 N. Y. Supp. 605. **N. C.**—McRae *v.* Morrison, 35 N. C. 46.

8. **Ala.**—Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264. **Del.**—Pusey & Jones Co. *v.* Dodge, 3 Penne. 63, 49 Atl. 248. **Ill.**—Daniels *v.* Osborn, 71 Ill. 169; Kellogg *v.* Turpie, 2 Ill. App. 55. **Md.**—Phelan *v.* Crosby, 2 Gill 462. **Neb.**—Peru Plow & Imp. Co. *v.* Johnson Bros., 86 Neb. 428, 125 N. W. 595. **N. Y.**—Yale *v.* Coddington, 21 Wend. 175. **N. C.**—Gudger *v.* Fletcher, 29 N. C. 372. **Pa.**—Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327. **Vt.** Eddy *v.* Stafford, 18 Vt. 235.

[a] **Credit Conditional.** — Where, however, credit is extended upon the performance of some condition, the failure of the buyer to perform will give the seller a right to sue at once. **Conn.**—Clark *v.* Smith, 9 Conn. 379. **Ind.**—Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841. **Mich.** Wineman *v.* Walters, 53 Mich. 470, 19 N. W. 150. **Tex.**—Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

9. **U. S.**—Barrett *v.* Koella, 5 Biss. 40, 2 Fed. Cas. No. 1,048. **Ala.**—Pope *v.* Nance & Co., 1 Stew. 354, 18 Am Dec. 60. **Mass.** — Manufacturers' & Mechanics' Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83. **N. Y.**—Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 (*reversing* 33 App. Div. 311, 53 N. Y. Supp. 841); Wigand *v.* Sichel, 4 Abb. Dec. 592, 3 Keyes 120, 33 How. Pr. 174; Westcott *v.* Ainsworth, 9 Hun 53; Reid *v.* Martin, 4 Hun 590; Kayser *v.* Sichel, 34 Barb. 84 (*affirmed*, 4 Abb. Dec. 592, 3 Keyes 120); Roth *v.* Palmer, 27 Barb. 652; Eppens *v.* McGrath, 3 N. Y. Supp. 213; Talcott *v.* Rosenberg, 41 Hun 646, 4 N. Y. St. 17; White *v.* Harrison, 1 N. Y. City Ct. 482. **Okla.**—Jaffrey *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

10. **Conn.**—Bulkley *v.* Morgan, 46 Conn. 393. **Ill.**—Kellogg & Co. *v.* Turpie, 93 Ill. 265, 34 Am. Rep. 163. **Mich.**—Emerson *v.* Detroit Steel & Spring Co., 100 Mich. 127, 58 N. W. 659. **Mass.**—England *v.* Adams, 157 Mass. 449, 32 N. E. 665. **Md.**—Dellane *v.* Hull, 47 Md. 112. **N. H.**—Stewart *v.* Emerson, 52 N. H. 301. **Pa.**—Jones *v.* Brown, 167 Pa. 395, 31 Atl. 647.

Contra.—Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759. See, also, Dietz's Assignee *v.* Sutcliffe, 80 Ky. 650; Jaffrey *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

11. **U. S.**—Magner *v.* Johnston, 3 Cranch. C. C. 249, 16 Fed. Cas. No. 8,954. **Conn.**—House C. T. S. Co. *v.* Ingraham, 83 Conn. 31, 75 Atl. 80. **Ill.**—Manton *v.* Gammon, 7 Ill. App. 201. **Ia.**—Hall *v.* Hunter, 4 G. Gr. 539. **Mass.**—Hunneman *v.* Grafton, 10 Metc. 454. **Mich.**—Gibbs *v.* Blanchard, 15 Mich. 292. **Miss.**—Crawford *v.* Avery, 35 Miss. 205. **N. H.**—Dodge *v.* Waterman, 36 N. H. 186. **N. Y.**—Yale *v.* Coddington, 21 Wend. 175. **N. C.** Thompson *v.* Morris, 4 N. C. 13, 6 N. C. 248, 1 Car. Law Repos. 102.

upon credit, promises to give a note or other security for the price, but fails to perform his promise, the seller may sue immediately for the breach of the contract to give security.[12] Moreover, the contract may expressly provide that upon the buyer's failure to give the note or other security the price shall be due at once.[13] Where the contract provides for installment payments, an action for the full price cannot be maintained when there is merely a breach of the first installment payment,[14] but the seller may maintain an action to recover for any individual installment when it becomes due.[15] By agreement of the parties the price may be payable at a date certain irrespective of performance on the part of the seller, and even irrespective of the passing of title. In such a case, an action lies upon the failure of the buyer to pay at the time stipulated.[16] In jurisdictions where, upon full performance by the seller, an action for the price may be maintained in case of the buyer's breach of an executory contract,[17] the seller may bring his action at once upon the buyer's repudiation.[18]

12. Ill.—Manton *v.* Gammon, 7 Ill. App. 201. **Ind.**—Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79; Hays *v.* Weatherman, 14 Ind. 341. **Mass.**—Hunneman *v.* Grafton, 10 Metc. 454. **Mo.** Campbell *v.* Buller, 32 Mo. App. 646. **N. Y.**—Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; O'Beirne *v.* Greenberg, 86 Misc. 49, 148 N. Y. Supp. 85; Hanna *v.* Mills, 21 Wend. 90, 34 Am. Dec. 216; Yale *v.* Coddington, 21 Wend. 175. **N. C.**—Thompson *v.* Morris, 4 N. C. 13, 6 N. C. 248, 1 Car. Law Repos. 102. **Ohio.**—Stephenson *v.* Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620. **Ore.**—Wheeler *v.* Harrah, 14 Ore. 325, 12 Pac. 500. **Pa.**—Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327; Rinehart *v.* Olwine, 5 Watts & S. 157. **Tex.**—Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284. **Vt.**—Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120; Rice *v.* Andrews, 32 Vt. 691; Eddy *v.* Stafford, 18 Vt. 235. **Eng.** Marshall *v.* Poole, 13 East 97, 104 Eng. Reprint 304; Lee *v.* Risdon, 7 Taunt. 188, 2 Marsh. 495, 2 E. C. L. 320, 129 Eng. Reprint 76.

[a] **Action for Price.**—In Loring *v.* Gurney, 5 Pick. (Mass.) 15, it is held that a promissory note payable on demand, with interest after a limited term, will support an action brought before the expiration of that term, consequently, in the case of goods sold and delivered, to be paid for by such a promissory note, if the vendee neglects or refuses to give the note, the vendor may forthwith bring indebtitatus assumpsit. "The payment is to be immediate, though in a particular manner. If the purchaser fail to make his payment in the manner stipulated, we can see no reason," says the court, "why the vendors should not maintain an action for goods sold and delivered upon an implied assumpsit." See, also, Rice *v.* McLarren, 42 Me. 157, 165; Rice *v.* Andrews, 32 Vt. 691.

13. Mo.—Campbell *v.* Buller, 32 Mo. App. 646. **Ore.**—Wheeler *v.* Harrah, 14 Ore. 325, 12 Pac. 500. **Tex.**—Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284. **Vt.**—Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120; Rice *v.* Andrews, 32 Vt. 691.

14. Hunt *v.* Markle, 12 Ind. App. 335, 40 N. E. 151.

15. Glenn *v.* Miller, 18 Ky. L. Rep. 1022, 38 S. W. 1086; Barnes *v.* Leidigh, 46 Ore. 43, 79 Pac. 51.

16. White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

17. See *supra*, II, A, 4, b, (II).

18. Cal.—Hale *v.* Trout, 35 Cal. 229. **Mich.**—Jenness *v.* Shaw, 35 Mich. 20. **Minn.**—Robson *v.* Bohn, 27 Minn. 333, 7 N. W. 357. **N. Y.**—Daly *v.* Lowenstein, 129 N. Y. Supp. 25. **N. D.**—Hart-Parr Co. *v.* Finley, 31 N. D. 130, 153 N. W. 137, Ann. Cas. 1917E, 706, L. R. A. 1915E, 851. **Pa.**—Hocking *v.* Hamilton, 158 Pa. 107, 27 Atl. 836. **Vt.** Tyson *v.* Doe, 15 Vt. 571. **Wis.** Haueter *v.* Marty, 156 Wis. 208, 145 N. W. 775. **Can.**—McFarlane *v.* McLean, 43 Nova Scotia 304.

e. *Parties.* — **(I.) Plaintiffs.** — At common law, the well settled doctrine that an action on a contract, whether express or implied, or whether by parol or under seal, must be brought in the name of the party in whom the legal interest in such contract is vested, applies to an action for the price of goods.[19] The codes, however, have changed this common law rule by providing that an action must be brought by the real party in interest.[20] An assignee of an account for goods sold has been held a real party in interest, and, as such, may bring action.[21] Ordinarily, the proper party plaintiff is the owner of the goods who in his own name and on his own responsibility makes the sale.[22] An agent or bailee when authorized may, however, sell and bring action in his own name.[23] Thus, an auctioneer may maintain an action in his own name against the buyer where the goods were sold in the course of the former's employment,[24] and, under the codes, an auctioneer or factor who in his own name sells for another, is the "trustee of an express trust," and as such may sue.[25] Where, however, an agent for the sale of goods sells them in his own name without disclosing his principal, the latter may sue for the price.[26]

(II.) Defendants. — Ordinarily, an action for the price is brought only against the person to whom the sale was understood by the seller to be made.[27] Where, however, one buys for a person or corporation

19. Heald *v.* Warren, 22 Vt. 409. See 11 STANDARD PROC. 958; 20 STANDARD PROC. 896.

[a] **Where there are two persons connected with the sale** of goods, one having a legal interest in the property and the other having only an equitable interest, the right of action, at law, to recover the price is in the former. Heald *v.* Warren, 22 Vt. 409.

20. See 11 STANDARD PROC. 962; 20 STANDARD PROC. 897.

21. Idaho.—Brumback *v.* Oldham, 1 Idaho 709. **Ind.**—Garrison *v.* Clark, 11 Ind. 369. **Mo.**—Buffington *v.* Southern Missouri Land Co., 25 Mo. App. 492, plaintiff having assigned his claim to a third person is no longer the real party in interest.

See 20 STANDARD PROC. 899, 908; 3 STANDARD PROC. 111.

22. Peirce *v.* Closterhouse, 96 Mich. 124, 55 N. W. 663.

[a] **Joint Owners.** — Where the property is owned jointly, the action should be brought in the name of the several owners. Goodspeed *v.* Wasatch Silver Lead Works, 2 Utah 263. See 11 STANDARD PROC. 965, 969. By mutual agreement, however, jointly owned property may be sold independently by the several owners, and, in such a case, the seller may sue alone. Williams *v.* Haskins' Est., 66 Vt. 378, 29 Atl. 371.

[b] **The actual seller** of the goods may sue for the price although he signed another's name to the memorandum of sale. Morrison *v.* Bartholomew, 9 Colo. App. 27, 47 Pac. 410.

[c] **In case of a written contract,** followed by a mutual oral agreement that another should be substituted for the prospective seller, such substituted person may, upon due performance, sue for the price although the written contract had not been formally assigned to him by the original contractor. Plunger Elevator Co. *v.* Day, 184 Mass. 130, 68 N. E. 16.

23. Harris *v.* Johnston, 3 Cranch. (U. S.) 311, 2 L. ed. 450. See 20 STANDARD PROC. 908, and the title "**Principal and Agent.**"

24. Williams *v.* Millington, 1 H. Bl. 81, 126 Eng. Reprint 49.

25. Albany & R. Iron & Steel Co. *v.* Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. ed. 982; Dupre *v.* Rein, 56 How. Pr. (N. Y.) 228. See 20 STANDARD PROC. 909.

26. Squires *v.* Barber, 37 Vt. 558. See, also, Edwards *v.* Golding, 20 Vt. 30, holding that the principal is not estopped from bringing suit by the fact that he executed a bill of sale of the goods in the name of the agent.

27. Thayer *v.* Gallup, 13 Wis. 539; Shaw *v.* Hislop, 4 Dowl. & R. (Eng.) 241, 16 E. C. L. 198.

later discovered to have no existence, the action may be brought against the actual purchaser,[28] and an undisclosed principal may also be sued for goods bought by his agent.[29] Where goods are delivered to one on the credit or request of another, the action lies against the latter,[30] but an action against one person for goods sold and delivered, and against another on his promise to pay for the same, cannot be joined.[31]

f. *Pleadings.* — **(I.) Declaration, Complaint or Petition.** — (A.) GENERALLY. As a rule, where the plaintiff alleges, in substance, a contract of sale of specified goods for an agreed price or for their value, due performance on his part, and non-payment and indebtedness on the part of the defendant, it is sufficient on general demurrer.[32] When the

Parties defendant in actions on contract generally, see 20 STANDARD PROC. 972.

[a] **Where one duly authorized buys goods** for another who receives the same, the latter may be sued for the price even though he has paid the former. Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

[b] **Where one person purchases goods, and another is afterwards permitted to share in the venture,** the seller cannot recover against such other person for the price. Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617; Young *v.* Hunter, 4 Taunt. 582, 128 Eng. Reprint 458.

28. Montgomery *v.* Forbes, 148 Mass. 249, 19 N. E. 342.

29. Bacon *v.* Sondley, 3 Strob. (S. C.) 542, 51 Am. Dec. 646. See generally the title **"Principal and Agent."**

30. **Me.**—Fuller *v.* Miller, 57 Me. 168. **Pa.**—Bickham *v.* Irwin, 3 Yeates 66. **Wis.**—Thayer *v.* Gallup, 13 Wis. 539.

[a] **Delivery to Third Person.** — Where a sale of goods is made on the order and credit of one person, and the goods are delivered to another for his own use, the presumption is that the credit of such third person was accepted as payment, and in the absence of evidence to overcome this presumption the vendee is not liable for the purchase price. Parker *v.* Joslin Dry Goods Co., 52 Colo. 238, 120 Pac. 1042, Ann. Cas. 1913D, 633.

[b] **Guarantor.**—Where B merely guarantees payment by A, only a special action will lie against the guarantor. Mines *v.* Sculthorpe, 2 Camp. (Eng.) 215. See the title **"Guaranty."**

31. Sanders *v.* Clason, 13 Minn. 379.

32. See *infra,* this note.

[a] **For sufficiency,** in general, of plaintiff's declaration, see the following cases: **Cal.**—Malter *v.* Cutting Fruit Packing Co., 134 Cal. xix, 66 Pac. 582; Abadie *v.* Carrillo, 32 Cal. 172. **Colo.**—Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314. **Ill.**—Read *v.* Walker, 52 Ill. 333. **Ind. Ter.**—Tynon *v.* Crowell, 3 Ind. Ter. 346, 58 S. W. 565. **Ind.**—Jones *v.* Cook, 35 Ind. 175; Crosby *v.* Tichenor, 6 Blackf. 418; Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815. **Mo.**—Miller *v.* Duff, 34 Mo., 167. **Mont.**—S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135. **Neb.**—Allen *v.* Rushfort, 72 Neb. 907, 101 N. W. 1028; Tessier *v.* Reed, 17 Neb. 105, 22 N. W. 225; Stubendorf *v.* Sonnenschein, 11 Neb. 235, 9 N. W. 91. **N. J.**—Hill *v.* Hill, 1 N. J. L. 261, 1 Am. Dec. 206. **N. Y.**—Smith *v.* Ferguson, 33 App. Div. 561, 53 N. Y. Supp. 1097; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32; Phillips *v.* Bartlett, 9 Bosw. 678. **Pa.**—Kamber *v.* Becker, 27 Pa. Super. 266; Steelton Planing Mills Co. *v.* Kunkel, 20 Pa. Super. 72. **S. C.**—Gillespie *v.* Page, 87 S. C. 82, 68 S. E. 1044; McDaniel *v.* Monroe, 63 S. C. 307, 41 S. E. 456. **Tex.**—Guthrie *v.* Mann (Tex. Civ. App.), 35 S. W. 710. **Wash.**—Horr *v.* Powe, 18 Wash. 536, 52 Pac. 235.

[a] **Special Demurrer.** — Where the pleadings are contradictory, as that the goods were sold for a stipulated price, and that the defendant promised to pay what the goods were reasonably worth, alleging the worth the same as the price, they are bad on special demurrer. Gist *v.* Cicot, 4 Blackf. (Ind.) 126.

[b] **Insufficient Complaint.—A**

action is brought for goods sold and delivered, both the sale and the delivery must be alleged,[33] and, generally, under that form of action, it is sufficient to allege that the defendant is indebted to plaintiff in a certain sum (price or value) for goods sold and delivered to him at his request,[34] and that the defendant has not paid.[35]

(B.) PARTICULAR ALLEGATIONS. — (1.) *The Contract.* — In assumpsit on a verbal contract for the sale and delivery of goods, only so much of the contract need be alleged as shows plaintiff's right to recover, and this may be stated according to its legal effect;[36] and in connection with the use of the common counts, a bill of particulars may be filed for desired additional allegations.[37] In some jurisdictions, a declaration upon "an account annexed" is permissible practice,[38] it being

complaint that "On the —— day of —— plaintiffs sold and delivered to defendant 4000 lbs. of flour, and the same was worth $212.00," is insufficient. No breach of contract is alleged. It fails to show that the time of payment has arrived, since it may have been sold on credit. Bowen *v.* Emmerson, 3 Ore. 452.

[c] **Forms.**—For various forms of a complaint in an action for the price, see **Colo.**—Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209. **Kan.**—Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445. **Mo.**—Suddarth *v.* Empire Lime Co., 79 Mo. App. 585. **Neb.**—Cockrell *v.* Wood, 51 Neb. 269, 70 N. W. 944, also 9 STANDARD PROC. 1104, and cross references there found.

33. **Cal.**—Philip *v.* Durkee, 108 Cal. 300, 41 Pac. 407. **Ind.**—Brickey *v.* Irwin, 122 Ind. 51, 23 N. E. 694; Niagara Oil Co. *v.* McBee, 45 Ind. App. 576, 91 N. E. 250; Drudge *v.* Leiter, 18 Ind. App. 694, 49 N. E. 34, 63 Am. St. Rep. 359. **Ky.**—Blish Mill. Co. *v.* Detherage, 155 Ky. 319, 159 S. W. 816. **Mont.**—Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492. **Tex.**—Love *v.* Doak, 5 Tex. 343. **Utah**—Kilpatrick-Koch Dry Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629. **Eng.**—Stapleton *v.* Shelburne, 1 Bro. P. C. 215, 1 Eng. Reprint 523.

34. See *infra.* this note.

[a] **At His Request.**—(1) It is the common practice to include the allegation "at his request." See **Cal.**—Abadie *v.* Carrillo, 32 Cal. 172; Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64. **Ky.**—Drake's Admr. *v.* Semonin, 5 Ky. L. Rep. 183. **N. Y.**—Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32. (2) It has even been held an essential. See McEwen *v.* Morey, 60 Ill. 32. (3) In Acome *v.* American Mineral Co., 11 How. Pr. (N. Y.) 24, it is said, however, to be unnecessary in a count for goods sold and delivered. (4) See, also, Victors *v.* Davis, 1 Dowl. & L. (Eng.) 984. Where, however, goods are delivered to a third person, there should be an allegation that they are so delivered at the request of the defendant. See Fry *v.* Colborn, 17 Ind. App. 96, 46 N. E. 351; Smith *v.* Leland, 2 Duer (N. Y.) 497.

35. **Cal.**—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172. **Ind.**—Curran *v.* Curran, 40 Ind. 473; Kerstetter *v.* Raymond, 10 Ind. 199. **Kan.**—Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476. **N. Y.**—Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32; Salisbury *v.* Stinson, 10 Hun 242.

36. **Ala.**—Adams *v.* Davis, 16 Ala. 748. **Cal.**—Magee *v.* Kast, 49 Cal. 141. **Ind.**—Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815 (on quantum meruit); Fry *v.* Colborn, 17 Ind. App. 96, 46 N. E. 351. **Mich.**—Richards *v.* Burroughs, 62 Mich. 117, 28 N. W. 755.

See 11 STANDARD PROC. 992.

How contract is alleged generally, see 11 STANDARD PROC. 981, *et seq.*

37. Cummings *v.* Gleason, 72 Conn. 587, 45 Atl. 353, a demand note of defendant to plaintiff in consideration of the goods sold. See generally the title "**Bills of Particulars.**"

38. **Me.**—Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630; Bennett *v.* Davis, 62 Me. 544; Gray *v.* Farmer, 55 Me. 487. **Mass.**—Turner *v.* Langdon, 112 Mass. 265; Rider *v.* Robbins, 13 Mass. 284; Stearns *v.* Washburn, 7 Gray 187. Hull *v.* Richardson, 4 Gray 598. **N. H.** Gordon *v.* Norris, 49 N. H. 376, 381;

held, in connection with such a count, that by usage and understanding the words "sold and delivered," though omitted, are to be implied,[39] the account annexed being allowed to supply the want of proper allegations in the body of the declaration,[40] since, for this purpose, it becomes a part of the declaration.[41] Where, however, the account annexed fails to identify the goods, the deficiency cannot be supplied by reference to a paper not attached.[42] Where the case is within the statute of frauds the rules of pleading elsewhere discussed must be followed.[43] A written contract may be alleged as are other written contracts.[44]

(2.) *Time of Sale.* — The time of the sale when material should be stated.[45] Where goods are sold and the delivery is at divers times between specified dates, the declaration need not allege that the transaction occurred on a single specified date.[46]

(3.) *Place of Sale.* — The place where the goods were sold when not material need not be alleged.[47]

(4.) *Parties to Sale.* — In an action for the price, the declaration should allege who sold the goods,[48] although in a sale by joint plaintiffs

Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

See also the statutes.

Action account generally, see the title "**Account and Accounting.**"

39. **Ky.**—Thruston's Admx. *v.* Oldham, 6 Bush 16. **Me.**—Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630. **N. H.**—Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395, 406.

Contra, Love *v.* Doak, 5 Tex. 343.

40. Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395, 406.

41. Bennett *v* Davis, 62 Me. 544.

42. Bennett *v.* Davis, 62 Me. 544; May & Co. *v.* Pollard, 28 Tex. 677.

[a] **Insufficient Allegation.**—In the case of Bennett *v.* Davis, 62 Me. 544, the court, where the account annexed was in the following form: "George Davis to Andrew Bennett, Dr. To groceries as per bill of particulars rendered, $28.52," said: "As each item is, or may be, a separate contract of itself, no proof in regard to such contract is admissible, unless the contract relied upon is alleged in the declaration. The bill annexed in this case shows that different items are relied upon, but does not state what they are. It is clear that the plaintiff cannot sustain his action."

43. See the title "**Frauds, Statute of,**" and the following: **Neb.**—Powder River L. S. Co. *v.* Lamb, 38 Neb. 339, 56 N. W. 1019. **N. Y.**—Day *v.* New York Cent. R. Co., 51 N. Y. 583, 590. **Wash.**—Shelton *v.* Conant, 10 Wash. 193, 38 Pac. 1013. **Wis.**—Winslow *v.* Bradley, 15 Wis. 394.

44. See 6 STANDARD PROC. 697; 8 STANDARD PROC. 793; 11 STANDARD PROC. 984, 992.

45. Holgate *v.* Broome, 8 Minn. 243. See 4 STANDARD PROC. 841, *et seq.*

[a] **If the goods have been delivered** and the price be due before bringing the action, the time of sale as alleged in the declaration is not material. McLaughlin *v.* Turner, 1 Cranch C. C. 476, 16 Fed. Cas. No. 8,875.

46. Read *v.* Walker, 52 Ill. 333.

[a] **Running Account.** — Deliveries upon a running account may be considered as constituting but one transaction and one cause of action. Secor *v.* Sturgis, 16 N. Y. 548.

47. Behlow *v.* Shorb, 91 Cal. 141, 27 Pac. 546. See 4 STANDARD PROC. 844; 6 STANDARD PROC. 674.

48. **Cal.**—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172. **Mont.**—S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135. **N. Y.**—Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32. Meyer *v.* Fiegel, 34 How. Pr. 434, 7 Robt. 122.

[a] **Common Law Requirement.**—Where, in a code state, the common law formula in indebitatus assumpsit is permissible, the complaint must allege that the goods were sold by the plaintiff. A defect in this particular was fatal at common law. Chitty Pl., note C, 16th Am. Ed.; Fenton *v.* Ellis, 6 Taunt. 192, 1 E. C. L. 572, 128 Eng.

it is not necessary to allege that they were partners.[49] There should, also, be an allegation to whom the goods were sold.[50] Where delivery is made to a third person at the request of the purchaser, the complaint should so allege.[51]

(5.) *Description of Goods.* — The pleadings must designate the articles sold,[52] but the description may be brief and expressed in general terms.[53] The articles need not be particularized in the declaration, and if greater certainty is needed, they may, according to the local practice, be described in a bill of particulars,[54] an annexed schedule or exhibit,[55] or an account annexed.[56]

(6.) *Price or Value.* — The price or value of the goods must be stated.[57]

Reprint 1008. The complaint must, at least, be sufficient at common law. Pioneer Fuel Co. *v.* Hager, 57 Minn. 76, 58 N. W. 828, 47 Am. St. Rep. 574.

49. Phillips *v.* Bartlett, 9 Bosw. (N. Y.) 678.

50. Cal.—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172; Mershon *v.* Randall, 4 Cal. 324. **Ill.**—Burnham *v.* Roberts, 70 Ill. 19. **Ky.**—Vincent *v.* Callihan & Sons, 8 Ky. L. Rep. 964. **N. Y.**—Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32. **Ore.**—Duzan *v.* Meserve, 24 Ore. 523, 34 Pac. 548.

[a] **An averment that goods were sold and delivered to the defendant and others** at defendant's request is sufficient, it not being necessary to state who the others were. Hubbard *v.* Beckwith, 1 Bibb (Ky.) 492.

51. Rend *v.* Boord, 75 Ind. 307 (delivery to agent of defendant); Smith *v.* Leland, 2 Duer (N. Y.) 497. But see Thayer *v.* Cable, 19 App. Div. 558, 46 N. Y. Supp. 850, holding that the complaint may allege that, in such a case, the goods were delivered to the purchaser.

[a] **Necessaries Delivered to Wife.** In an action against a husband for necessaries furnished to his wife, an allegation of sale and delivery to the husband is sustained by proof of furnishing the necessaries in question to the wife. Simons, Jacobs & Co. *v.* Scott, 53 Cal. 74. See 11 STANDARD PROC. 780.

52. Del.—O'Hara *v.* Reed, 1 Penne. 138, 39 Atl. 776. **Neb.**—Johnson *v.* Ellis, 17 Neb. 608, 24 N. W. 214. **Pa.** Altoona Concrete Constr. & S. Co. *v.* Knickerbocker Contracting Co., 29 Pa. Super. 512.

[a] **Account Stated.**—When the action is on an account stated, plaintiff need not describe the goods. Collins *v.* McCrummen, 3 Mart. (N. S.) (La.) 166. See generally the title "**Account and Accounting.**"

53. Cal.—Cochran *v.* Goodman, 3 Cal. 244. **Ind.**—Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848. **Ky.**—Snodgrass *v.* Broadwell, 2 Litt. 353. **Mass.**—Rider *v.* Robbins, 13 Mass. 284; Kinder *v.* Shaw, 2 Mass. 398, note. **N. Y.**—Logan *v.* Berkshire Apartment Association, 18 N. Y. Supp. 164.

54. See Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815.

55. Rider *v.* Robbins, 13 Mass. 284; Kinder *v.* Shaw, 2 Mass. 398, note. See generally the title "**Exhibits.**"

56. Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630.

57. Ind.—Divine *v.* State, 4 Ind. 240. **Me.**—Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630, holding that a gross price for different articles may be sufficient. **Minn.**—Holgate *v.* Broome, 8 Minn. 243. **Mo.**—Jesse French Piano & O. Co. *v.* Wallace, 84 Mo. App. 378, holding that the omission of the dollar sign failed to show a price. **Neb.**—Bowen *v.* School Dist. No. 3, 10 Neb. 265, 4 N. W. 981. **N. Y.**—Macksoud *v.* Dildarian, 93 N. Y. Supp. 382; Gregory *v.* Wright, 11 Abb. Pr. 417. **Eng.**—Laing *v.* Fidgeon, 6 Taunt. 108, 4 Camp. 169, 1 E. C. L. 531, 128 Eng. Reprint 974.

[a] **Indebitatus Assumpsit.**—Under the indebitatus assumpsit form of action, or action analogous thereto, the price is alleged in the indebitatus clause, namely "That whereas the defendant was indebted to the plaintiff in $——, for, etc., and the defendant, in consideration thereof promised the

(7.) *Promise To Pay.* — In actions for the price or value of goods, it is customary to allege that the defendant promised to pay the same,[58] and in some jurisdictions an express promise, if made by the defendant, must be alleged.[59] It is generally held, however, and particularly in connection with pleading under the codes, that the implied promise to pay from the allegations of the sale and the indebtedness of the buyer makes an express allegation of the promise unnecessary. It is a conclusion of law which need not be pleaded.[60] In every case, however, it is necessary, of course, either to allege a promise or to set out sufficient facts from which a promise may be implied.[61]

(8.) *Performance by Plaintiff.* — In an action for the price or value, the allegations must show due performance on the part of the seller. Thus, where the action is based upon the delivery of the goods, as in goods sold and delivered, delivery is essential and must be averred.[62]

plaintiff to pay him the said sum of money on request,'' etc., followed by the common counts. See **Cal.**—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172. **Ind.**—Johnson *v.* Kilgore, 39 Ind. 147. **Minn.**—Solomon *v.* Vinson, 31 Minn. 205, 17 N. W. 340. This last case holds that such an allegation is not a mere conclusion of law, and permissible under the code practice.

[b] **Complaint for Reasonable Value.** In Livingston *v.* Wagner, 23 Nev. 53, 42 Pac. 290, a complaint is given of which the court says, ''The complaint states a good cause of action to recover the reasonable value of goods sold and delivered to the defendant at his especial instance and request, independently of the allegation of an agreed price. This allegation cuts no figure in the case except to prevent a recovery for any greater sum than the price alleged.''

58. For example, after alleging the sale and describing the goods, ''for the price (or value) of —— dollars which the defendant then promised to pay,'' etc. If credit was given, it is customary to allege the time of payment. Frequently, in practice, an allegation of a promise to pay (in absence of credit) ''within a reasonable time'' is made. This, doubtless is unnecessary, since, if no credit be given, the law presumes a cash payment. The indebitatus assumpsit form of action at common law contains an allegation of an express promise to pay. See preceding note.

59. Higgins *v.* Germaine, 1 Mont. 230.

[a] **Express Contract.**—In an action on an express contract, no allegation of defendant's promise to pay is necessary, but otherwise if the action is brought on a constructive contract. Keyes *v.* Binkert, 48 Ill. App. 259.

60. **Cal.**—Abadie *v.* Carrillo, 32 Cal. 172; Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64. **Mont.**—Higgins *v.* Germaine, 1 Mont. 230. **N. Y.**—Farron *v.* Sherwood, 17 N. Y. 227; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32; Glenny *v.* Hitchins, 4 How. Pr. 98, 2 Code Rep. 56.

[a] **If there is no express promise to pay,** the value must be stated and a promise will then be implied. Holgate *v.* Broome, 8 Minn. 243.

61. **Ala.**—Kelly *v.* Burke, 132 Ala. 235, 31 So. 512. **Ind.**—See Bouslog *v.* Garrett, 39 Ind. 338. **Minn.**—Foerster *v.* Kirkpatrick, 2 Minn. 210. **Neb.**—Bowen *v.* School Dist. No. 3, 10 Neb. 265, 4 N. W. 981. **N. Y.**—McCarthy *v.* Fitzgerald, 139 N. Y. Supp. 950. **Utah** Kilpatrick-Koch Dry Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

62. **Cal.**—Philip *v.* Durkee, 108 Cal. 300, 41 Pac. 407. And see Barron *v.* Frink, 30 Cal. 486; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618. **Ill.**—Burnham *v.* Roberts, 70 Ill. 19. **Ind.**—Brickey *v.* Irwin, 122 Ind. 51, 23 N. E. 694; Drudge *v.* Leiter, 18 Ind. App. 694, 49 N. E. 34, 63 Am. St. Rep. 359. **Ky.**—Morton's Admr. *v.* Smith, 4 Mon. 313. **Mont.**—Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492. **Tex.**—Love *v.* Doak, 5 Tex. 343. **Utah**—Kilpatrick-Koch Dry Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629. **Eng.**—Stapleton *v.* Shelburne 1 Bro. P. C. 215, 1 Eng. Reprint 523.

In jurisdictions where an action for the price is permitted upon defendant's refusal to accept upon plaintiff's full readiness to perform,[63] an allegation of plaintiff's readiness to deliver and defendant's refusal to accept must be made in such a case.[64] In general, whatever conditions precedent are necessary in order to establish the seller's right to the action, the pleadings must show that they have been performed.[65] The method of alleging performance is elsewhere treated.[66] A condition subsequent need not, however, be alleged.[67]

(9.) *Anticipating Defenses.* — In an action for the price, it is not necessary to anticipate a defense.[68] This principle applies to warranties made by the seller.[69]

(10.) *Indebtedness.* — In indebitatus assumpsit there is an allegation that the defendant is indebted to the plaintiff, and in actions for the price such an averment is often used.[70] More frequently, however, and, especially under the code practice, such an averment is omitted.[71]

(11.) *Nonpayment.* — That the sum due has not been paid is a necessary allegation.[72] An allegation of a demand of the payment

[a] **Acceptance Alleged.**—Where acceptance is alleged, the complaint is not demurrable although it fails to show delivery within the time agreed. Bedel *v.* Kowalsky, 99 Cal. 236, 33 Pac. 904.

63. See *supra*, II, A, 4, b.

64. Kaufman *v.* Canary, 21 Misc. 302, 47 N. Y. Supp, 152, *affirming* 20 Misc. 726, 45 N. Y. Supp. 1143.

65. **Colo.**—Armor *v.* Fisk, 1 Colo. 148, impossible condition need not be averred. **Ga.**—Griswold *v.* Scott, 13 Ga. 210. **Miss.**—Crawford *v.* Avery, 35 Miss. 205. **N. Y.**—Hubbard *v.* Chapman, 34 App. Div. 252, 54 N. Y. Supp. 527; Moses *v.* Banker, 2 Sweeny 267. See 11 STANDARD PROC. 998.

66. See 11 STANDARD PROC. 998. 1102.

[a] **At common law,** the facts showing the performance must be alleged. If this method is followed, and the contract does not specify the time of performance, the plaintiff must allege performance within a reasonable time. Pope *v.* Terre Haute etc. Co., 107 N. Y. 61, 13 N. E. 592; Logan *v.* Berkshire Ap. Assn., 3 Misc. 296, 22 N. Y. Supp. 776.

67. Griswold *v.* Scott, 13 Ga. 210. See 11 STANDARD PROC. 1102.

68. Griswold *v.* Scott, 13 Ga. 210. (holding that where the sale, absolute in its terms, may be defeated by some subsequent act on the buyer's part, such a matter is a matter of defense which need not be pleaded by the plaintiff); Ballinger *v.* Lantier, 15 Kan. 608. See 6 STANDARD PROC. 681.

69. **Where the contract calls for goods of a certain character or quality,** it is not necessary to allege that the goods delivered were of the kind and quality warranted. Fairbanks, Morse & Co. *v.* Midvale Min. & Mfg. Co., 105 Mo. App. 644, 80 S. W. 13. See also Buckstaff *v.* Russell & Co., 151 U. S. 626, 14 Sup. Ct. 448, 38 L. ed. 292 (a machine to work to buyer's satisfaction); Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848, goods to be "first class."

70. **Cal.**—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172; Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64. **Colo.**—Wilcox *v.* Jamieson, 20 Colo. 158, 36 Pac. 902. See precedent in Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209. **Ind.**—Humphrey *v.* Fair, 79 Ind. 410; Johnson *v.* Kilgore, 39 Ind. 147. **Minn.**—Pioneer Fuel Co. *v.* Hager, 57 Minn. 76, 58 N. W. 828, 47 Am. St. Rep. 574; Solomon *v.* Vinson, 31 Minn. 205, 17 N. W. 340. **N. Y.**—Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, Seld. Notes 32.

71. See precedent in Cockrell *v.* Wood, 51 Neb. 269, 70 N. W. 944, and see the forms in 9 STANDARD PROC. 1107, *et seq.*

72. **Ind.**—Goodman *v.* Gordon, 87 Ind. 126; Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072. **Mont.**—Yancey *v.* Northern Pac. R. Co., 42 Mont. 342, 112 Pac. 533; S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135. **Neb.**—Bowen

is not necessary,[73] although it is usually inserted.[74]

(II.) Plea or Answer. — (A.) GENERALLY. — The plea or answer must conform to the general rules elsewhere treated.[75] Although, at common law, the plea "never indebted" may, in an action upon the indebitatus counts for goods sold, be set up where the goods are worthless,[76] or where they fail to comply with a condition, such as good quality,[77] or where the goods were sold on credit and the action brought before the credit period has elapsed,[78] yet, generally, under the codes, the plea of never indebted, or a general denial of indebtedness, is not sufficient, since the plea must state the facts which constitute the defendant's defense.[79] What is necessary to constitute a sufficient denial in any particular case must depend on the import of the petition;[80] and in order that an answer may be sufficient as a denial, it should controvert some material part of the averments of the petition,[81] and otherwise conform to the general rules governing de-

v. School Dist. No. 3, 10 Neb. 265, 4 N. W. 981. **N. Y.**—Lent *v.* New York & M. Ry. Co., 130 N. Y. 504, 29 N. E. 988; Fraser *v.* Staso Mills, 143 App. Div. 520, 128 N. Y. Supp. 277; Donald *v.* Gearhardt, 42 Misc. 269, 86 N. Y. Supp. 598; Tracy *v.* Tracy, 59 Hun 1, 12 N. Y. Supp. 665, 20 Civ. Proc. 98, 35 N. Y. St. 167. **Wis.**—*Compare* Rossiter *v.* Schultz, 62 Wis. 655, 22 N. W. 839, holding complaint sufficient although there was no positive allegation that the price was unpaid.

See the title "**Payment.**"

[a] **Common Counts.**—The allegation under the common counts, that defendant is indebted to plaintiff in —— dollars for goods sold and delivered to him, and that defendant has not paid, is sufficient under the code. **Cal.**—Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172. **Colo.**—Wilcox *v.* Jamieson, 20 Colo. 158, 36 Pac. 902. **Ind.**—Curran *v.* Curran, 40 Ind. 473. **Mont.**—Higgins *v.* Germaine, 1 Mont. 230. **N. Y.**—Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542.

73. Lake Ontario, A. & N. Y. R. Co. *v.* Mason, 16 N. Y. 451.

74. See *infra*, this note.

[a] **Question of Interest.**—If demand is alleged, then interest from the time of such demand may be charged. Beers *v.* Reynolds, 11 N. Y. 97.

75. See 11 STANDARD PROC., 1010. See also the titles "**Answers,**" "**Assumpsit,**" "**Confession and Avoidance,**" "**Denials,**" "**Justices of the Peace,**" "**Pleas;**" and titles dealing with particular kinds of pleas and defenses.

76. Cousins *v.* Paddon, 2 Cr., M. & R. 547, 5 L. J. Ex. 49, 5 Tyrew 535; Dawson *v.* Colls, 10 C. B. 523, 70 E. C. L. 522, 2 L. M. & P. 14, 20 L. J. C. P. 116, 138 Eng. Reprint 208.

As to plea of nil debit, see 11 STANDARD PROC. 1013.

77. Dicken *v.* Neale, 1 M. & W. (Eng.) 556.

78. Broomfield *v.* Smith, 1 M. & W. 542, 2 Gale 114, 1 Tyr. & G. 929, 5 L. J. Ex. 155.

79. **Colo.**—Moffitt-West Drug Co. *v.* Lyneman, 10 Colo. App. 249, 50 Pac. 736. **Ky.**—Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419. **Mont.**—Higgins *v.* Germaine, 1 Mont. 230. **N. Y.**—Hardenburgh *v.* Fish, 61 App. Div. 333, 70 N. Y. Supp. 415; Lamb *v.* Hirschberg, 1 Misc. 108, 20 N. Y. Supp. 678. **Wis.**—Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

[a] **Conclusion of Law.**—It is not sufficient to deny some mere conclusion of law, as to deny that the defendant is indebted. Thruston's Admx. *v.* Oldham, 6 Bush (Ky.) 16; Francis *v.* Francis, 18 B. Mon. (Ky.) 57.

80. Thruston's Admx. *v.* Oldham, 6 Bush (Ky.) 16.

81. **Ala.**—Smith *v.* Dick, 95 Ala. 311, 10 So. 845. **D. C.**—Cropley *v.* Vogeler, 2 App. Cas. 28. **Ky.**—Thruston's Admx. *v.* Oldham, 6 Bush 16. **N. Y.**—Seelay *v.* McKenzie. 92 N. Y. Supp. 350. **Pa.**—United Oil Cloth Co. *v.* Dash, 32 Pa. Super. 155; Laferty *v.* Sheriff, 2 Monag. 202, 16 Atl. 90; Armor Lith. Co. *v.* Allegheny Mach. Co., 1 Monag. 84; Jacobsohn *v.* Carey, 23 Pa. Dist. 267.

nials.[82] Where some affirmative defense is relied on, all the facts necessary to constitute a legal defense must be stated;[83] the facts upon which the buyer bases his defense must be expressly pleaded, and with certainty.[84]

(B.) In Particular Matters. — (1.) *Want or Failure of Consideration.* Want or failure of consideration, as a defense, are governed by the general rules elsewhere treated.[85]

(2.) *Illegality or Fraud.* — Fraud or illegality where dependent upon extrinsic facts, must generally be pleaded.[86] Although some cases hold that the buyer may show fraud under the general issue or general denial,[87] and also that a general plea of fraud is good,[88] yet it is the general rule that the facts constituting the fraud must be directly charged even as in a complaint or petition.[89] In other words, the

82. See the title "**Denials**" and 11 Standard Proc. 1014.

83. **U. S.**—American Electric Constr. Co. *v.* Consumers' Gas Co., 47 Fed. 43, *affirmed*, 50 Fed. 778, 1 C. C. A. 663. **D. C.**—Cropley *v.* Vogeler, 2 App. Cas. 28. **N. Y.**—Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; Hardenburgh *v.* Fish, 61 App. Div. 333, 70 N. Y. Supp. 415. **Pa.**—Williams *v.* Sawyer, 155 Pa. 129, 25 Atl. 1049; Kohn *v.* Raflo, 19 Pa. Dist. 288; Burke Electric Co. *v.* Benkert, 19 Pa. Dist. 472.

84. **U. S.**—Kenworthy *v.* Hirst, 124 Fed. 995. **Ill.**—Townsend *v.* Water Comrs, 63 Ill. 26, 14 Am. Rep. 109. **Ind.**—Bacon *v.* Markley, 46 Ind. 116. **N. Y.**—Flournoy *v.* Osgood, 99 App. Div. 270, 90 N. Y. Supp. 972. **Pa.**—Heckscher *v.* American Tube etc. Co., 137 Pa. 421, 20 Atl. 804; Kowdy *v.* Savings Fund Loan Assoc., 31 Ill. Super. 52; Fish *v.* Barr, 22 Pa. Super. 131; Hess & Co. *v.* Schwartz Sons, 20 Pa. Dist. 105.

See 11 Standard Proc. 1011.

Issues under general issue or general denial, see *infra*, II, B, 3, g, (II).

85. See 11 Standard Proc. 1021, 1024.

[a] **If defendant relies upon a whole or partial failure** of consideration, he must, in some jurisdictions, state the facts showing the failure. **Ill.**—Hough *v.* Gage, 74 Ill. 257. **Ind.**—Smith *v.* Borden, 160 Ind. 223, 66 N. E. 681; D. M. Osborne & Co. *v.* Hanlon, 158 Ind. 325, 63 N. E. 572. **Ky.**—Minor *v.* Kelly, 5 Mon. 272, defendant must show he received no benefit at all in order to bar any recovery.

[b] **No consideration** may be alleged (1) in general terms (D. M. Osborne & Co. *v.* Hanlon, 158 Ind. 325, 63 N. E. 572; Ohio Thresher & Engine Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716), or (2) under the general issue with notice of the special defense. See Keystone Mfg. Co. *v.* Forsyth, 126 Mich. 98, 85 N. W. 262, and 11 Standard Proc. 1022.

86. See the titles "**Fraud and Deceit;**" "**Illegality, How Pleaded.**"

[a] **Illegality.**—See **Idaho.**—Miller *v.* Donovan, 11 Idaho 545, 83 Pac. 608. **Mass.**—Bradford *v.* Tinkham, 6 Gray 494; Granger *v.* Ilsley, 2 Gray 521. **Minn.** Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 94, sale on Sunday. **Mo.**—Dwyer Brick Works *v.* Flanagan Bros., 87 Mo. App. 340. **Pa.**—Horan *v.* Weiler, 41 Pa. 470.

Fraud as counterclaim, see *infra*, II, B, 3, f, (IV).

87. **D. C.**—Bell *v.* Sheridan, 10 Mackey 370. **Ind.**—Connersville *v.* Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214. **Miss.**—Simmons *v.* Cutreer, 12 Smed. & M. 584.

88. Elliott *v.* Coggshall, 4 Blackf. (Ind.) 238, 29 Am. Dec. 365. See 11 Standard Proc. 1027, 1028.

[a] **In Connection With Common Counts.**—Although it is the common law rule that fraud must be specially pleaded, yet a general form of pleading has been recognized. Thus a general plea of fraud, namely, "That the defendant was induced to enter into and to make the said agreement by the fraud of the plaintiff," is good in connection with the common counts. See Lawton *v.* Elmore, 27 L. J. Ex. 141; The Deposit and General Life Assur. Co. *v.* Ayscough, 6 El. & Bl. 761, 88 E. C. L. 761, 119 Eng. Reprint 1048.

89. See 11 Standard Proc. 1027 and

plea or answer must allege what the false representations were,[90] that they were made with intent to deceive the buyer,[91] that the buyer relied upon them,[92] and that he suffered a loss thereby.[93]

(3.) *Breach of Contract by Plaintiff.*[94] — A breach by the plaintiff of the contract of sale may be urged in the manner elsewhere shown.[95] If the defendant sets up a breach of warranty, the same particularity of allegations is necessary in a plea as in an original action for the breach.[96] A plea based upon defects in the quality and condition of goods,[97] or that they were not fit for the purpose as specified by the contract,[98] should set out the facts wherein such defects or lack of fitness consisted.

(4.) *Rescission, Modification, Dissolution, etc.* — Defenses of modification, novation, dissolution, discharge, rescission, or waiver must ordinarily be pleaded,[99] a defendant who relies on the rescission of a sale must plead the same,[1] and allege a return of the goods, or an offer to return them.[2] This rule applies in case the defendant pleads failure

Ala.—Thomas *v.* Thomas, 146 Ala. 533, 41 So. 141. **Cal.**—Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. **Mo.**—Fairbanks, Morse & Co. *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113.

90. **Ala.**—Thomas *v.* Irvine, 171 Ala. 332, 55 So. 109; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59. **Ariz.**—History Co. *v.* Dougherty, 3 Ariz. 387, 29 Pac. 649. **Ark.**—Hynson *v.* Dunn, 5 Ark. 395, 41 Am. Dec. 100. **Fla.**—Jones *v.* Streeter, 8 Fla. 83. **Ind.**—Patterson *v.* Lord, 47 Ind. 203; Keller *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355. **Mont.**—Budd *v.* Power, 8 Mont. 380, 20 Pac. 820. **N. Y.**—Hunt *v.* Mails, 1 Code Rep. 118. **Tex.**—Riley *v.* Treanor (Tex. Civ. App.), 25 S. W. 1054; Morgan *v.* Vandermark, 1 White & W. Civ. Cas. § 511.

See the title "**Fraud and Deceit.**"

91. Lefler *v.* Field, 52 N. Y. 621.

92. **Ala.**—Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019. **Ind.**—Jones *v.* Frost, 51 Ind. 69. **Minn.** Loveland *v.* Gravel, 95 Minn. 135, 103 N. W. 721. **N. Y.**—Star Steamship Co. *v.* Mitchell, 1 Abb. Pr. (N. S.) 396. **Tex.**—Morgan *v.* Vandermark, 1 White & W. Civ. Cas. § 511.

93. Parker *v.* Jewett, 52 Minn. 514, 55 N. W. 56.

94. **By way of counter-claim or recoupment,** see *infra,* II, B, 3, f, (IV).

95. See 11 STANDARD PROC. 1017.

96. See *infra,* III, B, 5, b. (IV), (C).

97. **Ala.**—Penn *v.* Smith, 93 Ala. 476, 9 So. 609. **Fla.**—Jones *v.* Streeter, 8 Fla. 83. **Ga.**—Spinks *v.* Washington, 96 Ga. 756, 22 S. E. 326. **Ill.**—Hough *v.* Gage, 74 Ill. 257. **Ind.**—Aermotor Co. *v.* Earl, 18 Ind. App. 181, 47 N. E. 685. **Ky.**—Vogel *v.* Moore, 27 Ky. L. Rep. 94, 84 S. W. 557. **N. Y.**—Castles *v.* Woodhouse, 1 Code Rep. 71. **Pa.**—Vollmer *v.* Magowan, 180 Pa. 110, 36 Atl. 571; Ogden *v.* Beatty, 137 Pa. 197, 20 Atl. 620, 21 Am. St. Rep. 862; Fuhrman *v.* Stackman, 28 Pa. Super. 154; Genesee Paper Co. *v.* Bogert, 23 Pa. Super. 23; Wile & Brickner Co. *v.* Onsel, 10 Pa. Co. Ct. 659. **Tex.**—Barnard *v.* Robertson (Tex. Civ. App.), 29 S. W. 697; A. J. Anderson Electric Co. *v.* Cleburne Water & Light Co. (Tex. Civ. App.), 27 S. W. 504; Wood *v.* Ross, (Tex. Civ. App.), 26 S. W. 148.

98. Misner *v.* Granger, 9 Ill. 69; Connersville *v.* Wadleigh, 6 Blackf. 297; Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312. See, also, III, A, 3, e; III, B, 5, b.

99. See 11 STANDARD PROC. 1012, 1032, and Wallace *v.* Blake, 128 N. Y. 676, 28 N. E. 603, 3 Silv. Ct. App. 576.

1. **Neb.**—McCormick *v.* Barry, 10 Neb. 207, 4 N. W. 1014; Sloan Commission Co. *v.* Henry A. Fry & Co., 4 Neb. (Unof.) 647, 95 N. W. 862. **N. Y.**—Haas *v.* Selig, 26 Misc. 191, 55 N. Y. Supp. 439, *affirming* 27 Misc. 504, 58 N. Y. Supp. 328. **Ore.**—Steiger *v.* Fronhofer, 43 Ore. 178, 72 Pac. 693. **Wash.**—Holt Mfg. Co. *v.* Odenrider, 61 Wash. 555, 112 Pac. 670.

See the title "**Rescission and Cancellation.**"

2. **Ind.**—Burns *v.* Barnes, 58 Ind. 436; Rose *v.* Hurley, 39 Ind. 77. **Ia.**—Donahue *v.* Prosser, 10 Iowa 276. **Neb.**

of consideration, providing the goods are of any value at all,[3] although in case the goods are alleged to be worthless, it is not necessary to allege either a return or an offer to return.[4]

(III.) Affidavit of Defense. — Where the practice requires an affidavit of defense, it must contain all the facts necessary to constitute a defense.[5] A general allegation of a warranty and its breach, for example, is not sufficient. The terms of the warranty should be set forth.[6]

(IV.) Recoupment, Set-off, Counterclaim. — Under the rules, or code, governing the local practice, the buyer when sued for the price, may recoup, set-off, or counterclaim his damages for the seller's breach of warranty,[7] for misrepresentation and fraud,[8] for default or delay in delivery,[9] for injury to the goods caused by the seller's fault or

Sloan Commission Co. *v.* Henry A. Fry & Co., 4 Neb. (Unof.) 647, 95 N. W. 862. **Ore.**—Steiger *v.* Fronhofer, 43 Ore. 178, 72 Pac. 693. **Pa.**—Hess & Co. *v.* Schwartz Sons, 20 Pa. Dist. 105.

3. **U. S.**—Christy *v.* Cummins, 3 McLean 386, 5 Fed. Cas. No. 2,708. **Ala.**—Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56. **Ia.**—Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369. **N. Y.**—Coplay Iron Co. *v.* Pope, 108 N. Y. 232, 15 N. E. 335. **N. C.**—Sapona Iron Co. *v.* Holt, 64 N. C. 335. **Okla.**—Barber Medicine Co. *v.* Bradley, 48 Okla. 82, 150 Pac. 127. **Pa.**—American Watch Tool Co. *v.* Reed Mfg. Co., 18 Pa. Super. Ct. 24. **S. C.**—Fewell *v.* Deane, 43 S. C. 257, 21 S. E. 1.

4. Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421; Dill *v.* O'Ferrell, 45 Ind. 268; Love *v.* Oldham, 22 Ind. 51.

5. Williams *v.* Sawyers, 155 Pa. 129, 25 Atl. 1049; Heckscher *v.* American Tube & Iron Co., 137 Pa. 421, 20 Atl. 804; Kaufman & Co. *v.* Cooper Iron Min. Co., 105 Pa. 537.

[a] **Form.**—For a form of an affidavit of defense, see Leechburg Co. *v.* Jennings Bros. & Co., 145 Pa. 559, 24 Atl. 910.

See the title **"Affidavits of Merits and Defense."**

6. Gould *v.* Gage, 118 Pa. 559, 12 Atl. 476; Kaufman & Co. *v.* Cooper Iron Min. Co., 105 Pa. 537.

[a] **An affidavit of defense is sufficient** which denies the grounds of liability averred in the statement, and those which arise by implication from the averments made. While the construction of an affidavit should be in favor of the plaintiff, and against the party making it, a defendant is under no duty to deny a liability not fairly arising from the statement. Baker *v.* Fairchild, 168 Pa. 246, 31 Atl. 1102.

7. See *infra*, III, A, 3, e; III, B, 5, b.

8. **Cal.**—Field *v.* Austin, 131 Cal. 379, 63 Pac. 692. **Ill.**—Walker *v.* Field & Co., 179 Ill. App. 3; Hoerner *v.* Giles, 53 Ill. App. 540. **Mass.**—Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108. **Mo.**—Wade *v.* Scott, 7 Mo. 509; Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484. **N. C.**—May *v.* Loomis, 140 N. C. 350, 52 S. E. 728. **Ohio.**—Timmons *v.* Dunn, 4 Ohio St. 680. **Tenn.**—Hogg *v.* Cardwell, 4 Sneed 151. **Tex.**—Suttle *v.* Hutchinson (Tex. Civ. App.), 31 S. W. 211. **Wash.**—Griffith *v.* Strand, 19 Wash. 686, 54 Pac. 613.

9. **U. S.**—Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816. **Ga.**—Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. **Ill.**—Cooke *v.* Preble, 80 Ill. 381. **Ind.** Berkey & Gray Furniture Co. *v.* Hascall, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65. **Ia.**—Bamberger Bros. *v.* Burrows, 145 Iowa 441, 124 N. W. 333. **Ky.**—Albin Co. *v.* Demorest Mfg. Co., 22 Ky. L. Rep. 245, 56 S. W. 982. **Mich.**—Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466. **Mo.**—Redlands Orange Growers' Assn. *v.* Gorman, 76 Mo. App. 184. **N. Y.**—Phillips *v.* Taylor, 101 N. Y. 639, 4 N. E. 727. **Tex.**—Saunders Exrs. *v.* Weekes (Tex. Civ. App.), 55 S. W. 33. **Can.**—Leonard & Sons *v.* Kremer, 48 Can. Sup. Ct. 518; Pictou Iron Foundry & Mfg. Co. *v.* Archibald, 30 Nova Scotia 262.

neglect between the sale and the time of delivery,[10] for failure to deliver the goods ordered,[11] or failure to deliver the quantity or quality specified,[12] or for any breach on the seller's part in the fitness and condition of the goods,[13] or for expenses in connection with the goods incurred by the buyer, directly and naturally resulting from the seller's breach.[14] Also, the buyer may counterclaim for the seller's

10. Barrow *v.* Window, 71 Ill. 214.

11. **U. S.**—Thomas China Co. *v.* C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629. **Ga.**—Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. **N. Y.**—Jones *v.* National Printing Co., 13 Daly 92.

12. **U. S.**—McNamara *v.* Home Land etc. Co., 121 Fed. 797, 58 C. C. A. 245. **Ala.**—Harralson & Co. *v.* Stein, 50 Ala. 347; Robertson *v.* Davenport, 27 Ala. 574. **Ark.**—Wilman *v.* Mizer, 60 Ark. 281, 30 S. W. 31. **Cal.**—Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288; Hills *v.* Edmund Peycke Co., 14 Cal. App. 32, 110 Pac. 1088. **Ga.**—Electric Ry. Co. of Savannah *v.* Tennessee Coal, I. & R. Co., 98 Ga. 189, 26 S. E. 741; Finney *v.* Cadwallader, 55 Ga. 75; Daniel *v.* Trice, 31 Ga. 162; Cherry *v.* Sutton, 30 Ga. 875. **Haw.**—Haskins *v.* Shillaber, 1 Hawaii 47. **Ill.**—W. H. Purcell Co. *v.* Sage, 200 Ill. 342, 65 N. E. 723 (*affirmng* 90 Ill. App. 160); Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529 (*affirming* 56 Ill. App. 248); Evans *v.* Chicago & R. I. R. Co., 26 Ill. 189; Western Coal & M. Co. *v.* Western Coal & S. Co., 191 Ill. App. 13; Beldam *v.* Lewisohn, 51 Ill. App. 47. **Me.**—Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366. **Mich.**—Thorn *v.* Morgan & Whateley Co., 135 Mich. 51, 97 N. W. 43; Gage *v.* Myers, 59 Mich. 300, 26 N. W. 522. **Mo.**—Rickey *v.* Zeppenfeldt, 64 Mo. 277. **N. H.**—Flanders *v.* Putney. 58 N. H. 358. **N. Y.** Patton *v.* Royal Baking Powder Co., 114 N. Y. 1, 20 N. E. 621 (*affirming* 45 Hun 248); Hall *v.* New Hartford Canning Co., 153 App. Div. 562, 138 N. Y. Supp. 866. **N. C.**—Hardison *v.* Dunn, 159 N. C. 579, 75 S. E. 940. **Pa.**—Fessler *v.* Love, 43 Pa. 313. **P. I.**—Kaisha *v.* Government, 7 Phil. Isl. 436. **Tenn.**—Porter *v.* Woods S. & Co., 3 Humph. 56, 39 Am. Dec. 153. **Can.**—Bauld *v.* Fraser, 37 Can. L. J. 363, 34 Nova Scotia 178; Cuddy *v.* Cameron, 16 Brit. Col. 451; Emack *v.* Woods, 39 N. Bruns. 111; Royal Bank *v.* Schaffner, 44 Nova Scotia 89.

13. **U. S.**—Meyer, Wilson & Co. *v.* Everett Pulp etc. Co., 184 Fed. 945; Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816; Miller *v.* Smith, 1 Mason 437, 17 Fed. Cas. No. 9,590. **Ga.**—De Vaughn's Son *v.* Ohio Pottery & G. Co., 12 Ga. App. 50, 76 S. E. 793. **Ill.**—Cooke *v.* Preble, 80 Ill. 381; Madsen & Co. *v.* Hogans, 189 Ill. App. 589. **Ky.**—Wallace *v.* Knoxville Woolen Mills, 117 Ky. 450, 78 S. W. 192. **La.**—Edwards *v.* Plaquemine Ice & C. S. Co., 46 La. Ann. 360, 15 So. 61. **Mass.**—Hilliard *v.* Weeks, 173 Mass. 304, 53 N. E. 818. **Mo.**—Monarch M. Weather-Strip Co. *v.* Hanick, 172 Mo. App. 680, 155 S. W. 858; National Stamping & Elec. Wks. *v.* Wicks, 144 Mo. App. 249, 128 S. W. 775. **Neb.**—Hessig-Ellis Drug Co. *v.* Harley Drug Co., 95 Neb. 267, 145 N. W. 716. **N. Y.** Stewart *v.* Bock, 1 Hilt. 122, 3 Abb. Pr. 118; McElraevy & Hauck Co. *v.* St. Joseph's Home, 143 N. Y. Supp. 235. **N. C.**—Hurst, Miller & Co. *v.* Everett, 91 N. C. 399. **Ohio.**—Upton & Co. *v.* I. J. Julian & Co., 7 Ohio St. 95. **Okla.**—Obenchain *v.* Roff, 29 Okla. 211, 116 Pac. 782; Diebold Safe & Lock Co. *v.* Holt, 4 Okla. 479, 46 Pac. 512. **Ore.**—Dean Pump Works *v.* Astoria Iron Works, 40 Ore. 83, 66 Pac. 605. **R. I.**—King & Sons *v.* Quidnick Co., 14 R. I. 131. **Tex.**—Mangum *v.* Pitts Co. (Tex. Civ. App.), 131 S. W. 1196. **Wis.**—Getty *v.* Rountree, 2 Pin. 379, 2 Chandl. 28, 54 Am. Dec. 138. **Can.** Winnipeg Fish Co. *v.* Whitman Fish Co., 41 Can. Sup. Ct. 453; Brooks-Scanlan-O'Brien Co. *v.* Red Fir Lumb. Co., 14 Brit. Col. 439.

14. **U. S.**—Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816. **Ga.**—Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811. **Ind.**—Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62. **Mich.**—Bice *v.* Walker, 131 Mich. 311, 91 N. W. 128; American Cushman Tel. Co. *v.* Noble, 98 Mich. 67, 56 N. W. 1100. **N. H.**—Tabor *v.* Harriman, 59 N. H. 226. **Tex.**—Saunders' Exrs. *v.* Weekes (Tex. Civ. App.), 55 S. W. 33.

breach of agreement as to exclusive territory for the resale of the goods.[15] The right to counterclaim separate and distinct transactions is governed by the local code or practice regulating counterclaim in general, but in some jurisdictions a counterclaim must arise out of the contract or transaction stated in the petition, or which is connected with the subject of the action.[16]

Although the buyer may have a right to rescind the contract or the sale, he may, nevertheless waive such right, and elect to set up his damages by way of counterclaim, without returning the goods,[17] and the fact that the buyer has accepted the goods does not bar his right to counterclaim his damages for the seller's fault, neglect, or breach.[18]

Matter of set-off or counterclaim must be pleaded specially,[19] in accordance with the general rules elsewhere discussed;[20] and a counterclaim must, like a complaint or a petition, allege all the facts sufficient to constitute a cause of action,[21] and allege them with sufficient definiteness and certainty.[22] For example, a counterclaim based upon fraud must allege the essential elements of fraud,[23] but need aver neither a rescission nor an offer to return the goods.[24]

(V.) Replication or Reply. — The replication or reply must conform to the general rules elsewhere treated.[25]

15. Turner *v.* Mellier, 59 Mo. 526, 529; Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938; Blauner *v.* Williams Co., 36 Misc. 173, 73 N. Y. Supp. 165, *affirming* 34 Misc. 823, 69 N. Y. Supp. 749.

16. Ill.—Higbie *v.* Rust, 112 Ill. App. 218. **Ky.**—Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24. **N. Y.**—March *v.* Hyman, 88 Misc. 65, 150 N. Y. Supp. 460; Berdell *v.* Johnson, 18 Barb. 559. **Ohio.**—Loomis, Campbell & Co. *v.* Eagle Bank, 10 Ohio St. 327. **Tenn.**—Allen *v.* McNew, 8 Humph. 46. **W. Va.**—Sterling Organ Co. *v.* House, 25 W. Va. 64.

See the title "**Set-Off, Counterclaim and Recoupment.**"

17. Ind.—Bushman *v.* Taylor, 2 Ind. App. 12, 28 N. E. 97, 50 Am. St. Rep. 228. **Kan.**—Graff *v.* D. M. Osborne & Co., 56 Kan. 162, 43 Pac. 704; Cavender *v.* Roberson, 33 Kan. 626, 7 Pac. 152. **Mich.** — Peterson *v.* Door etc. Lumb. Co., 51 Mich. 86, 16 N. W. 243. **Mo.**—Huber Mlg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484. **Okla.**—Obenchain *v.* Roff, 29 Okla. 211, 116 Pac. 782. **Vt.**—Traverse *v.* Montpelier Carriage Co., 62 Vt. 67, 19 Atl. 715.

18. Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987.

19. Denham *v.* Bryant, 139 Mass. 110, 28 N. E. 691.

20. See the title "**Set-Off, Counterclaim and Recoupment.**"

[a] **Matter of defense and counterclaim** should not be combined. New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

21. Ind.—Stoner *v.* Swift, 164 Ind. 652, 74 N. E. 248. **Mont.**—Butte Hardware Co. *v.* Knox, 28 Mont. 111, 72 Pac. 301. **N. Y.**—Weaver *v.* Bonnell, 15 Misc. 456, 37 N. Y. Supp. 212, 72 N. Y. St. 791. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Briggs *v.* Seymour, 17 Wis. 255.

[a] **A counterclaim for freight paid** on the goods must allege that the payment was made at the request of the plaintiff. Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019.

22. Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816.

23. Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019. See Herman *v.* Gray, 79 Wis. 182, 48 N. W. 113.

24. Cal.—Field *v.* Austin, 131 Cal. 379, 63 Pac. 692. **Ind.**—Hillenbrand *v.* Stockman, 123 Ind. 598, 24 N. E. 370. **Ky.**—Rogers *v.* McKnight, 4 J. J. Marsh 154; Hardwick *v.* Hardwick, 4 Bibb 569.

25. See the title "**Replication and Reply,**" and Magnuson *v.* Billings, 152 Ind. 177, 52 N. E. 803, must not be argumentative.

g. *Issues, Proof, and Variance.* — (I.) **In General.** — In actions for the price or value of goods, as in other actions, the parties will be limited in their proof to the issues presented by the pleading.[26] All essential averments to the cause of action must be proved,[27] but if the plaintiff is unable to prove the contract as specially alleged, he may, nevertheless, recover upon a quantum valebant where the averments are sufficient to maintain the same.[28]

(II.) General Issue or Denial. — While there is some conflict in the cases as to what may, or may not, be proved under the general issue, and while, also, there have been some changes in the rules applied in earlier times,[29] yet it is generally held that, under the general issue or the general denial, the buyer may show that the goods delivered were not the goods ordered,[30] or that the goods were sold on credit and that the price is not yet due.[31] It is also held that, under the general issue, or the general denial, the defendant may show that by reason of a condition attached to the sale he is not liable for the

[a] **Must Be Responsive — Ill.**— King *v.* Bradley, 44 Ill. 342. **Ind.**— Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214, no departure. **Ia.**—Toledo Sav. Bank. *v.* Rathmann, 78 Iowa 288, 43 N. W. 193.

26. **Ark.**—Roach *v.* Whitfield, 94 Ark. 448, 127 S. W. 722, 140 Am. St. Rep. 131. **Colo.**—Lozier *v.* Hannan, 12 Colo. App. 59, 54 Pac. 399. **Ia.**—Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787; Osborne & Co. *v.* Simmerson, 73 Iowa 509, 35 N. W. 615. **Mass.**—Vale *v.* Butler, 111 Mass. 55. **Mich.**—Yeiter *v.* Campau, 174 Mich. 94, 140 N. W. 479; Taylor *v.* Butters & Peters Salt & L. Co., 103 Mich. 1, 61 N. W. 5. **Miss.**—Bacot *v.* Hazlehurst Lumber Co., 23 So. 481. **Mo.**—Koenig *v.* Truscott B. Mfg. Co., 155 Mo. App. 685, 135 S. W. 514; Madison & Co. *v.* Danville Min. Co., 65 Mo. App. 564. **Mont.**—Hillman *v.* Luzon Cafe Co., 49 Mont. 180, 142 Pac. 641. **Neb.**—Maurer *v.* Midmay, 25 Neb. 575, 41 N. W. 395. **N. Y.**—Clonin *v.* Lippe, 121 App. Div. 466, 106 N. Y. Supp. 58; Doyle *v.* Beaupre, 63 Hun 624, 17 N. Y. Supp. 287, 43 N. Y. St. 741, *affirmed*, 137 N. Y. 558, 33 N. E. 337. **N. C.**—National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100. **Va.**—Davis *v.* Cole Bros., 115 Va. 501, 79 S. E. 1033. **Wash.**—Wolf Co. *v.* Northwestern Dairy Co., 55 Wash. 665, 104 Pac. 1123. **W. Va.**—Ohio River Contract Co. *v.* Smith, 76 W. Va. 503, 85 S. E. 671.

See *infra*, II, B, 3, g, (III), and the title **"Variance and Failure of Proof."**

27. **Ill.**—Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534 (*affirming* 107 Ill. App. 47); Burnham *v.* Roberts, 70 Ill. 19. **Mo.**—New York Store Merc. Co. *v.* Chapman, 78 Mo. App. 616; Robbins *v.* St. Louis etc. R. Co., 34 Mo. App. 609. **N. Y.**—Albro *v.* Figuera, 60 N. Y. 630; Lambert *v.* Seely, 2 Hilt. 429.

28. **Cal.**—Ruiz *v.* Norton, 4 Cal. 359. **Conn.**—Vanderbeek *v.* Francis, 75 Conn. 467, 53 Atl. 1015; Collins *v.* Richmond Stove Co., 63 Conn. 356, 28 Atl. 534. **Ill.**—Kerfoot *v.* Cromwell Mound Co., 115 Ill. 502, 25 N. E. 960. **La.**—Boyd *v.* Howard, 4 Mart. (N. S.) 178; Boyd *v.* Howard, 3 Mart. (N. S.) 286; Gilly *v.* Henry, 8 Mart (O. S.) 402, 13 Am. Dec. 291. **Md.**—Myers *v.* Smith, 27 Md. 43. **N. Y.**—Sherman *v.* New York Cent. R. Co., 22 Barb. 239.

29. See the title **"Denials"** and Granger *v.* Ilsley, 2 Gray (Mass.) 521.

Affirmative defenses, see *supra*, I, B, 3, e, (II), (B).

30. **Mich.**—Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533. **Mo.**—Montgomery *v.* Gann, 51 Mo. App. 187. **Mont.**—Mette & Kanne Distilling Co. *v.* Lowrey, 39 Mont. 124, 101 Pac. 966. **N. Y.**—Caffee *v.* A. R. Sax Lumb. Co., 139 App. Div. 746, 124 N. Y. Supp. 325. **Eng.**—Cousins *v.* Paddon, 2 C. M. & R. 547, 5 L. J. Exch. 49, 5 Tyrw. 535.

31. **Ill.**—Daniels *v.* Osborn, 71 Ill. 169. **Mass.**—Waterhouse *v.* Levine, 182 Mass. 407, 65 N. E. 822. **Eng.**—Bloomfield *v.* Smith, 2 Gale 114, 5 L. J.

price,[32] that the contract was cancelled, for failure to deliver as agreed, and before the goods were shipped,[33] that the plaintiff did not accept the order for the goods on the defendant's terms, and that there was no delivery,[34] that the defendant did not buy the goods but that they were given to him by the plaintiff,[35] that only a part of the goods have been delivered,[36] or that the goods were not sold to defendant but to another person.[37] On the other hand it is held that, under the general issue or the general denial, the defendant cannot show failure of title in the property,[38] that the goods were of no value,[39] or that they were not the quality ordered but of an inferior quality.[40] The defense of payment is elsewhere discussed.[41]

(III.) Variance. — Where, in an action for the price or value, there is a material variance between the plaintiff's allegations and the proof, it will be fatal to his action and he cannot recover.[42] For example, where there is a material variance between the proof and the nature and form of the action as declared,[43] or the nature and form of the

Exch. 155, 1 M. & W. 542, 1 Tyrw. & G. 929.

32. Buckels *v.* Cunningham, 6 Smed. & M. (Miss.) 358.

33. Wilson *v.* J. H. Flickinger Co., 76 App. Div. 399, 78 N. Y. Supp. 746.

34. Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 75 Pac. 528.

35. Blatz *v.* Lester, 54 Mo. App. 283.

36. Manning *v.* Winter, 7 Hun (N. Y.) 482.

37. Alpert *v.* Bright, 74 Conn. 614, 51 Atl. 521; Wiedeman *v.* Hedges, 63 Neb. 103, 88 N. W. 170.

38. Miller *v.* Donovan, 11 Idaho 545, 83 Pac. 608; Walker *v.* Mellor, 11 Q. B. 478, 63 E. C. L. 478, 2 Car. & K. 346, 17 L. J. Q. B. 103, 12 Jur. 268, 116 Eng. Reprint 556.

39. Knabe *v.* Flameless Gas Stove Co., 19 Misc. 152, 43 N. Y. Supp. 205. See *supra*, I, B, 3, e, (II), (B), (3).

40. **Mass.** — Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022. **N. Y.**—Wallace *v.* Blake, 128 N. Y. 676, 28 N. E. 603, 3 Silv. Ct. App. 576, *affirming* 26 Jones & S. 13, 8 N. Y. Supp. 862, 30 N. Y. St. 248. **Wis.**—Holendyke *v.* Newton, 50 Wis. 635, 7 N. W. 558; Crawford *v.* Earl, 38 Wis. 312.

See *supra*, II, B, 3, f, (II), (B), (3).

41. See the title "**Payment.**"

42. **Cal.**—Simpson *v.* Porter Bros. Co., 140 Cal. 667, 74 Pac. 286. **Mass.** Wilder *v.* Colby, 134 Mass. 377. **Mo.** Link *v.* Vaughn, 17 Mo. 585.

See the title "**Variance and Failure of Proof,**" and 11 STANDARD PROC. 1036.

[a] **Variance Must Mislead Defendant.**—In the case of Gaar, Scott & Co. *v.* Brundage, 89 Minn. 412, 94 N. W. 1091, the court says: "The defendant does not claim that the balance is not due to the plaintiff, but his claim, in a word, is that he owes it on account of money received for the plaintiff, as the evidence shows, and not on account of goods sold and delivered, as the complaint alleges; hence there is an entire failure of evidence to support either the allegations of the complaint, or the finding of the court that they are true. It must be conceded that there is a variance between the allegations of the complaint and the proof in that the goods were not sold to the defendant, nor did he promise to pay for them, but they were delivered to him, and a settlement made therefor, and a balance found due to the plaintiff, precisely as alleged in the complaint. The complaint fairly informed the defendant of the basis of plaintiff's claim. The defendant could not have been misled by the variance. The errors complained of are technical, not prejudicial, and will not justify a reversal of the order appealed from." Citing Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637.

43. **U. S.**—Trask *v.* Duval, 4 Wash. C. C. 97, 24 Fed. Cas. No. 14,143. **Ga.** Hobbs *v.* Gross, 94 Ga. 637, 21 S. E. 579. **Ind.**—Barrows *v.* Wampler, 24 Ind. App. 472, 56 N. E. 935. **Ia.**—Brink *v.* Chicago & N. W. Ry. Co., 23 Iowa 473. **Mass.**—Hull *v.* Richardson, 4 Gray 598. **Miss.**—Fitch *v.* Asher, 56 Miss. 571. **Mo.**—Link *v.* Vaughn, 17 Mo. 585;

contract as alleged,[44] or the designation of the parties to the contract,[45] or the description of the goods,[46] or the allegations relating to the delivery of the goods,[47] or the allegations as to the price or value of the goods,[48] it will defeat the plaintiff's action.

h. *Trial.* — (I.) Questions of Law and Fact.[49] — As in other contract actions,[50] it is a question of fact for the jury, in case of disputed evidence, whether there is a contract between the parties, and, if so, what the terms of the contract are.[51] Likewise, it is for the jury to

Phillips *v.* Mastbrook, 24 Mo. App. 129. **N. H.**—Young *v.* Woodward, 44 N. H. 250. **N. Y.**—Consolidated Car Heating Co. *v.* Kahn, 84 N. Y. Supp. 919. **Pa.**—Shaw *v.* Fleming, 174 Pa. 52, 34 Atl. 555. **Tex.**—J. I. Case Plow Works *v.* Morris, 17 Tex. Civ. App. 6, 42 S. W. 652. **Vt.**—Vail *v.* Strong, 10 Vt. 457.

44. **Mass.** — Keller *v.* Webb, 126 Mass. 393; Read *v.* Smith, 1 Allen 519. **Mo.**—Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365. **N. Y.**—Harris *v.* Kasson, 79 N. Y. 381.

See 11 STANDARD PROC. 1039.

45. **Ala.**—Lee *v.* Wimberly, 102 Ala. 539, 15 So. 444. **Colo.**—Miller *v.* Hallock, 9 Colo. 551, 13 Pac. 541. **Ga.**—Hobbs *v.* Gross, 94 Ga. 637, 21 S. E. 579. **Ill.**—Ruggles *v.* Blank, 15 Ill. App. 436. **La.**—Shaw *v.* Noble, 15 La. Ann. 305. **Mass.**—Brown *v.* Holbrook, 4 Gray 102.

See 11 STANDARD PROC. 1048.

46. **Mass.**—Upton *v.* Winchester, 106 Mass. 330; Robbins *v.* Otis, 1 Pick. 368; Colton *v.* King, 2 Allen 317. **Mo.**—Feurth *v.* Anderson, 87 Mo. 354. **Mont.** Stotesbury *v.* Power, 27 Mont. 469, 71 Pac. 675. **N. Y.**—Jackson *v.* Reich, 3 Misc. 86, 22 N. Y. Supp. 366. **N. C.**—Brown *v.* Morris, 83 N. C. 251. **Pa.**—Cleaver *v.* Garner, 133 Pa. 419, 19 Atl. 408; Powell *v.* Robinson, 2 W. N. C. 370. **Wis.**—Clauson *v.* Goodrich, 70 Wis. 672, 36 N. W. 6.

See 11 STANDARD PROC. 1047.

47. **Me.**—Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371. **Mass.**—Peck *v.* Waters, 104 Mass. 345. **N. Y.**—Butler Bros. *v.* Hirzel, 87 App. Div. 462, 84 N. Y. Supp. 693, *affirmed.* 181 N. Y. 520, 73 N. E. 1120.

48. **Cal.**—Santa Monica Lumb. & Mill Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555. **Ill.**—McEwen *v.* Morey, 60 Ill. 32. **Eng.**—Churchill *v.* Wilkins, 1 T. R. 447, 99 Eng. Reprint 1189.

[a] **Price and Reasonable Value.**— (1) The price should be proved substantially as alleged, or a variance will result. Thus where a reasonable value was alleged, proof of an agreed price has been held a variance. Gaar *v.* Fritz, 60 Minn. 346, 62 N. W. 391; Acebal *v.* Levy, 10 Bing. 376, 4 Moo. & S. 217, 25 E. C. L. 180, 131 Eng. Reprint 949. (2) Proof, however, that the contract was to pay the market value of the goods is held no fatal variance from an allegation to pay their reasonable value. Santa Monica Lumb. & Mill Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555. (3) If the price is alleged under a videlicet, a variance may be prevented. See Cave *v.* Coleman, 3 M. & R. 2, 7 L. J. K. B. (O. S.) 25.

49. See generally the title "**Province of Judge and Jury.**"

50. See 11 STANDARD PROC. 1054, *et seq.*

51. **U. S.**—Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432. **Ala.**—Garnett *v.* Parry Mfg. Co., 185 Ala. 326, 64 So. 509. **Ark.**—Elgin *v.* Barker, 106 Ark. 482, 153 S. W. 598. **Del.**—Heidelbaugh *v.* Cranston, 4 Penne. 464, 56 Atl. 367. **Ia.**—Munroe *v.* Mundy, 164 Iowa 707, 146 N. W. 819. **Ky.**—White Sewing Mach. Co. *v.* Mahoney, 156 Ky. 805, 162 S. W. 80. **Me.**—Holway Co. *v.* Bailey, 109 Me. 579, 85 Atl. 406. **Mich.**—Gorman *v.* Kennedy, 126 Mich. 182, 85 N. W. 458. **Neb.**—Hirsch Distilling Co. *v.* Roach, 92 Neb. 624, 138 N. W. 1131. **Nev.**—Herring-Hall Marvin Safe Co. *v.* Balliet, 38 Nev. 164, 145 Pac. 941. **N. Y.**—Newmeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. Supp. 204; Douglas *v.* New York Cent. & H. R. R. Co., 105 App. Div. 65, 93 N. Y. Supp. 723; New York Hydraulic Press Brick Co. *v.* Gunn, 43 Misc. 330, 87 N. Y. Supp. 168. **N. C.**—Layton *v.* Elba Mfg. Co., 161 N. C. 482, 77 S. E. 677; Bowser & Co. *v.* Tarry, 156 N. C. 35, 72 S. E. 74. **N. D.**—Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340. **Okla.**—Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 75 Pac. 528. **Pa.**—Allum *v.* Nolle, 25 Pa. Super. 220; Tunkhannock Ice Co.

determine whether, as alleged, the goods were defective,[52] also, where under the contract, the buyer has the right to a trial of the goods and to return the same if unsatisfactory, it is for the jury to determine whether the buyer made a fair trial of the goods,[53] or whether the goods were returned within the limits of a reasonable time.[54] In all material matters it is for the jury to decide between conflicting evidence,[55] but where there is no conflict in the evidence and there could be no reasonable difference as to the conclusion to be drawn

v. Franklin, 22 Pa. Super. 147. **S. D.**—Karsten *v.* Root, 36 S. D. 111, 153 N. W. 932.

See 11 STANDARD PROC. 1054.

52. **Ill.**—Fifth Ave. Library Soc. *v.* Cavanaugh, 186 Ill. App. 123; Falls City Tannery *v.* Allen Mfg. Co., 186 Ill. App. 13; McCartney *v.* Dairy Farms Co., 174 Ill. App. 254; Chicago Tip & Tire Co. *v.* Beardsley, 86 Ill. App. 184. **Ia.**—McCormick Harv. Mach. Co. *v.* Okerstrom, 114 Iowa 260, 86 N. W. 284. **Mass.**—Whitcomb *v.* Boston Dairy Co., 218 Mass. 24, 105 N. E. 554. **Mich.**—Reedy Co. *v.* Cameron, 163 Mich. 638, 129 N. W. 27. **Mo.**—Barnes-Smith Mercantile Co. *v.* Tate, 156 Mo. App. 236, 137 S. W. 619; Conklin *v.* Redemeyer-Hollister Commission Co., 86 Mo. App. 190. **N. Y.**—Hess *v.* Kaufherr, 128 App. Div. 526, 112 N. Y. Supp. 832; Hardt *v.* Western Electric Co., 84 App. Div. 249, 82 N. Y. Supp. 835; Charter Gas Engine Co. *v.* Kellam, 79 App. Div. 231, 79 N. Y. Supp. 1019; New York Hydraulic Press Brick Co. *v.* Gunn, 43 Misc. 330, 87 N. Y. Supp. 168; Carey *v.* Baldwin, 61 N. Y. Supp. 581. **N. C.**—Pickrell & Craig Co. *v.* Wilson Wholesale Co., 169 N. C. 381, 86 S. E. 187, Ann. Cas. 1917C, 344. **S. C.**—Ingram *v.* Sumter Music House, 51 S. C. 281, 28 S. E. 936. **Tex.**—Bryan Cotton-Seed Oil Mill *v.* Fuller (Tex. Civ. App.), 57 S. W. 924.

53. **Ia.**—Smith *v.* School Dist., 112 Iowa 35, 83 N. W. 810. **N. J.**—Underfeed Stoker Co. *v.* Hudson County Consumers' Brew. Co., 70 N. J. L. 649, 58 Atl. 296. **Pa.**—Harrisburg Foundry & Mach. Works *v.* Lebanon, 195 Pa. 331, 45 Atl. 1062.

54. **Ala.**—Rumsey & Co. *v.* Bessemer, 138 Ala. 329, 35 So. 353. **Ga.**—International Harv. Co. *v.* Bowen, 16 Ga. App. 457, 85 S. E. 613. **Ia.**—Laird *v.* Cole, 121 Iowa 146, 96 N. W. 744. **Kan.**—Auto-Fedan Hay Press Co. *v.* Ward, 89 Kan. 218, 131 Pac. 595, 50 L. R. A. (N. S.) 783. **Md.**—Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75. **N. Y.**—Acme Electric Lamp Co. *v.* Kingston Carriage Co., 31 Misc. 823, 64 N. Y. Supp. 377. **Okla.**—Barber Medicine Co. *v.* Bradley, 48 Okla. 82, 150 Pac. 127.

55. **U. S.**—Sloss-Sheffield Steel & Iron Co. *v.* Tacony Iron Co., 197 Fed. 36, 116 C. C. A. 584; Crane *v.* C. Crane & Co., 105 Fed. 869, 45 C. C. A. 96. **D. C.**—Smith *v.* Ross, 31 App. Cas. 348. **Ga.**—Eldorado Jewelry Co. *v.* Hitchcock, 130 Ga. 778, 61 S. E. 855; McDuffie *v.* Lummus Cotton-Gin Co., 13 Ga. App. 591, 79 S. E. 493; Gude *v.* H. J. Bailey Co., 4 Ga. App. 226, 61 S. E. 135. **Ill.**—Olcese *v.* Mobile Fruit etc. Co., 211 Ill. 539, 71 N. E. 1084 (*affirming* 112 Ill. App. 281); Noble *v.* Watson, 188 Ill. App. 451; Falls City Tannery *v.* Allen Mfg. Co., 186 Ill. App. 13; Sage & Co. *v.* Chicago Steel Fdy. Co., 174 Ill. App. 56; Lamb-Davis Lumb. Co. *v.* Great Western Cereal Co., 153 Ill. App. 194. **Ia.**—Sempel *v.* Northern Hardwood Lumb. Co., 142 Iowa 586, 121 N. W. 23. **Md.**—Joseph Joseph Bros. Co. *v.* Schonthal Iron, etc. Co., 99 Md. 382, 58 Atl. 205. **Mich.**—Cook *v.* Darling, 160 Mich. 475, 125 N. W. 411; Watson *v.* E. E. Naugle Tie Co., 159 Mich. 174, 123 N. W. 589. **Mo.**—Martin *v.* Williams, 96 Mo. App. 249, 70 S. W. 249. **Neb.**—Fairbanks, Morse & Co. *v.* Burgert, 88 Neb. 376, 129 N. W. 557. **N. Y.**—Roots Co. *v.* New York Foundry Co., 56 Misc. 687, 107 N. Y. Supp. 742. **N. C.**—Carr *v.* Alexander, 169 N. C. 665, 86 S. E. 613; Bowden *v.* English, 165 N. C. 97, 80 S. E. 979; Equitable Mfg. Co. *v.* Sexton, 161 N. C. 501, 77 S. E. 696. **Pa.**—Patterson *v.* Brace, 198 Pa. 107, 47 Atl. 950; Schenk *v.* Fetzer, 54 Pa. Super. 573; Stuart & Peterson Co. *v.* Newton, 52 Pa. Super. 158. **S. C.**—Walker *v.* Ayer, 80 S. C. 292, 61 S. E. 557. **S. D.**—Sheafe *v.* Zastrow, 30 S. D. 159, 138 N. W. 16. **Tex.**—Continental Bank & Tr. Co. *v.* Dealey Bros. (Tex. Civ. App.), 171 S.

therefrom, then the decision is for the court and not the jury.[56]

(II.) Instructions. — As in other actions, in an action for the price or value of goods sold the instructions must be based upon the evidence,[57] and, likewise, upon all of the evidence material to the case.[58] They must, also, be applicable to the pleadings,[59] and to the issues.[60]

W. 552; Heyer *v.* Doke & Son (Tex. Civ. App.), 130 S. W. 1026.

56. **Ala.**—Central Lumb. & T. Co. *v.* McClure Lumb. Co., 180 Ala. 606, 61 So. 821; Continental Jewelry Co. *v.* Pugh, 168 Ala. 295, 53 So. 324, Ann. Cas. 1912 A, 657; Brenard Mfg. Co. *v.* Citronelle Merc. Co., 140 Ala. 602, 37 So. 509. **Ark.**—Holland Banking Co. *v.* Hearn, 116 Ark. 238, 172 S. W. 881. **Colo.**—Colorado Trading & Transfer Co. *v.* Oliver, 20 Colo. App. 257, 78 Pac. 308. **Ga.**—Smith *v.* Frazer, 144 Ga. 85, 86 S. E. 225; Rockmart Brick & S. Co. *v.* Williams Patent Crusher & P. Co., 143 Ga. 552, 85 S. E. 855; Muller *v.* Ludlow-Saylor Wire Co., 141 Ga. 376, 81 S. E. 127. **Ia.**—Four Traction Auto Co. *v.* Hurni, 170 Iowa 476, 153 N. W. 102. **Mich.**—Detroit River Transit Co. *v.* Aldrich, 176 Mich. 357, 142 N. W. 373. **Pa.**—Lipper Mfg. Co. *v.* Morris & Co., 58 Pa. Super. 611; Field *v.* Schuster, 26 Pa. Super. 82. **Tex.**—Bixler *v.* Rinn (Tex. Civ. App.), 166 S. W. 96; Martin, Moodie & Co. *v.* Petty (Tex. Civ. App.), 79 S. W. 878.

57. **Ala.**—Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422. **Ark.**—Kenyon Printing & Mfg. Co. *v.* Crosby, 105 Ark. 258, 150 S. W. 567. **Ga.**—Ellard *v.* Smith, 140 Ga. 592, 79 S. E. 459; Wholesale Mercantile Co. *v.* Jackson, 2 Ga. App. 776, 59 S. E. 106. **Ill.**—Olcese *v.* Mobile Fruit etc. Co., 211 Ill. 539, 71 N. E. 1084 (*affirming* 112 Ill. App. 281); Auto Light & Mfg. Co. *v.* Auto Supply Co., 189 Ill. App. 543; Jones *v.* Vickers, 173 Ill. App. 481; International Filter Co. *v.* Crystal etc. Storage Co., 157 Ill. App. 96; Chamberlain *v.* Bain, 27 Ill. App. 634. **Ky.**—Noel *v.* Kauffman Buggy Co., 32 Ky. L. Rep. 576, 106 S. W. 237. **Mich.**—Kupfer *v.* Michigan Clothing Co., 141 Mich. 325, 104 N. W. 582. **Mo.**—Waers *v.* Wiesberg, 152 Mo. App. 276, 133 S. W. 617; Franz *v.* William Barr Dry Goods Co., 132 Mo. App. 8, 111 S. W. 636; Nugent *v.* Armour Packing Co. (Mo. App.), 81 S. W. 506. **Neb.**—Bowie *v.* Spaids, 26 Neb. 635, 42 N. W. 700. **N. J.**—Otis Elev. Co. *v.* Headley, 81 N. J. L. 173, 80 Atl. 109, 18 L. R. A. (N. S.) 300. **N. Y.**—United States Rubber Reclaiming Co. *v.* Manchester Rubber Co., 144 N. Y. Supp. 622. **N. C.** Frick Co. *v.* Boles, 168 N. C. 654, 84 S. E. 1017. **Pa.**—Braddock Glass Co. *v.* Irwin, 153 Pa. 440, 25 Atl. 490. **Tex.**—McAfee *v.* Meadows, 32 Tex. Civ. App. 105, 75 S. W. 813; Drumm Seed & Floral Co. *v.* Bell (Tex. Civ. App.), 29 S. W. 796. **Wis.**—Thayer *v.* Davis, 75 Wis. 205, 43 N. W. 902.

See 13 STANDARD PROC. 792.

58. **Conn.**—Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546. **Ga.**—International Harv. Co. *v.* Adams, 135 Ga. 104, 68 S. E. 1093. **Ill.**—Nichols *v.* Mercer, 44 Ill. 250; Goldberg *v.* Einstein, 44 Ill. App. 272. **Md.**—Deland Min. & M. Co. *v.* Hanna, 112 Md. 528, 76 Atl. 850, 136 Am. St. Rep. 404; Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75. **Mich.**—Morris *v.* Osterhout, 55 Mich. 262, 21 N. W. 339. **Wash.**—Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098. **Wis.**—J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

59. **Ga.**—Ellard *v.* Smith, 140 Ga. 592, 79 S. E. 459; Freeman & Turner News Co. *v.* Mencken, 115 Ga. 1017, 42 S. E. 369. **Ky.**—Helfrich Saw & P. Mill Co. *v.* Everly, 17 Ky. L. Rep. 795, 32 S. W. 750. **Mo.**—Brown *v.* Emerson, 155 Mo. App. 459, 134 S. W. 1108. **N. Y.**—Walker Co. *v.* Roth, 79 Misc. 613, 140 N. Y. Supp. 516. **N. C.**—Gaines *v.* McAlister, 122 N. C. 340, 29 S. E. 844; Burton *v.* Wilkes, 66 N. C. 604. **Tex.** Merrill *v.* Taylor, 72 Tex. 293, 10 S. W. 532; Hereford Nursery *v.* Deaf Smith County (Tex. Civ. App.), 138 S. W. 442; Flint *v.* Newton (Tex. Civ. App.), 136 S. W. 820. **Wash.**—Belle City Mfg. Co. *v.* Kemp, 27 Wash. 111, 67 Pac. 580.

See 13 STANDARD PROC. 869.

60. **Ala.**—American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644. **Ill.** Driscoll *v.* Duryee, 66 Ill. 35; Hovey *v.* Thompson, 37 Ill. 538; Chamberlain *v.* Bain, 27 Ill. App. 634; Chicago Safe & Lock Co. *v.* Cremen, 27 Ill. App. 331. **Md.**—Deland Min. & M. Co. *v.* Hanna, 112 Md. 528, 76 Atl. 850, 136 Am. St. Rep. 404. **Mo.**—Forster Vinegar Mfg.

Moreover, instructions must not in themselves determine issues of fact and thus take such questions away from the jury.[61] Instructions must be clear and free from ambiguity,[62] and they must not be contradictory or liable to confuse and mislead the jury,[63] yet even if particular instructions fail to state the law correctly, nevertheless if the charge taken as a whole fairly states the law upon the issues involved there will be no reversible error.[64]

i. *Verdict and Findings.*[65] — Findings must not be outside the pleadings but must be based upon the issues,[66] and a verdict for the

Co. *v.* Guggemos, 98 Mo. 391, 11 S. W. 966; Brown *v.* Emerson, 155 Mo. App. 459, 134 S. W. 1108; Swink *v.* Anthony, 96 Mo. App. 420, 70 S. W. 272. **N. Y.** Lesser *v.* Perkins, 51 Hun 639, 4 N. Y. Supp. 53, *affirmed*, 123 N. Y. 629, 25 N. E. 952. **Pa.**—Sidney School Furniture Co. *v.* Warsaw School Dist., 130 Pa. 76, 18 Atl. 604. **Tex.**—Cocke & Co. *v.* Big Muddy Coal etc. Co. (Tex. Civ. App.), 155 S. W. 1019. **Va.**—Ney *v.* Wrenn, 117 Va. 85, 84 S. E. 1. **Wis.**—Warden B. & G. Co. *v.* Pischer, 110 Wis. 363, 85 N. W. 968.

See 13 STANDARD PROC. 774.

61. Ala.—Fuller *v.* Gray, 116 Ala. 238, 22 So. 576; Raisin Fertilizer Co. *v.* J. J. Barrow Jr. Co., 97 Ala. 694, 12 So. 388. **Ark.**—Jones-Pope Produce Co. *v.* Breedlove, 73 Ark. 625, 83 S. W. 924. **Cal.**—United Iron Wks. *v.* Outer Harbor Dock & W. Co., 168 Cal. 81, 141 Pac. 917. **D. C.**—Smith *v.* Ross, 31 App. Cas. 348. **Ga.**—International Harv. Co. *v.* Adams, 135 Ga. 104, 68 S. E. 1093. **Idaho.**—Idaho Imp. Co. *v.* Lambach, 16 Idaho 497, 101 Pac. 951. **Ill.**—Guggenheim *v.* Hoffman, 151 Ill. App. 457. **Mich.** Reedy *v.* Cameron, 163 Mich. 638, 129 N. W. 27; Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770. **Miss.** Kimbrough *v.* Ragsdale, 69 Miss. 674, 13 So. 830. **N. C.**—Powers *v.* Erwin, 108 N. C. 522, 13 S. E. 208. **Tex.**—Gutta Percha & R. Mfg. Co. *v.* Cleburne, 102 Tex. 36, 112 S. W. 1047; Pierpont Mfg. Co. *v.* Goodman Produce Co. (Tex. Civ. App.), 60 S. W. 347. **Wis.**—Keeler *v.* Jacobs, 87 Wis. 545, 58 N. W. 1107.

See 13 STANDARD PROC. 829.

62. Ala.—Raisin Fertilizer Co. *v.* J. J. Barrow Jr. Co., 97 Ala. 694, 12 So. 388. **Ark.**—Matthews *v.* Freker, 68 Ark. 190, 57 S. W. 262. **Ia.**—Warder B. & G. Co. *v.* Horne, 110 Iowa 285, 81 N. W. 591.

See 13 STANDARD PROC. 807.

63. U. S.—Dawson Town & Gas Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464. **Ala.**—Vinegar Bend Lumb. Co. *v.* Soule Steam Feed Wks., 182 Ala. 146, 62 So. 279; Green *v.* Linville Drug Co., 167 Ala. 372, 52 So. 433; Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019. **Cal.**—Fleming *v.* Law, 28 Cal. App. 110, 151 Pac. 385. **Fla.**—Demens *v.* Le Moyne, 26 Fla. 323, 8 So. 442. **Ga.** Aripeka Saw Mills *v.* Georgia Supply Co., 143 Ga. 210, 84 S. E. 455. **Ia.** Warder B. & G. Co. *v.* Horne, 110 Iowa 285, 81 N. W. 591; Aufderheide *v.* Hunt, 64 Iowa 133, 19 N. W. 878. **Kan.**—Stout *v.* Bolin, 93 Kan. 185, 144 Pac. 204. **Mo.** Brooks Tire Mach. Co. *v.* Wells, 182 Mo. App. 50, 167 S. W. 604; Nugent *v.* Armour Packing Co. (Mo. App.), 81 S. W. 506. **N. Y.**—Gourd *v.* Healy, 165 App. Div. 288, 150 N. Y. Supp. 1006. **Pa.** Sidney School Furniture Co. *v.* Warsaw School Dist., 130 Pa. 76, 18 Atl. 604. **S. C.**—Burns *v.* Mills, 31 S. C. 53, 9 S. E. 689. **Wash.**—Mueller *v.* Dennis, 83 Wash. 123, 145 Pac. 218; Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534. **Wis.**—Carle *v.* Nelson, 145 Wis. 593, 130 N. W. 467.

64. Ark.—Jones-Pope Produce Co. *v.* Breedlove, 73 Ark. 625, 83 S. W. 924. **Colo.**—Fitzhugh *v.* Spear, 8 Colo. App. 398, 46 Pac. 625. **Ind.**—Allyn *v.* Burns, 37 Ind. App. 223, 76 N. E. 636. **Mo.** Gaar *v.* Hill, 113 Mo. App. 10, 87 S. W. 609. **Neb.**—Gray *v.* Farmer, 19 Neb. 69, 26 N. W. 593. **Pa.**—Whitehall Mfg. Co. *v.* Wise, 119 Pa. 484, 13 Atl. 298. **S. D.** Karsten *v.* Root, 36 S. D. 111, 153 N. W. 932. **Wash.**—Agnew *v.* Hackett, 80 Wash. 236, 141 Pac. 319. **Wis.**—Baumbach *v.* Gessler, 82 Wis. 231, 52 N. W. 259.

65. See the titles **"Findings and Conclusions;" "Verdict."**

66. Ill.—Fish Furniture Co. *v.* Horrie, 186 Ill. App. 64. **Ind.** — Palmer Steel & Iron Co. *v.* Heat, L. & P. Co., 160 Ind. 232, 66 N. E. 690. **Nev.**—Livingston *v.* Wagner, 23 Nev. 53, 42 Pac. 290. **N. Y.**—Braun *v.* Hothan, 87 App.

plaintiff, having the burden of proof, will be set aside where there was no substantial evidence to support it.[67]

j. *Judgment and Review.* — Where plaintiff declares upon the common counts, and especially for goods sold and delivered, he cannot recover on a breach of a contract for the sale of the goods,[68] and, in general, the judgment must be based upon the form of action presented by the pleadings as, also, upon the proof in connection therewith.[69] A judgment will be reversed where an essential element of the action is not proved,[70] likewise, where the proof fails to show that the amount recovered was due.[71] However, as in other actions, no reversal will be ordered for harmless error in the admission or exclusion of evidence,[72] or in connection with the giving or refusing to give instructions.[73] Also, where the evidence is conflicting, if there is sufficient to warrant its submission to the jury, their verdict thereon will not be set aside.[74]

4. Enforcement of Remedies With Respect to Goods. — a. *Recovery of Goods.* — (I.) **Conditions Precedent.** — In an action by the seller to recover the goods, a rescission of the sale is necessary where

Div. 611, 84 N. Y. Supp. 8; Herzfeld *v.* Robinson, 152 N. Y. Supp. 194. **Can.** Hope *v.* Stewart, 35 U. C. Q. B. 89.

67. Fleming *v.* Law, 28 Cal. App. 110, 151 Pac. 385.

68. Bullock *v.* Ueberroth, 121 Mich. 293, 80 N. W. 39.

69. **Ill.**—Fish Furniture Co. *v.* Horrie, 186 Ill. App. 64. **Mich.**—Bullock *v.* Ueberroth, 121 Mich. 293, 80 N. W. 39. **Mo.**—Hess *v.* Corwin, 109 Mo. App. 22, 84 S. W. 141. **N. Y.**—Gourd *v.* Healy, 165 App. Div. 288, 150 N. Y. Supp. 1006; Flower City Plant Food Co. *v.* Roberts, 81 App. Div. 249, 80 N. Y. Supp. 1060; Deacon *v.* Horn Co., 152 N. Y. Supp. 1073. **S. C.**—Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192.

70. Siegel *v.* Howard, 13 Mo. App. 588 (a failure to show value of the goods); Houston, E. & W. T. Ry. Co. *v.* Ryan (Tex. Civ. App.), 38 S. W. 221, failure to show an agency where the sale was alleged to have been made with defendant's agent.

71. Muhlstein *v.* Hertzberg, 85 N. Y. Supp. 1075.

72. **Colo.**—Dolan *v.* Paradice, 4 Colo. App. 314, 35 Pac. 987. **Ill.**—Reynolds *v.* Palmer, 70 Ill. 288. **Ia.**—Buckeye Traction Ditcher Co. *v.* Smith, 158 Iowa 104, 138 N. W. 817. **Mass.**—Cobb, Bates & Yerka Co. *v.* Hills, 208 Mass. 270, 94 N. E. 265. **N. Y.**—Doyle *v.* Beaupre, 63 Hun 624, 17 N. Y. Supp. 287, 43 N. Y. St. 741; Empire Steam Pump Co. *v.* Inman, 59 Hun 230, 12 N. Y. Supp. 948, 36 N. Y. St. 111; Maher *v.* Willson, 50 Hun 605, 3 N. Y. Supp. 80, *affirmed*, 123 N. Y. 655, 25 N. E. 954. **Pa.**—Roebling's Sons Co. *v.* American Amusement & C. Co., 231 Pa. 261, 80 Atl. 647. **R. I.** Newberger *v.* Feldman, 94 Atl. 673. **Vt.** Mears *v.* Daniels, 84 Vt. 91, 78 Atl. 737.

73. **Ind.**—Kuhn *v.* Bowman, 46 Ind. App. 677, 93 N. E. 455. **Ia.**—Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846. **N. M.**—Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504. **Tex.**—Brown Mfg. Co. *v.* Low (Tex. Civ. App.), 138 S. W. 1107. **Wis.**—Carle *v.* Nelson, 145 Wis. 593, 130 N. W. 467.

74. **Ark.**—Toledo C. Scale Co. *v.* Stephens, 96 Ark. 606, 132 S. W. 926. **Colo.** Stock *v.* Schlewing, 19 Colo. App. 138, 73 Pac. 1090. **Idaho.**—Coffin *v.* Bradbury, 3 Idaho 770, 35 Pac. 715, 95 Am. St. Rep. 37. **Ill.**—Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Michelin Tire Co. *v.* Sbarbaro, 189 Ill. App. 585; Auto Light & Mfg. Co. *v.* Auto Supply Co., 189 Ill. App. 543; Fifth Ave. Library Soc. *v.* Cavanaugh, 186 Ill. App. 123; Moderwell & Co. *v.* Farmers Grain etc. Co., 174 Ill. App. 535; Cohen *v.* Van Sickle, 65 Ill. App. 70. **Kan.**—Vanausdeln *v.* Crenshaw, 16 Kan. 234. **Minn.**—Pitz *v.* Kentucky & N. D. etc. Co., 94 Minn. 519, 101 N. W. 797. **N. M.**—Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504. **N. Y.**—Burnham *v.* Edison Elect. Illum. Co., 13 App. Div. 363, 43 N. Y. Supp. 242; Gleason *v.* Thom, 16 Misc. 29, 37 N. Y. Supp. 680. **Can.**—Dempster *v.*

the title has passed to the buyer,[75] but if the title has not passed, the seller may recover possession without a rescission of the contract.[76] Ordinarily, the seller should place, or offer to place, the purchaser in statu quo, by restoring the money paid, before he can maintain an action to replevy the goods,[77] although, in a conditional sale, the return of the consideration is not usually a requisite,[78] and where a note has been given with worthless securities, the fact that the plaintiff has transferred the note will not defeat the action,[79] and replevin to recover goods for fraud will also lie without returning such a note when the purchaser cannot be found.[80] Moreover, it is not necessary, in order to maintain replevin, that a defrauded vendor should reimburse or offer to reimburse a fraudulent vendee for freight charges paid by the latter, or other expenses incurred by him in connection with the goods.[81] Property lawfully in possession of the buyer

Lewis, 33 Can. Sup. Ct. 292; Rafuse *v.* Ernst, 42 Novia Scotia 173.

75. **U. S.**—Hadden *v.* Natchaug Silk Co., 84 Fed. 80. **Ill.**—Mathews *v.* Reinhardt, 43 Ill. App. 169 (*affirmed,* 149 Ill. 635, 37 N. E. 85); Farwell *v.* Hanchett, 19 Ill. App. 620. **Ind.**—Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Parrish *v.* Thurston, 87 Ind. 437. **Ia.**—Morse *v.* Hamill, 97 Iowa 631, 66 N. W. 892. **Mo.**—Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678, 2 Mo. App. Rep. 1378; Cahn *v.* Reid, 18 Mo. App. 115. **N. Y.**—Wise *v.* Grant, 140 N. Y. 593, 35 N. E. 1078; Pinckney *v.* Darling, 3 App. Div. 553, 38 N. Y. Supp. 441 (*affirmed,* 158 N. Y. 728, 53 N. E. 1130); George Borgfeldt & Co. *v.* Wood, 92 Hun 260, 36 N. Y. Supp. 612, 3 N. Y. Ann. Cas. 46 (*affirmed,* 154 N. Y. 784, 49 N. E. 1097); Bliss *v.* Cottle, 32 Barb. 322; Stevens *v.* Hyde, 32 Barb. 171; Schwabeland *v.* Buchler, 8 Misc. 86, 28 N. Y. Supp. 523. **Pa.**—Schwartz *v.* McCloskey, 156 Pa. 258, 27 Atl. 300.

76. **Ill.**—Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476. **Mo.**—Loeffel *v.* Pohlman, 47 Mo. App. 574. **N. Y.** Klee *v.* Grant, 4 Misc. 88, 23 N. Y. Supp. 855, *reversing* 2 Misc. 412, 21 N. Y. Supp. 1010, 17 N. Y. Supp. 845.

77. **Ill.**—Moriarty *v.* Stofferan, 89 Ill. 528; Hamilton *v.* Singer Mfg. Co., 54 Ill. 370; McGuire *v.* Bradley, 118 Ill. App. 59. **Ind.**—Adam, M. & A. Co. *v.* Stewart, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; John H. Hibben Dry-Goods Co. *v.* Hicks, 26 Ind. App. 646, 59 N. E. 938. **Kan.**—Rock Island Implement Co. *v.* First Nat. Bank, 9 Kan. App. 96, 57 Pac. 1050. **Neb.**—Baker *v.* McDonald, 74 Neb. 595, 104 N. W. 923, 1 L. R. A. N. S. 474.

[a] **Promissory Note.—Where the** seller has taken a note, he cannot maintain replevin until the note has been surrendered or adjudged void. Gittings *v.* Carter, 49 Iowa 338. See also Moriarty *v.* Stofferan, 89 Ill. 528.

[b] **Contrary View.**—Contrary to the doctrine generally recognized, the Supreme Court of Rhode Island has said: "We have no disposition to find fault with the application of the rule to cases of executory contracts of sale, in which a party seeks to rescind the contract on the ground of the failure of the other to fulfill his part of the contract, and which it is said in Duval & Inglehart *v.* Mowry, 6 R. I. 479, 487, constitute most of the cases in which a return has been held necessary before an action can be brought. This court, however, has never been disposed, apparently, to apply the rule, any further than may be necessary, to cases of the avoidance of contracts on the ground of fraud." Sisson *v.* Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206.

78. See, in general, *infra,* IV.

[a] **Conditional Payment.**—A note given in conditional payment need not be returned. Clark *v.* Young, 1 Cranch (U. S.) 181, 2 L. ed. 74.

79. Manning *v.* Albee, 14 Allen (Mass.) 7, 92 Am. Dec. 736.

80. Manning *v.* Albee, 11 Allen (Mass.) 520.

81. **Conn.**—Soper Lumb. Co. *v.* Halstead & Harmount Co., 73 Conn. 547, 48 Atl. 425, freight charges. **Kan.**—John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12, 61 Pac. 675, fees for recording mortgage of goods. **Mass.** Adams *v.* O'Connor, 100 Mass. 515, 1

under a contract of purchase,[82] or delivered to him in connection with a sale on trial,[83] cannot be replevied without a previous demand. No notice or demand is necessary, however, where the seller brings replevin on account of the fraud of the buyer.[84]

(II.) The Action. — Where the seller has rescinded the contract for fraud in the sale, he may, at his election, bring either trover or replevin.[85] The action should be brought promptly after discovery of the fraud,[86] and may be brought before the expiration of a credit period.[87] In an action of replevin, the usual allegations required in such actions must be made,[88] general allegations of ownership and right to possession and unlawful withholding being, in some jurisdictions, sufficient.[89] Likewise, the defendant's pleadings are gov-

Am. Rep. 137, freight and storage charges.

82. New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326; Darling *v.* Tegler, 30 Mich. 54; Smith *v.* Newland, 9 Hun (N. Y.) 553.

83. Witherby *v.* Sleeper, 101 Mass. 138.

Conditional Sales.—As to the necessity of a demand in case of a breach of condition in conditional sales, see *infra*, IV, B, 3, c.

84. **Ill.**—Farwell *v.* Hanchett, 19 Ill. App. 620, *affirmed*, 120 Ill. 573, 11 N. E. 875. **Ia.**—Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53. **Mich.**—Carl *v.* McGonigal, 58 Mich. 567, 25 N. W. 516.

85. **Cal.**—Wendling Lumb. Co. *v.* Glenwood Lumb. Co., 153 Cal. 411, 95 Pac. 1029; Amer *v.* Hightower, 70 Cal. 440, 11 Pac. 697. **Ga.**—Wilkes *v.* Dixie Cotton Co., 143 Ga. 588, 85 S. E. 706. **Ill.**—Smith *v.* Birge, 126 Ill. App. 596. **Ky.**—American-German Nat. Bank *v.* Gray & D. Hdw. Co., 33 Ky. L. Rep. 547, 110 S. W. 393. **Mass.**—Tyler *v.* Freeman, 3 Cush. 261. **N. Y.**—Hunter *v.* Hudson River Iron etc. Co., 20 Barb. 493; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323. **Can.**—Smith *v.* Hamilton, 29 U. C. Q. B. 394.

[a] **Remedies.**—The defrauded seller has as his remedies, trover or replevin in the detinet, or trespass or replevin in the cepit. Wendling Lumb. Co. *v.* Glenwood Lumb. Co., 153 Cal. 411, 95 Pac. 1029.

86. **Ala.**—Jones *v.* Anderson, 82 Ala. 302, 2 So. 911. **Ill.**—Hall *v.* Fullerton, 69 Ill. 448; Musick *v.* Gatzmeyer, 47 Ill. App. 329. **Kan.**—Scheidel-Western X-Ray Coil Co. *v.* Ross, 92 Kan. 798, 141 Pac. 1007. **Ky.**—Gibson *v.* Moore, 7 B. Mon. 92. **Mo.**—World Pub. Co. *v.* Hull, 81 Mo. App. 277; Johnson-Brinkman Commission Co. *v.* Missouri Pac. Ry. Co., 52 Mo. App. 407 (*reversed*, on other grounds, 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840); Lapp *v.* Ryan, 23 Mo. App. 436. **N. Y.**—Heilbronn *v.* Herzog, 33 App. Div. 311, 53 N. Y. Supp. 841 (*reversed*, on other grounds, 165 N. Y. 98, 58 N. E. 759); Hallahan *v.* Webber, 7 App. Div. 122, 40 N. Y. Supp. 103. **Pa.**—Backentoss *v.* Speicher, 31 Pa. 324. **Tenn.** Wertheimer-Swartz Shoe Co. *v.* Faris (Tenn. Ch.), 46 S. W. 336. **Tex.**—Hunt *v.* Kellum, 59 Tex. 535. **Vt.**—Tilton Safe Co. *v.* Tisdale, 48 Vt. 83. **Wis.** Goldsmith *v.* Bryant, 26 Wis. 34.

87. **Ill.**—Kellogg *v.* Turpie, 2 Ill. App. 55. **La.**—Yaeger Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398. **Me.** Hall *v.* Gilmore, 40 Me. 578; Seaver *v.* Dingley, 4 Greenl. 306. **Can.**—Hunters & Co. *v.* Graham, 1 Newfoundl. 219.

88. See the title "**Replevin.**"

89. **Cal.**—Wendling Lumb. Co. *v.* Glenwood Lumb. Co., 153 Cal. 411, 95 Pac. 1029. **Ia.**—Nolan *v.* Jones, 53 Iowa 387, 5 N. W. 572. **Kan.**—Salisbury *v.* Barton, 63 Kan. 552, 66 Pac. 618; John S. Brittain Dry Goods Co. *v.* Merkel, 10 Kan. App. 12, 61 Pac. 675. **N. Y.** Bliss *v.* Cottle, 32 Barb. 322.

[a] **Recovery From Third Person.** Where the seller seeks to recover the goods from his fraudulent vendee's mortgagee an allegation of general ownership in a replevin petition is sufficient. John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12, 61 Pac. 675.

[b] **Allegations of Fraud.**— Some cases hold that it is not necessary to allege the fraud where replevin is brought to recover the goods from a fraudulent vendee, but that such general allegations are sufficient to admit

erned by the rules regulating pleadings in replevin suits in general.[90]

(III.) Judgment. — Where there is a money judgment instead of the specific return of the goods, the measure of damages is the contract price of the goods, if agreed upon, and not their market value.[91] Upon judgment, however, of nonsuit or discontinuance of the seller's action, plaintiff having obtained possession of the property under the original writ, the buyer is entitled either to a return of the property or its value less the amount still due on the price.[92] A judgment of return, however, to the buyer does not impair the seller's rights under the contract.[93]

b. *Enforcement of Lien.*[94] — Where the statute provides a method of enforcing a seller's lien it must be followed.[95] If the lien is an equitable one a bill in equity will lie to enforce it.[96]

Pleading. — In accordance with rules elsewhere discussed,[97] the party seeking to enforce a seller's lien should set forth facts sufficient to entitle him to the same,[98] should properly describe the property covered by the lien,[99] and show his present right to enforce it.[1]

proof of any facts sustaining the claim. See Wendling Lumb. Co. *v.* Glenwood Lumb. Co., 153 Cal. 411, 95 Pac. 1029; Amer *v.* Hightower, 70 Cal. 440, 11 Pac. 697; Nolan *v.* Jones, 53 Iowa 387, 5 N. W. 572.

[c] **Anticipating Defenses.** — The plaintiff is not required to anticipate in his complaint any defense that may be made by the defendant. Wendling Lumb. Co. *v.* Glenwood Lumb. Co., 153 Cal. 411, 95 Pac. 1029.

90. See the title "**Replevin.**"

[a] **Legal Conclusions.**— Defendant must not plead legal conclusions, otherwise his answer will be demurrable, as where the plaintiff sues on an alleged sale and defendant alleges that the instrument of sale is a mortgage, and that he is entitled to an accounting. Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845.

[b] **General Denial.** — Under the general denial, defendant may show part payment for the goods, and may also set up the seller's breach of warranty. C. Aultman & Co. *v.* Forgy, 10 Ind. App. 397, 36 N. E. 939.

[c] **Property in Defendant.**—The defendant may deny the alleged ownership of the plaintiff and aver the right of property to be in himself. See Sheehan *v.* Golden, 85 Hun 462, 33 N. Y. Supp. 109, 66 N. Y. St. 711.

[d] **Purchase of Property.**—In replevin, an answer alleging purchase of the property by the defendant is good. Baldwin *v.* Burrows, 95 Ind. 81.

91. Herbert *v.* Stanford, 12 Ind. 503; Halff *v.* Wangemann (Tex. Civ. App.), 54 S. W. 937.

[a] **No Damages for Detention.** Upon an order of resale instead of a delivery, the price and interest should be paid to the plaintiff, but no damages should be awarded for the detention. Keitt *v.* Counts, 15 S. C. 493. *Compare*, however Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063.

Where sale is conditional, see *infra.* IV, B, 3, d, (III).

92. Hoffman *v.* Gorman, 123 Mich. 485, 82 N. W. 225.

93. Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788. See Sheppard *v.* Newhall, 47 Fed. 468.

94. **Enforcement of liens generally,** see the title "**Liens.**"

95. Monroe Bldg. & Loan Assn. *v.* Johnston, 51 La. Ann. 470, 25 So. 383; Reeves & Co. *v.* Bruening, 16 N. D. 398, 114 N. W. 313.

96. Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. 879; Perkins *v.* United States Electric Light Co., 16 Fed. 513, 21 Blatchf. 308; Cole *v.* Smith, 24 W. Va. 287. See generally 18 STANDARD PROC. 999.

97. See 18 STANDARD PROC. 997.

98. **Ga.**—Gilbert *v.* Marshall, 56 Ga. 148. **Miss.**—Graham *v.* Thornton, 9 So. 292. **Wash.**—Horr *v.* Powe, 18 Wash. 536, 52 Pac. 235.

99.—Horr *v.* Powe, 18 Wash. 536, 52 Pac. 235; Wright *v.* Texas Moline Plow Co., 40 Tex. Civ. App. 434, 90 S. W. 905.

1. Graham *v.* Thornton (Miss.), 9

Judgment. — Any judgment rendered enforcing the lien should recognize the sale as a valid, subsisting one.[2]

c. *Enforcement of Stoppage in Transitu.* — A seller's right to stoppage in transitu is ordinarily exercised by his giving due notice of his rights to the person or carrier then in custody of the goods.[3] He thereby becomes entitled to the possession of the goods and may proceed to enforce his rights therein as an unpaid seller.[4]

d. *Resale.* — To subject the goods to resale for payment of the price the seller may proceed by attachment where the goods are not in his possession.[5] If he has possession of the property, he may proceed to sell them upon proper notice to the buyer,[6] or even in the absence of such notice.[7] In making the sale the seller acts as agent of the original buyer,[8] and he should, as such, act in good faith, conducting the sale within a reasonable time,[9] and at a place,[10] and in a manner[11] calculated to realize the best price for the goods.[12]

III. BUYER'S REMEDIES. — A. What Remedies Maintainable. — **1. In General.** — Upon the default of the seller, there are various remedies open to the buyer, depending upon the possession of the goods, the passing of the title, the nature of the breach, and any

So. 292; Horr *v.* Powe, 18 Wash. 536, 52 Pac. 235.

2. Perkins *v.* United States Elect. Light Co., 21 Blatchf. 308, 16 Fed. 513; Adler *v.* Wolff, 36 La. Ann. 169.

3. **Conn.**—Millard *v.* Webster, 54 Conn. 415, 8 Atl. 470. **Kan.**—Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84. **N. H.**—Reynolds *v.* Boston & M. R. Co., 43 N. H. 580. **N. Y.**—Mottram *v.* Heyer, 5 Denio 629. **Eng.**—*Ex parte* Falk, 14 Ch. D. 446, 42 L. T. N. S. 780, 28 Wkly. Rep. 785. **Can.**—Ascher *v.* Grand Trunk R. W. Co., 36 U. C. Q. B. 609.

4. **Kan.**—Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84. **Ohio.**—Jordan, Ellis & Co. *v.* James, 5 Ohio 88. **Tenn.**—McGill *v.* Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210.

5. State *v.* Mason, 96 Mo. 127, 132, 9 S. W. 19; Parker *v.* Rodes, 79 Mo. 88; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Huelet *v.* Reyns, 1 Abb. Pr. N. S. (N. Y.) 27.

6. **Ga.**—Davis Sulphur Ore Co. *v.* Atlantic Guano Co., 109 Ga. 607, 34 S. E. 1011. **Ill.**—Bagley *v.* Findlay, 82 Ill. 524. **Ind.**—Dill *v.* Mumford, 19 Ind. App. 609, 49 N. E. 861. **N. Y.**—Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012; Case *v.* Simonds, 54 Hun 635, 7 N. Y. Supp. 253, 26 N. Y. St. 832, 4 Silv. 180. **Pa.**—Bowser *v.* Cessna, 62 Pa. 148. **Tenn.**—Granberry *v.* Frierson, 2 Baxt. 326. **Va.**—American Hide & Leather Co. *v.* Chalkey & Co., 101 Va. 458, 44 S. E. 705.

7. **Ala.**—West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300. **Colo.**—Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879. **Ill.**—Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406. **Ky.**—Clore *v.* Robinson, 100 Ky. 402, 38 S. W. 687. **Mich.**—Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057. **Mo.**—Ingram *v.* Matthien, 3 Mo. 209. **N. Y.**—Mann *v.* National Linseed Oil Co., 87 Hun 558, 34 N. Y. Supp. 481.

8. Swann *v.* West, 41 Miss, 104; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374.

9. **Ga.**—Brooke *v.* Robson, 3 Ga. App. 136, 59 S. E. 323. **Mo.**—Logan *v.* Carroll, 72 Mo. App. 613. **N. Y.**—Dustan *v.* McAndrew, 10 Bosw. 130. **Tex.**—Carver, Frierson & Co. *v.* Graves, 47 Tex. Civ. App. 481, 106 S. W. 903.

10. **U. S.**—Baltimore & L. Ry. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419. **Ill.**—Saladin *v.* Mitchell, 45 Ill. 79. **N. Y.**—Lewis *v.* Greider, 49 Barb. 606. **Tex.**—Waples *v.* Overaker, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727.

11. **Colo.**—Magnes *v.* Sioux City Nursery etc. Co., 14 Colo. App. 219, 59 Pac. 879. **Ill.**—Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837. **Mo.**—Ingram *v.* Matthien, 3 Mo. 209. **Tenn.**—Hogg *v.* Cardwell, 4 Sneed 151.

12. Carver, Frierson & Co. *v.* Graves,

prepayment made by the buyer. These remedies are herein considered separately.

2. Before Possession. — a. *Contract Executory.* — **(I.) Rescission and Recovery of Money Paid.** — If, before the title to the goods has passed, and before they have come into the possession of the buyer, the seller refuses or neglects to deliver the goods,[13] or if there is a total failure of consideration,[14] or, if, while the title yet remains in the seller, the goods are destroyed, so that delivery becomes impossible,[15] the buyer may rescind the contract; and recover, by action, any money he may have paid in advance. If, however, there has been a delivery of a part of the goods accepted by the buyer, and if such part performance and acceptance be separable from the entire contract, then the buyer, if he has prepaid, can recover only pro rata.[16]

(II.) Action for Damages. — The buyer is not, however, confined to the preceding remedy, since, if he prefers, he may bring an action for damages for the breach of the seller,[17] and, if no part of the price has

47 Tex. Civ. App. 481, 106 S. W. 903.

13. U. S.—Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527. **Conn.**—Bush *v.* Canfield, 2 Conn. 485. **Fla.**—Evans *v.* Givens, 22 Fla. 476. **Ill.**—Smith *v.* Weaver, 90 Ill. 392; Heller & Sons *v.* Illinois Tract. Co., 186 Ill. App. 327; Marten *v.* Redlich, 156 Ill. App. 498. **Ind.**—Harvey *v.* Myer, 9 Ind. 391. **Neb.**—Winside State Bank *v.* Lound, 52 Neb. 469, 72 N. W. 486. **N. H.**—Danforth *v.* Dewey, 3 N. H. 79. **N. Y.**—Interboro Brewing Co. *v.* Independent C. Ice Co., 83 Misc. 119, 144 N. Y. Supp. 820; Greenfield *v.* Herrman, 72 Misc. 406, 130 N. Y. Supp. 132. **N. C.**—Bell *v.* Hoffman, 92 N. C. 273. **Pa.**—Cleveland & Co. *v.* Sterrett, 70 Pa. 204. **Tenn.**—Harrison *v.* Chilton, 5 Yerg. 293. **Wis.** Menasha Wooden Ware Co. *v.* Mitchelstetter, 145 Wis. 486, 130 N. W. 463. **Eng.**—Biggerstaff *v.* Rowatt's Wharf, 2 Ch. 93, 65 L. J. Ch. 536, 74 L. T. N. S. 473, 44 Wkly. Rep. 536. **Can.**—Hefferman *v.* Berry, 32 U. C. Q. B. 518.

14. Bataille *v.* Firemen's Ins. Co., 2 Rob. (La.) 60.

[a] **Uniform Sales Act.**—"Nothing in this act shall affect the right of the buyer . . . to recover money paid where the consideration for the payment of it has failed." Sec. 70. Likewise, English Sale of Goods Act, Sec. 54.

15. Colo.—Prowers *v.* Nowles, 42 Colo. 442, 94 Pac. 347. **N. Y.**—Joyce *v.* Adams, 8 N. Y. 291, Seld. Notes 136. **Pa.**—Haldeman *v.* Duncan, 51 Pa. 66. **Tenn.**—Williams *v.* Allen, 10 Humph. 337, 51 Am. Dec. 709.

16. Leary *v.* Hegeman, 28 Misc. 195, 59 N. Y. Supp. 59; Routh *v.* Caron, 64 Tex. 289.

17. Cal.—Cummings *v.* Dudley, 60 Cal. 383, 44 Am. Rep. 58; Jones *v.* Post, 6 Cal. 102. **Ky.**—Cockran *v.* Bowles, 4 Bibb. 233. **La.**—Gallagher *v.* Pike, Lapeyre & Bro., 24 La. Ann. 344. **Miss.**—American Trading Co. *v.* Ingram-Day Lumb. Co., 110 Miss. 31, 69 So. 707. **N. J.**—Gruen *v.* George A. Ohl & Co., 81 N. J. L. 626, 80 Atl. 547. **N. Y.**—Interboro Brewing Co. *v.* Independent C. Ice Co., 83 Misc. 119, 144 N. Y. Supp. 820; Greenfield *v.* Herrman, 72 Misc. 406, 130 N. Y. Supp. 132; Townsend *v.* Shepard, 64 Barb. 39. **Okla.**—Coyle Consol. Cos. *v.* Swift & Co., 42 Okla. 613, 141 Pac. 1114. **Tex.** Watson *v.* Patrick (Tex. Civ. App.), 174 S. W. 632; Handy *v.* Roberts (Tex. Civ. App.), 165 S. W. 37. **Can.**—Canada Wood Specialty Co. *v.* Moritz, 42 Can. Sup. Ct. 237, 17 Ont. L. R. 53, 9 Ont. W. R. 522; Manning *v*, Carrique, 9 Ont. W. N. 61; Clark *v.* Rose, 29 U. C. Q. B. 302.

[a] **Delay in Delivery.**—The breach on the part of the seller for which a suit for damages may be maintained may be a delay in the delivery. Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591; Redlands Orange Growers' Assn. *v.* Gorman, 76 Mo. App. 184.

[b] **Partial Delivery.**—Where less than all of the goods are delivered, an action lies for the failure to deliver the remaining part. Reynolds *v.* Bell,

been paid, this is the buyer's only remedy for the failure of the seller to deliver, where the title to the goods is yet in the seller,[18] replevin not being maintainable when there has been no possssion by the purchaser.[19]

b. *Contract Executed.* — **(I.) In General.** — Where the title has passed to the buyer, but the goods have not come into his possession, he may, upon the neglect or refusal of the seller to deliver, seek his remedy in contract or in tort, or may, in certain cases, apply for equitable relief.[20]

(II.) Rescission and Recovery of Money Paid. — Where the buyer has paid the price, or any part thereof, in advance, he may, upon the wrongful refusal or neglect of the seller to deliver, elect to rescind the sale and recover by action the money paid.[21]

(III.) Action for Nondelivery. — As in the case of an executory contract, the buyer may, if he prefers, sue the seller for his breach of contract in not delivering the goods.[22] Where, however, the goods

84 Ala. 496, 4 So. 703; Cofield *v.* Clark, 2 Colo. 101.

[c] **Cannot Have Both Remedies.**— The buyer cannot, however, treat the sale as void for the purpose of recovering the price, and at the same time treat it in force in order to recover damages. Junkins *v.* Simpson, 14 Me. 364.

18. **U. S.**—Columbus Const. Co. *v.* Crane Co., 9 U. S. App. 46. **Ill.**—Haverstick *v.* Fergus, 71 Ill. 105. **Ind.** Lester *v.* East, 49 Ind. 588. **Mo.** Boutell *v.* Warne, 62 Mo. 350. **Ore.** Hamilton *v.* Gordon, 22 Ore. 557, 30 Pac. 495.

19. **Ark.**—Deutsch *v.* Dunham, 72 Ark. 141, 78 S. W. 767, 105 Am. St. Rep. 21; Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678. **Ill.**—Haverstick *v.* Fergus, 71 Ill. 105; Millay *v.* Dunn, 27 Ill. 516; Updike *v.* Henry, 14 Ill. 378; Stanley *v.* Robinson, 14 Ill. App. 480. **Ky.**—Gibson *v.* Ray, 28 Ky. L. Rep. 444, 89 S. W. 474. **Me.**—Silver *v.* Moore, 109 Me. 505, 84 Atl. 1072; Pattengill *v.* Merrill, 47 Me. 109. **Mo.** Boutell *v.* Warne, 62 Mo. 350; Suggett's Admr. *v.* Cason's Admr., 26 Mo. 221. **Neb.**—Graves *v.* Damrow, 28 Neb. 271, 44 N. W. 234; Barrett *v.* Turner, 2 Neb. 172. **Ore.**—La Vie *v.* Tooze, 43 Ore. 590, 74 Pac. 210; Hamilton *v.* Gordon, 22 Ore. 557, 30 Pac. 495.

20. See *infra*, this note and section.

[a] **The Uniform Sales Act**, in connection with such executed sales, provides that where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods when wrongfully converted or withheld. Sec. 66. Prof. Williston, the draftsman of the act, says, in his work on Sales, sec. 594, that "the language of the section is broad enough to include actions of tort for the conversion or detention of the property, actions of replevin, and also actions for breach of the seller's contractual obligation to deliver the goods."

[b] **English Law.**—The buyer has three remedies in case of wrongful non-delivery of the goods, namely, (1) in all cases an action for damages; (2) if the goods are specific or ascertained, a right to specific performance; and (3) if the property has passed, the ordinary remedies of an owner, such as detinue and trover. Laws of England, Vol. 25, p. 269, note t.

21. **U. S.**—Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527. **Ind.**—Harvey *v.* Myer, 9 Ind. 391. **Pa.**—Smethurst *v.* Woolston, 5 Watts & S. 106.

[a] **Partial Delivery.**—If several chattels are sold together for one gross sum, which is paid by the buyer, and a part of them is delivered, but the seller refuses to deliver the rest, the buyer cannot, if he retain such as were delivered, recover back any portion of the purchase money. His remedy would be upon the special contract for damages. Miner *v.* Bradley, 22 Pick. (Mass.) 457.

22. Biggers *v.* Pace, 5 Ga. 171; Harvey *v.* Myers, 9 Ind. 391.

are destroyed without fault on the part of the seller, the purchase money cannot be recovered for their nondelivery since the goods are at the buyer's risk.[23]

(IV.) Action for Conversion. — Upon the buyer's right to the possession of the goods, when the title has passed, he may elect to bring an action for conversion either against the seller, or third persons dealing tortiously with the goods,[24] subject, however, to the rules relating to innocent subsequent purchasers who rely upon the possession of the goods by the seller.

(V.) Replevin. — In some jurisdictions, the buyer may also maintain replevin against the seller.[25] If the price has not been fully paid, it should be tendered to the seller before the commencement of the action.[26]

(VI.) Specific Performance. — Where the subject matter of the sale is of such a peculiar nature that it is not elsewhere procurable, or where it has a peculiar individual value to the buyer, such as objects of art, antiquity, or heirlooms, the remedy of specific performance may be available, on the theory that no ordinary rules as to the measure of legal damages can be applied.[27] The remedy is, however, rarely granted, since in most cases an action at law is presumed to give the buyer adequate relief.[28] It is, nevertheless, expressly recognized and provided for in the sales act of both England and America.[29]

3. After Possession. — a. *In General.* — Even after the buyer has obtained possession of the goods, there may have been some breach on the part of the seller. The goods may be worthless, or defective in quality or quantity; they may not be the goods ordered; there may

23. Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56.

24. **Ala.**—Browning *v.* Hamilton, 42 Ala. 484. **Mass.**—Philbrook *v.* Eaton, 134 Mass. 398; Kennedy *v.* Whitwell, 4 Pick. 466. **N. Y.**—Koon *v.* Brinkerhoff, 39 Hun 130.

25. **U. S.**—Deatz *v.* United States, 38 Ct. Cl. 355. **Ind.**—Schenck *v.* Sithoff, 75 Ind. 485. **Mass.**—Elliott *v.* Stoddard, 98 Mass. 145; Brown *v.* Pierce, 97 Mass. 46, 93 Am. Dec. 57. **Mich.**—Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271. **Mo.**—Glass *v.* Blazer Bros., 91 Mo. App. 564. **N. Y.** Crounse *v.* Alfred Schrimpton & Sons, 10 Misc. 51, 30 N. Y. Supp. 809, 62 N. Y. St. 770. **Pa.**—Kent Iron & Hdw. Co. *v.* Norbeck, 150 Pa. 559, 24 Atl. 737. **W. Va.**—Haines *v.* Cochran Bros., 26 W. Va. 719. **Wis.**—Abraham *v.* Karger, 100 Wis. 387, 76 N. W. 330.

[a] **Sale Executed.**—If the goods are specified and title passed, replevin may be maintained although the buyer has not weighed them nor ascertained their quantity. Sandler *v.* Bresnaham, 53 Mich. 567, 19 N. W. 188.

[b] **A demand** of the goods and a refusal thereof is a condition precedent to the bringing of the action in case the goods are in possession of a third person, and the possession was rightfully acquired. Harris *v.* McCasland, 29 Ill. App. 430.

26. **Ill.**—Chicago Iron & Metal Co. *v.* Berkson, 186 Ill. App. 194. **Ind.** Bradley *v.* Michael, 1 Ind. 551, Smith 346. **Ia.**—Hart *v.* Livingston, 29 Iowa 217. **Miss.**—Hundley *v.* Buckner, 6 Smed. & M. 70.

27. **U. S.**—Hapgood *v.* Rosenstock, 23 Blatchf. 95, 23 Fed. 86. **Conn.** Corbin *v.* Tracy, 34 Conn. 325. **Md.**—Equitable Gaslight Co. *v.* Baltimore Coal Tar & Mfg. Co., 63 Md. 285. **Mass.**—Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679. **Pa.**—McGovin *v.* Remington, 12 Pa. 56, 61. **Eng.**—Falcke *v.* Gray, 4 Drew. p. 651, 658, 29 L. J. Ch. 28, 5 Jur. N. S. 645, 7 Wkly. Rep. 535, 62 Eng. Reprint 250.

28. See cases in preceding note.

29. Uniform Sales Act, § 68; English Sale of Goods Act, § 52.

be some other breach of condition, terms, or warranty; or the seller may have been guilty of fraud. In all such possibilities, the buyer has his remedies.[30]

b. *Rescission.* — The buyer may rescind in case the goods delivered are not the specific goods ordered,[31] or for failure of the seller's title to the property,[32] for material defects in the quantity,[33] or quality of the goods as delivered,[34] or for any other breach of a material condition of the sale,[35] or where the contract was procured by fraud on the seller's part,[36] or, in many jurisdictions, for a breach

30. See the discussion following.

31. Howe Machine Co. *v.* Willie, 85 Ill. 333; Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143, 60 N. E. 473.

[a] **Delivery by Mistake.**—Where however, an article not in accordance with the order is delivered by mistake, the seller may thereafter tender the correct article, if within the time the delivery could rightfully be made. Miller *v.* Benjamin, 142 N. Y. 613, 37 N. E. 631; Borrowman *v.* Free, 48 L. J. Q. B. 65, 4 Q. B. D. 500.

32. **U. S.**—Mayer *v.* United States, 5 Ct. Cl. 317. **Fla.**—Hunter *v.* Bradford, 3 Fla. 269. **Ky.**—Kitchen *v.* Wilcox, 21 Ky. L. Rep. 1823, 56 S. W. 514. **La.**—McCollom *v.* McCollom, 6 Rob. 506. **Wash. Ter.**—Baker *v.* McAllister, 2 Wash. Ter. 48, 3 Pac. 581. **Wis.** Shores Lumb. Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

33. **Ala.**—Behrman *v.* Newton, 103 Ala. 525, 15 So. 838. **Del.**—Heidlebaugh *v.* Cranston, 4 Penne. 464, 56 Atl. 367. **Ia.**—Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738. **N. Y.**—Frost *v.* Smith, 7 Bosw. 108.

34. **Ga.**—Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137; Tufts *v.* Cheatham, 75 Ga. 865. **Ill.**—Electric Vehicle Co. *v.* Price, 138 Ill. App. 594; Starks *v.* Schlensky, 128 Ill. App. 1. **Ia.**—Helm *v.* Loveland, 136 Iowa 504, 113 N. W. 1082. **Kan.**—Fairbanks, Morse & Co. *v.* Walker, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. (N. S.) 558. **Mo.**—Columbia River Packer's Assoc. *v.* Springfield Grocer Co., 129 Mo. App. 132, 108 S. W. 113; Grafeman Dairy Co. *v.* St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390. **N. H.**—Walker *v.* Davis, 65 N. H. 170, 18 Atl. 196. **N. J.** Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244. **N. Y.**—American Art Metal Novelty Co. *v.* Bosselman & Co., 91 N. Y. Supp. 722. **Tenn.**—Garr, Scott & Co. *v.* Young, 62 S. W. 631. **Va.** Virginia-Carolina Chemical Co. *v.* Carpenter, 99 Va. 292, 38 S. E. 143. **Wis.** Fox *v.* Wilkinson, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. (N. S.) 1107.

35. See *infra*, this note.

[a] **Exclusive Right to Sell.**—The buyer may, in some jurisdictions, rescind for the breach of a contract giving the buyer an exclusive right to sell the goods in a certain territory. **Ill.**—Freet *v.* American Electrical Supply Co., 257 Ill. 248, 100 N. E. 933. **Neb.**—Bride *v.* Riffe, 93 Neb. 355, 140 N. W. 639. **N. Y.**—Koerner *v.* Henn, 8 App. Div. 602, 40 N. Y. Supp. 1021.

36. **Ala.**—Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197; Young *v.* Arntze, 86 Ala. 116, 5 So. 253. **Ga.**—Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137. **Ill.**—Barker *v.* Keown, 67 Ill. App. 433. **Ia.**—Eldorado Jewelry Co. *v.* Darnell, 135 Iowa 555, 113 N. W. 344, 124 Am. St. Rep. 309; Hall *v.* Orvis, 35 Iowa 366. **Ky.**—H. T. Conde Implement Co. *v.* Grigsby & Co., 26 Ky. L. Rep. 768, 82 S. W. 458. **Me.** Junkins *v.* Simpson, 14 Me. 364. **Md.** Findlay *v.* Baltimore Trust & G. Co., 97 Md. 716, 55 Atl. 379. **Mass.**—Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Holbrook *v.* Burt, 22 Pick. 546; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700. **Mich.**—Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754. **N. Y.** Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600 (*affirming* 118 App. Div. 208, 103 N. Y. Supp. 156); Bridge *v.* Penniman, 105 N. Y. 642, 12 N. E. 19; Keefuss *v.* Weilmuster, 89 App. Div. 306, 85 N. Y. Supp. 913. **Tex.**—Jesse French Piano & O. Co. *v.* Nolan, 38 Tex. Civ. App. 395, 85 S. W. 821; Parlin & O. Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

[a] **Rescission for Fraud.**—"The law is that if, on the sale of property, the vendor knowingly makes any false representation to the vendee affecting the character or quality of the article

of warranty.[37] The contract may also be rescinded where the parties expressly so stipulate, and not infrequently the contract provides that the goods may be returned if unsatisfactory to the buyer.[38]

c. *Recovery of Money Paid.* — Where the goods delivered are absolutely worthless,[39] or in case there is a failure of title,[40] or where the goods are so defective in quality, fitness, or condition that they fail to correspond with the contract,[41] or in case of fraud on the part of the seller,[42] the buyer may recover the price or whatever part thereof

sold, upon which the vendee relies, and upon the faith of which he purchases, such vendee may (if he do so within a reasonable time) rescind the purchase by offering to return the property so purchased, and demanding a return of the consideration paid therefor. Potter *v.* Taggart, 54 Wis. 395, 11 N. W. Rep. 678, and cases cited.'' Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666.

37. See *infra*, III, A, 3, e, (IV).

38. **Ga.**—Chambers *v.* Harper, 83 Ga. 382, 9 S. E. 717. **Ill.**—Morrison *v.* Woodley, 84 Ill. 192. **La.**—Blair *v.* Collins, 15 La. Ann. 683. **N. Y.**—P. J. Sorg Co. *v.* Crouse, 88 Hun 246, 34 N. Y. Supp. 741.

[a] **Statutory Provisions.**—In several states, the grounds for rescission are expressly enunciated by the statutes, which should be consulted locally. See **Cal.**—Civ. Code §§ 1689-1691. **Mont.** Rev. Civ. Code, §§ 5063-5065. **N. D.** Rev. Civ. Code, §§ 5378-5380. **Okla.** Rev. Laws, 1910, §§ 984-986.

39. **Colo.**—Jones *v.* Hayden, 3 Colo. App. 305, 33 Pac. 76. **Ill.**—Tyler *v.* Bailey, 71 Ill. 34. **Ky.**—Robinson *v.* Bright's Exr., 3 Metc. 30. **Mich.**—Murphy *v.* McGraw, 74 Mich. 318, 41 N. W. 917. **N. J.**—Wood *v.* Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523. **N. Y.**—Stone *v.* Frost, 61 N. Y. 614. **N. C.**—Page *v.* Einstein, 52 N. C. 147. **Tenn.**—Boyd *v.* Anderson, 1 Overt. 438, 3 Am. Dec. 762. **Wis.**—Lawton *v.* Howe, 14 Wis. 241.

40. **Ky.**—Cook *v.* Redman, 2 Bush 52. **Me.**—Kneeland *v.* Willard, 59 Me. 445. **Mo.**—Porth *v.* Lux, 40 Mo. App. 162. **N. Y.**—D'Ambrosio *v.* Russo, 153 N. Y. Supp. 113; Wolf *v.* Michael, 21 Misc. 86, 46 N. Y. Supp. 991. **R. I.** Peckham *v.* Kiernan, 13 R. I. 354. **Tenn.**—Charlton *v.* Lay, 5 Humph. 496. **Can.**—Peuchen *v.* Imperial Bank, 20 Ont. 325.

41. **U. S.**—Conrad *v.* Dater, 2 Biss. 342, 6 Fed. Cas. No. 3,127. **Ala.** Veitch *v.* Illinois Cent. R. Co., 14 Ala. App. 146, 68 So. 575. **Cal.**—North Alaska Salmon Co. *v.* Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501. **Colo.** Springer *v.* Puckett, 25 Colo. App. 547, 139 Pac. 1115. **Ill.**—Tyler *v.* Bailey, 71 Ill. 34; Brown *v.* Malter Co., 184 Ill. App. 621; Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484. **Ind.**—Gossard *v.* Woods, 98 Ind. 195. **Ia.**—Jack *v.* Des Moines, etc. R. Co., 53 Iowa 399, 5 N. W. 537. **La.**—Adler *v.* Wolff, 36 La. Ann. 169. **Mich.** Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57. **Mo.**—Burns *v.* Liberick, 178 Mo. App. 145, 165 S. W. 1166; Excelsior Stove Mfg. Co. *v.* Million, 174 Mo. App. 718, 161 S. W. 298; Little Rock Grain Co. *v.* Brubaker & Co., 89 Mo. App. 1. **N. J.**—Meader *v.* Cornell, 58 N. J. L. 375, 33 Atl. 960. **N. Y.** Bach *v.* Levy, 101 N. Y. 511, 5 N. E. 345; Dochtermann Van & Exp. Co. *v.* Fiss, D. & C. Horse Co., 155 App. Div. 162, 140 N. Y. Supp. 72; Ideal Wrench Co. *v.* Garvin Mach. Co., 92 App. Div. 187, 87 N. Y. Supp. 41. **N. D.**—Minot Grocery Co. *v.* Flathead Produce Co., 30 N. D. 533, 153 N. W. 284. **Pa.**—*In re* Williams, 8 Pa. Co. Ct. 41. **Can.**—*Ex parte* Tessier, 7 Newfoundl. 423.

42. **Ala.**—McCoy *v.* Prince, 11 Ala. App. 388, 66 So. 950. **Ark.**—Warden *v.* Middleton, 110 Ark. 215, 161 S. W. 151. **Ill.**—Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416. **La.**—Lopez & Co. *v.* Thomas McAdam & Co., 7 La. Ann. 58. **Me.**—Lord *v.* French, 61 Me. 420. **Mass.** Goodwin *v.* Dick, 220 Mass. 556, 107 N. E. 925. **Neb.**—Omaha Elec. Light & P. Co. *v.* Union Fuel Co., 88 Neb. 423, 129 N. W. 989. **N. H.**—Fellows *v.* Judge, 72 N. H. 466, 57 Atl. 653. **N. Y.** Stewart *v.* Lyman, 62 App. Div. 182, 70 N. Y. Supp. 936; Shedd *v.* Montgomery, 61 Barb. 507; Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588. **N. C.** White Sewing Mach. Co. *v.* Bullock, 161 N. C. 1, 76 S. E. 634. **Tex.**—Halff Co. *v.* Jones (Tex. Civ. App.), 169 S. W. 906. **Wis.**—Page *v.* Dickerson, 28 Wis.

he may have paid. When, however, the price has been voluntarily paid with knowledge of facts that would warrant a rescission, it cannot be recovered,[43] and payments made under protest are generally regarded as voluntary payments.[44] Moreover, where the buyer, having had opportunity to inspect the goods, has paid for them after their delivery, he cannot, thereafter, recover the price for alleged defects in their quality.[45]

d. *Recovery of Overpayment.* — Where through mistake a purchaser of goods makes an overpayment the excess may be recovered by him,[46] and the same right of recovery applies where the overpayment was caused by the seller's fraud.[47]

e. *Remedies for Breach of Warranty.* — (I.) **In General.** —Upon a breach of warranty, various remedies may be open to the buyer: (1) he may accept or keep the goods, and recoup, set-off, or counterclaim against the price; (2) he may accept or keep the goods and bring an action for damages; or (3) he may, in some jurisdictions, rescind the contract and recover whatever he has paid.[48] In addition to these remedies, the buyer may, in case of a fraudulent warranty, sue in tort, if he desires, having an election of remedies either in tort or in contract.[49] In fact, according to many of the decisions, an action for the deceit lies in tort regardless of the existence of fraud,[50] al-

694, 9 Am. Rep. 532. **Can.**—Addison *v.* Ottawa Auto & Taxi Co., 30 Ont. L. Rep. 51, 5 Ont. W. N. 479.

43. **Ark.**—Vick *v.* Shinn, 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26. **Ill.** Frambers *v.* Risk, 2 Ill. App. 499. **Mich.**—Copas *v.* Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690. **N. H.**—Boutelle *v.* Melendy, 19 N. H. 196, 49 Am. Dec. 152. **N. Y.**—Altschul *v.* Kouen, 94 N. Y. Supp. 558. **N. C.** Matthews *v.* Smith, 67 N. C. 374. **Pa.** Armstrong *v.* Latimer, 165 Pa. 389, 30 Atl. 990.

44. **U. S.**—Lonergan *v.* Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. ed. 569 (*affirming* 6 Utah 301, 22 Pac. 164); New York Consol. Card Co. *v.* United States, 20 Ct. Cl. 174. **Mich.** Copas *v.* Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690. **Pa.**—Armstrong *v.* Latimer, 165 Pa. 389, 30 Atl. 990.

45. **Conn.**—Frazier *v.* Harvey, 34 Conn. 469. **N. C.**—Case Threshing Mach. Co. *v.* McClamrock, 152 N. C. 405, 67 S. E. 991. **Eng.**—Payne *v.* Whale, 7 East 274, 103 Eng. Reprint 105; Fortune *v.* Lingham, 2 Camp. 416.

46. **Ill.**—Devine *v.* Edwards, 101 Ill. 138. **Mass.**—Whitcomb *v.* Williams, 4 Pick. 228. **N. J.**—Glover *v.* Collins, 18 N. J. L. 232. **N. Y.**—Rosboro *v.* Peck, 48 Barb. 92.

47. Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619.

48. See *infra*, this section.

49. **Ark.**—Louisiana Molasses Co. *v.* Ft. Smith Wholesale Grocery Co., 73 Ark. 542, 84 S. W. 1047; Winter *v.* Bandell, 30 Ark. 362. **Ga.**—Dawson *v.* Pennaman, 65 Ga. 698. **Ky.**—Massie *v.* Crawford, 3 Mon. 218. **Me.**—Hillman *v.* Wilcox, 30 Me. 170. **Mass.** Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230. **N. H.**—Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401. **N. C.**—Fields *v.* Brown, 160 N. C. 295, 76 S. E. 8. **R. I.**—Demers *v.* Andrews Bros., 29 R. I. 209, 69 Atl. 923. **Tenn.** Rosson *v.* Hancock, 3 Sneed 434. **Eng.** Wood *v.* Smith, 4 C. & P. 45, 8 L. J. K. B. (O. S.) 50, 1 M. & M. 539, 5 M. & R. 124, 19 E. C. L. 399.

50. **U. S.**—Schuchardt *v.* Allens, 1 Wall. 359, 17 L. ed. 642. **Del.**—Tyre *v.* Causey, 4 Harr. 425. **Ill.**—Wallace *v.* Tanner, 118 Ill. App. 639. **Ind.** House *v.* Fort, 4 Blackf. 293. **Mass.** Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. (N. S.) 884; Norton *v.* Doherty, 3 Gray 372, 63 Am. Dec. 758. **Mich.**—Carter *v.* Glass, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240. **Pa.**—Vanleer *v.* Earle, 26 Pa. 277. **Va.** Trice *v.* Cockran, 8 Gratt. (49 Va.) 442, 56 Am. Dec. 151. **Eng.**—William-

though other cases hold that if there be no charge of fraud, the action should be based upon the breach of contract.[51]

(II.) Recoupment, Set-off, Counterclaim. — If there has been a breach of warranty, it is generally recognized that the buyer if sued for the price may, as a remedy, recoup either in diminution, or extinction,[52] of the price; or that he may plead a set-off or counterclaim,[53] thereby

son *v.* Allison, 2 East 446, 102 Eng. Reprint 439.

51. **Ala.**—Scott *v.* Holland, 132 Ala. 389, 31 So. 514. **Ga.**—Brooke *v.* Cole, 108 Ga. 251, 33 S. E. 849; Dawson *v.* Pennaman, 65 Ga. 698. **N. H.**—Crooker *v.* Willard, 28 N. H. 134; Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401. **N. Y.**—Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562; Moore *v.* Noble, 53 Barb. 425, 36 How. Pr. 385; Evertson's Exrs. *v.* Miles, 6 Johns. 138.

52. **U. S.**—Withers *v.* Greene, 9 How. 213, 661, 13 L. ed. 109; Lyon *v.* Bentram, 20 How. 149, 154, 15 L. ed. 847; Springfield Milling Co. *v.* Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389. **Cal.**—Polhemus *v.* Heiman, 45 Cal. 573. **Conn.**—McAlpin *v.* Lee, 12 Conn. 129, 30 Am. Dec. 609; Hitchcock *v.* Hunt, 28 Conn. 343. **Ill.**—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Wilson *v.* King, 83 Ill. 232; Ruff *v.* Jarrett, 94 Ill. 475. **Mass.** Bradley *v.* Rea, 14 Allen 20; Harrington *v.* Stratton, 22 Pick. 510. **Mich.** Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421. **N. J.**—Bouker *v.* Randles, Helm & Co., 31 N. J. L. 335. **N. Y.** McAllister *v.* Reab, 4 Wend. 483, *s. c.* 8 Wend. 109; Judd *v.* Dennison, 10 Wend. 512; Muller *v.* Eno, 14 N. Y. 597. **Ohio**—Dayton *v.* Hooglund, 39 Ohio St. 671. **Pa.**—Ogden *v.* Beatty, 137 Pa. 197, 20 Atl. 620, 21 Am. St. Rep. 862; Seigworth *v.* Leffel, 76 Pa. 476; Falconer *v.* Smith, 18 Pa. 130, 55 Am. Dec. 611; Dailey *v.* Green, 15 Pa. 118, 127. **Vt.**—Cragin *v.* Fowler, 34 Vt. 326, 80 Am. Dec. 680; Walker *v.* Hoisington, 43 Vt. 608. **Wash.**—Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414. **Wis.**—Parry Mfg. Co. *v.* Tobin, 106 Wis. 286, 82 N. W. 154.

See *infra*, III, B, 5, c.

53. **U. S.**—Hercules Iron Works *v.* Dodsworth, 57 Fed. 556; West, B. & C. Mfg. Co. *v.* Ansonia Brass & C. Co., 4 Fed. 145. **Ala.**—Baer & Co. *v.* Mobile C. & B. Mfg. Co., 159 Ala. 491, 49 So. 92; McCoy *v.* Prince, 11 Ala. App. 388, 66 So. 950. **Ark.**—Stevens Co. *v.* Whalen, 95 Ark. 488, 129 S. W. 1081. **Cal.** Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722; Earl *v.* Bull, 15 Cal. 421; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Erie City Iron Works *v.* Tatum, 1 Cal. App. 286, 82 Pac. 92. **Colo.** Smith *v.* Mayer, 3 Colo. 207. **Conn.** Hitchcock *v.* Hunt, 28 Conn. 343. **Ga.** Pound *v.* Williams, 119 Ga. 904, 47 S. E. 218; Taylor *v.* Griswold, 32 Ga. 569; Williamson *v.* Walker, 24 Ga. 257, 71 Am. Dec. 119; Wright *v.* Findley, 21 Ga. 59; Alpine Safe & L. Co. *v.* Parsons, 13 Ga. App. 154, 78 S. E. 1023. **Ill.**—McIlvrid *v.* Murphy, 190 Ill. App. 515; Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Owens *v.* Sturges, 67 Ill. 366; Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381; Crabtree *v.* Kile, 21 Ill. 180; Newton Rubber Works *v.* Home Rattan Co., 100 Ill. App. 421; Krause *v.* Scott, 86 Ill. App. 238; Gibbs & Sterret Mfg. Co. *v.* Kaszezyki, 18 Ill. App. 623. **Ind.** Love *v.* Oldham, 22 Ind. 51; Edwards Mfg. Co. *v.* Stoops, 54 Ind. App. 361, 102 N. E. 980. **Ia.**—Bixby *v.* Denison Normal School Assoc., 78 N. W. 234; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369. **Kan.**—Lyman *v.* Wederski, 95 Kan. 438, 148 Pac. 642; International Filter Co. *v.* Caney Ice & C. S. Co., 84 Kan. 705, 115 Pac. 635. **Ky.**—Cook *v.* Gray, 2 Bush 121; Culver *v.* Blake, 6 B. Mon. 528. **Me.**—Henkel *v.* Burke, 10 Atl. 249. **Md.**—Kernan *v.* Crook, Horner & Co., 100 Md. 210, 59 Atl. 753; Queen City Glass Co. *v.* Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447. **Mich.**—Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272. **Minn.**—Allen *v.* Swenson, 53 Minn. 133, 54 N. W. 1065. **Mo.**—Nelson *v.* Johnson, 25 Mo. 430; Myers *v.* Hay, 3 Mo. 98; June *v.* Falkinburg, 89 Mo. App. 563; Redlands Orange Growers Assn. *v.* Gorman, 79 Mo. App. 184; Voss *v.* McGuire, 18 Mo. App. 477. **Mont.**—Busbee *v.* Gagnon Co., 50 Mont. 203, 146 Pac. 275. **Neb.** McConnell *v.* Lewis, 58 Neb. 188, 78 N. W. 518. **N. J.**—Higbie *v.* Rogers, 63 N. J. Eq. 368, 50 Atl. 366. **N. Y.** Reab *v.* McAllister, 8 Wend. 109 (*affirming* 4 Wend. 483); Coble *v.* Potter,

obtaining affirmative relief, possibly even in excess of the plaintiff's claim.[54] This remedy is also expressly authorized by the uniform sales act.[55]

(III.) Action for Damages. — Instead of seeking redress by way of recoupment, set-off, or counterclaim, the buyer, upon a breach of warranty, may bring an independent action for damages.[56]

155 App. Div. 716, 140 N. Y. Supp. 855; Ames *v.* Norwich Light Co., 122 App. Div. 319, 106 N. Y. Supp. 952; Smith *v.* Hedges, 89 Misc. 183, 152 N. Y. Supp. 95; Kupfer & Co. *v.* Pellman, 67 Misc. 149, 121 N. Y. Supp. 1081; Shearer Co. *v.* Kakoulis, 144 N. Y. Supp. 1077. **N. C.** Cable Co. *v.* Macon, 153 N. C. 150, 69 S. E. 14; Huyett & Smith Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718. **N. D.**—Northwestern Cordage Co. *v.* Rice, 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563. **Ohio**—Timmons *v.* Dunn, 4 Ohio St. 680; Tillyer *v.* Van Cleve Glass Co., 13 Ohio C. C. 99, 7 Ohio Cir. Dec. 209. **Pa.**—Standard Auto Co. *v.* Thurston, 54 Pa. Super. 160. **S. C.** Carter *v.* Walker, 2 Rich. L. 40; Parker *v.* Pringle, 2 Strobh. 242. **S. D.** Spaulding *v.* Pitts, 26 S. D. 78, 127 N. W. 610. **Tenn.**—Sample *v.* Looney, 1 Overt. 85. **Vt.**—Walker *v.* Hoisington, 43 Vt. 608. **Va.**—King & Co. *v.* Hancock, 114 Va. 596, 77 S. E. 510. **Wash.** Houser & Haines Mfg. Co. *v.* McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925; Baker *v.* McAllister, 2 Wash. Ter. 48, 3 Pac. 581. **W. Va.** Wilson *v.* Wiggins, 73 W. Va. 560, 564, 81 S. E. 842. **Wis.**—Kelsey *v.* Ringrose, Net Co., 152 Wis. 499, 140 N. W. 66; Bonnell *v.* Jacobs, 36 Wis. 59; Rosebrook *v.* Runals, 32 Wis. 415; Getty *v.* Rountree, 2 Pinn. 379, 2 Chandl. 28, 54 Am. Dec. 138. **Can.**—Winnipeg Fish Co. *v.* Whitman Fish Co., 41 Can. Sup. Ct. 453; Wellington *v.* Fraser, 19 Ont. L. R. 88, 14 Ont. W. R. 291; Crompton & K. Loom Works *v.* Hoffman, 5 Ont. L. Rep. 554; Cull *v.* Roberts, 28 Ont. 591.

See *infra*, III, B. 5, c.

54. See generally the title **"Set-Off, Counterclaim and Recoupment."**

There is much confusion in the cases in the employment of the words "recoupment," "set-off," "counterclaim" and "defense," especially in the use of the terms "recoupment" and "counterclaim." See *infra*, III, B, 5, c, and the title **"Set-off, Counterclaim and Recoupment."**

55. See *infra*, this note.

[a] **This act**, now in force in many of our greatest commercial states (see *supra* I, B), provides as follows:

§69 (1). "Where there is a breach of warranty by the seller, the buyer may at his election: (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." It is further provided by the Act that the word "action" includes counterclaim and set-off. §76 (1). The word "recoupment" in the first of these sections is used in its proper and technical meaning in distinction from counterclaim and set-off. See Williston on Sales, § 605. Prof. Williston, the author of the text here referred to, was the draftsman of the Uniform Sales Act.

56. **Ala.**—Western Union Tel. Co. *v.* Jackson Lumb. Co., 187 Ala. 629, 65 So. 962; Baer & Co. *v.* Mobile C. & B. Mfg. Co., 159 Ala. 491, 49 So. 92; McCoy *v.* Prince, 11 Ala. App. 388, 66 So. 950. **Cal.**—Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618. **Colo.** Smith *v.* Mayer, 3 Colo. 207. **Ga.** Pound *v.* Williams, 119 Ga. 904, 47 S. E. 218. **Ill.**—Crabtree *v.* Kile, 21 Ill. 180. **Ind.**—Gatling *v.* Newell, 9 Ind. 572; House *v.* Fort, 4 Blackf. 293. **Ia.** Steele *v.* Andrews, 144 Iowa 360, 121 N. W. 17. **Kan.**—Lyman *v.* Wederski, 95 Kan. 438, 148 Pac. 642. **Ky.**—Cook *v.* Gray, 2 Bush 121. **Mass.**—Gascoigne *v.* Cary Brick Co., 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917C, 336. **Minn.** Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694. **N. Y.**—Interboro Brew. Co. *v.* Independent Consumers' Ice Co., 83 Misc. 119, 144 N. Y. Supp. 820; Plumb *v.* J. W. Hallauer & Sons Co., 145 App. Div. 20, 130 N. Y. Supp. 147; Larrowe Mill. Co. *v.* Lyons Beet Sugar Ref. Co., 137 App. Div. 732, 122 N. Y. Supp. 567. **N. C.**—Tomlinson & Co. *v.* Morgan, 166 N. C. 557, 82 S. E. 953; Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

(IV.) Rescission. — (A.) CONTRACT EXECUTORY. — Where the contract is executory, that is, where the goods are not ascertained, it is held generally that, upon the tender of the goods, the buyer may reject them, if they do not conform to the warranty, either express or implied, or, if, after receiving them, it is discovered that there is a breach of warranty, the buyer may return them and rescind the contract, recovering the price if paid.[57]

(B.) CONTRACT EXECUTED. — Where the contract is executed, that is, where specific, ascertained personal property is sold under a warranty, it is the general rule, at common law, that there is no right of rescission for the breach of an express warranty, but that the buyer is left to his action for damages.[58] In some states, however, the buyer

Ohio.—Allen *v.* Hass, 27 Ohio C. C. 727. **S. D.**—Spaulding *v.* Pitts, 26 S. D. 78, 127 N. W. 610; Acme Harvesting Mach. Co. *v.* Barkley, 22 S. D. 456, 118 N. W. 690. **Tex.**—Ellis *v.* Tips, 16 Tex. Civ. App. 82, 40 S. W. 524. **Wash.** Konnerup *v.* Allen, 56 Wash. 292, 105 Pac. 639; Houser & Haines Mfg. Co. *v.* McKay, 53 Wash. 337, 101 Pac. 894. **Wis.**—Kelsey *v.* Ringrose Net Co., 152 Wis. 499, 140 N. W. 66; Park *v.* Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572; Bonnell *v.* Jacobs, 36 Wis. 59. **Eng.**—Gompertz *v.* Denton, 1 Cromp. & M. 207, 1 Dowl. P. C. 623, 2 L. J. Exch. 82, 3 Tyrw. 233.

[a] **Warranty Collateral.**—A warranty of quality by a vendor, whether express or implied, is collateral to the main contract of sale, and a cause of action based upon a breach of warranty is not the same as a cause of action based upon a breach of the contract itself. McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88.

[b] **Uniform Sales Act.**—§69(1). "Where there is a breach of warranty by the seller, the buyer may, at his election: . . . (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." [See, to same effect, English Sale of Goods Act, Sec. 53(1)(b).] (c) "Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty." This latter clause is not contained in the English Act. Moreover, several American cases have held that no action will lie for a breach of warranty unless the title has passed to the buyer. Bunday *v.* Columbus Machine Co., 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475; English *v.* Hanford, 75 Hun (N. Y.) 428, 27 N. Y. Supp. 672, 57 N. Y. St. 352; Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082. See, also, Frye *v.* Milligan, 10 Ont. 509. In criticism of this view, see Williston on Sales, p. 1008. It is worthy of note that the three American states above cited have, since these decisions, adopted the Uniform Sales Act.

57. **U. S.**—Pope *v.* Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. ed. 393. **Cal.** Hoult *v.* Baldwin, 67 Cal. 610, 8 Pac. 440; Polhemus *v.* Heiman, 45 Cal. 573. **Ill.**—Owens *v.* Sturges, 67 Ill. 366; Doane *v.* Dunham, 65 Ill. 512; Starks *v.* Schlensky, 128 Ill. App. 1; Mayes *v.* Rogers, 47 Ill. App. 372. **Kan.**—Field *v.* Kinnear, 4 Kan. 476. **Ky.**—Munford *v.* Kevil, 109 Ky. 246, 58 S. W. 703. **Minn.**—Knoblauch *v.* Kronschnabel, 18 Minn. 300, Gil. 272. **Mo.**—Alabama Steel & Wire Co. *v.* Symons, 110 Mo. App. 41, 83 S. W. 78; Calhoun *v.* Paule, 26 Mo. App. 274. **Neb.**—McCormick Harvesting Mach. Co. *v.* Knoll, 57 Neb. 790, 78 N. W. 394. **N. Y.**—Murray *v.* Smith, 4 Daly 277; Pomeroy *v.* Shaw, 2 Daly 267. **Eng.**—Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 193, 109 Eng. Reprint 1212.

58. **U. S.**—Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847; Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595. **Conn.** Worcester Mfg. Co. *v.* Waterbury Brass Co., 73 Conn. 554, 48 Atl. 422. **Ga.** Woodruff *v.* Graddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33. **Ill.**—Owens *v.* Sturges, 67 Ill. 366; Doane *v.* Dunham, 65 Ill. 512. **Ind.**—Hoover *v.* Sidener, 98 Ind. 290. **Ky.**—Lightburn *v.* Cooper, 1 Dana 273. **Mich.**—H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939. **Minn.**—Lynch *v.* Curfman, 65 Minn. 170, 68 N. W. 5.

is not limited to his action for damages, but he may, if he so elects, rescind the sale, as in case of an executory contract, and recover whatever he has paid.[59] It is, moreover, held generally that there is a right of rescission in case of the breach of an implied warranty whether the contract be executory or executed.[60] Under the English law there is no right of rescission for a breach of warranty as distinguished from a breach of a condition.[61]

(C.) False Warranty. — Where the warranty is fraudulent, all the authorities agree in holding that the buyer may elect to rescind on the ground of the seller's fraud.[62]

(D.) Express Agreement of Parties. — The buyer may of course exercise the right of return in every case if there is an express agreement to that effect.[63]

(V.) Remedies Exclusive. — The various remedies open to the buyer for breach of warranty are exclusive.[64] Thus a party who rescinds

Neb.—Mundt *v.* Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670. **N. J.**—Woodward *v.* Emmons, 61 N. J. L. 281, 39 Atl. 703. **N. Y.**—Muller *v.* Eno, 14 N. Y. 597. **Pa.**—Eshleman *v.* Lightner, 169 Pa. 46, 32 Atl. 63; Freyman *v.* Knecht, 78 Pa. 141. **S. C.** Kauffman Milling Co. *v.* Stuckey, 40 S. C. 110, 18 S. E. 218. **Tenn.**—Belew *v.* Clark, 4 Humph. 506. **Tex.**—Wright *v.* Davenport, 44 Tex. 164. **Vt.**—Matteson *v.* Holt, 45 Vt. 336; Mayer *v.* Dwinell, 29 Vt. 298. **Wash.**—Hulet *v.* Achey, 39 Wash. 91, 80 Pac. 1105. **Eng.** Couston *v.* Chapman, L. R. 2 H. L. (Sc.) 250; Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 193, 109 Eng. Reprint 1212.

59. **Cal.**—Hoult *v.* Baldwin, 67 Cal. 610, 8 Pac. 440. **Ill.**—Sparling *v.* Marks, 86 Ill. 125. **Ia.**—Timken Carriage Co. *v.* C. S. Smith & Co., 123 Iowa 554, 99 N. W. 183. **Kan.**—Weybrick & Co. *v.* Harris, 31 Kan. 92, 1 Pac. 271. **Me.** Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77. **Md.**—Miller *v.* Grove, 18 Md. 242. **Mass.**—Bryant *v.* Isburgh, 13 Gray 607, 74 Am. Dec. 655. **Mo.**—Branson *v.* Turner, 77 Mo. 489. **Neb.** Mundt *v.* Simpkins, 81 Neb. 1, 4, 115 N. W. 325, 129 Am. St. Rep. 670. **Eng.** Curtis *v.* Hannay, 3 Esp. 82.

60. **U. S.**—Rubin *v.* Sturtevant, 80 Fed. 930, 26 C. C. A. 259. **Ill.**—Owens *v.* Sturges, 67 Ill. 366. **Ky.**—Nevels *v.* Kentucky Lumb. Co., 108 Ky. 550, 56 S. W. 969, 94 Am. St. Rep. 388, 49 L. R. A. 416. **N. H.**—Boothby *v.* Plaisted, 51 N. H. 436, 12 Am. Rep. 140.

[a] **Uniform Sales Act.**—See §69(1), and the statement of the draftsman in Williston on Sales, p. 1002.

61. **Sale of Goods Act, §53 (1).**

[a] **The English Act** allows no rescission for breach of warranty, the buyer being left to the remedy either of recoupment, or an action (or counterclaim) for damages. The English act permits rescission, however, in case of a breach of a condition, either express or implied, providing the buyer has not accepted the goods, and also provided the contract is not for specified goods the title to which has passed to the buyer. In America implied warranties are usually classed under two heads, (1) implied warranty of title, and (2) implied warranties of quality, including identity of kinds or species bought, conformity to sample if sold by sample, merchantability, and reasonable fitness for designated purpose. In England, such implied agreements are called implied conditions, and, as conditions, authorize rescission of the contract in case of their breach, providing the contract is not executed. See Sale of Goods Act, §§ 11, 12, 13, 14.

62. **U. S.**—McRae *v.* Lounsby, 130 Fed. 17, 64 C. C. A. 385; Rubin *v.* Sturtevant, 80 Fed. 930, 26 C. C. A. 259; Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595. **N. Y.**—Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588. **Pa.**—Freyman *v.* Knecht, 78 Pa. 141. **Vt.** Matteson *v.* Holt, 45 Vt. 336; Gates *v.* Bliss, 43 Vt. 299.

63. Latham *v.* Hartford, 27 Kan. 249; Muller *v.* Eno, 14 N. Y. 597; Kiernan *v.* Rocheleau, 6 Bosw. (N. Y.) 148.

64. See Huff *v.* Broyles, 26 Gratt. (67 Va.) 283 (the buyer cannot plead set-off when sued for the price, and,

thereby waives his right to any other concurrent remedy,[65] and an election to rescind once made, with knowledge of the facts, is final.[66]

B. Procedure in Connection With Remedies. — **1. Rescission.** a. *Conditions Precedent.* — **(I.) In General.** — The party who would rescind a contract must be without fault on his part.[67] Therefore, he must have performed, or been ready to perform all the terms of the contract imposed upon him,[68] and, so far as possible, the party seeking to rescind must restore the other party to the condition he was in before the contract was made.[69]

(II.) Duty To Return Goods. — The right of rescission being equitable in its nature, is based upon the condition that the other party shall be put in statu quo,[70] and the buyer, if he seeks to rescind the sale,

upon recovery thereby, later bring an action for damages); and 5 Standard Proc. 80.

[a] **The Uniform Sales Act** expressly provides that "when the buyer has claimed and has been granted a remedy in any one of these ways, no other remedy shall thereafter be granted." §69(2).

[b] **In England,** however, and by the express provision of the Sale of Goods Act of that country, the fact that the buyer has set up the breach by way of recoupment does not prevent him from also maintaining an action for the same breach if he has suffered damage. Rigge *v.* Burbidge, 15 M. & W. 598; Mondel *v.* Steel, 8 M. & W. 858; Sale of Goods Act, Sec. 53(4). See, however, note to this section, in Laws of Eng., Vol. 25, p. 274(c), where it is said that this was due to a rule of former practice, but that now since defense and counterclaim can be pleaded together, the point becomes of little importance.

65. Kansas Refrigerating Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943; Elgin *v.* Snyder, 60 Ore. 297, 118 Pac. 280.

[a] **Action for Damages.**—A buyer cannot rescind the contract and then bring an action for damages. Kansas Refrigerating Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943; Hunt County Oil Co. *v.* Scott, 28 Tex. Civ. App. 213, 67 S. W. 451.

66. **U. S.**—Richardson *v.* Lowe, 149 Fed. 625, 79 C. C. A. 317. **Ga.**—Kennedy *v.* Manry, 6 Ga. App. 816, 66 S. E. 29. **Md.**—Latrobe *v.* Dietrich, 114 Md. 8, 78 Atl. 983. **N. Y.**—Hayward *v.* Wemple, 152 App. Div. 195, 136 N. Y. Supp. 625. **Pa.**—Zeller *v.* Haupt, 41 Pa. Super. 647. **Va.**—Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837.

67. **U. S.**—Hull *v.* Pitrat, 45 Fed. 94. **Cal.**—Fairchild-Gilmore-Wilton Co. *v.* Southern Refining Co., 158 Cal. 264, 110 Pac. 951. **Ill.**—Griffin *v.* Griffin, 163 Ill. 216, 45 N. E. 241. **Ia.**—Newcomb *v.* Ogden Plow Co., 120 Iowa 570, 95 N. W. 174. **Kan.**—Provident Loan Trust Co. *v.* McIntosh, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906. **La.**—Mackay *v.* Holton & Co., 8 La. Ann. 48. **Minn.** Mason *v.* Edward Thompson Co., 94 Minn. 472, 103 N. W. 507. **Mo.**—Norris *v.* Letchworth, 167 Mo. App. 553, 152 S. W. 421. **Neb.**—Tepoel *v.* Shutt, 57 Neb. 592, 78 N. W. 288. **N. Y.** Gardner *v.* The Roycrofters, 197 N. Y. 511, 90 N. E. 1158. **Ohio**—Hopkins *v.* Shull, 2 Ohio Dec. 272. **Tex.**—Clay *v.* Hart, 49 Tex. 433. **Wash.**—Reddish *v.* Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781. **Wis.**—Blewett *v.* McRae, 88 Wis. 280, 60 N. W. 258.

68. **U. S.**—Sheridan State Bank *v.* Rowell, 212 Fed. 529. **Colo.**—Travelers' Ins. Co. *v.* Redfield, 6 Colo. App. 190, 40 Pac. 195. **Idaho**—Kessler *v.* Pruitt, 14 Idaho 175, 93 Pac. 965. **Ind.** McClellan *v.* Coffin, 93 Ind. 456. **Mass.** Seymour *v.* Bennet, 14 Mass. 266. **Minn.** Paget *v.* Park, 50 Minn. 186, 52 N. W. 532. **N. Y.**—Ridden *v.* Lynch, 133 N. Y. Supp. 468. **Ore.**—Lockhart *v.* Ferrey, 59 Ore. 179, 115 Pac. 481. **Pa.** McHenry *v.* Mitchell, 219 Pa. 297, 68 Atl. 729. **S. D.**—Spolek *v.* Hatch, 21 S. D. 386, 113 N. W. 75. **Tex.**—Whitaker *v.* Willis (Tex. Civ. App.), 146 S. W. 1004.

69. See *infra,* III, B, 1, a, (II).

70. **U. S.**—Andrews *v.* Hensler, 6 Wall. 254, 18 L. ed. 737. **Ala.**—Jemison *v.* Woodruff, 34 Ala. 143. **Me.** Milliken *v.* Skillings, 89 Me. 180, 36

must return, or tender, to the seller whatever goods he may have received,[71] unless the goods be utterly worthless,[72] or unless the other party positively refuses to accept them.[73] There, generally, should

Atl. 77. **Neb.**—First Nat. Bank *v.* Yocum, 11 Neb. 328, 9 N. W. 84. **Ohio.** Crooks *v.* Eldridge & Higgins Co., 64 Ohio St. 195, 60 N. E. 203. **Vt.**—Hoadley *v.* House, 32 Vt. 179, 76 Am. Dec. 167. **Va.**—Mason *v.* Chappell, 15 Gratt. (56 Va.) 572. **W. Va.**—Cheuvront *v.* Cheuvront, 54 W. Va. 171, 46 S. E. 233.

[a] **Rule Founded in Justice.**—"The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, so far as practicable, prevails equally at the civil and the common law. It is a rule founded in natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the discovery of the defects for which the recission is asked. The vendor may then receive back the property, and be able by proper care and attention to preserve it, or he may have recourse upon other parties, the remedies against whom might be lost by delay. He must be permitted to judge for himself what measures are necessary for his interest and protection, and if the purchaser by delay deprives him of the opportunity of thus protecting himself, he cannot demand a rescission of the contract." Mr. Justice Field, in Andrews *v.* Hensler, 6 Wall. (U. S.) 254, 18 L. ed. 737.

71. **U. S.**—Garland *v.* Bowling, Hempst. 710, 10 Fed. Cas. No. 5,242. **Ala.**—Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197. **Colo.**—Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832. **Ga.** Clark & Co. *v.* Neufville, 46 Ga. 261. **Ill.**—Dowden *v.* Wilson, 108 Ill. 257. **Ind.**—Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363. **Ia.**—Parsons Bandcutter & S. F. Co. *v.* Mallinger, 122 Iowa 703, 98 N. W. 580; Van Vechten *v.* Smith, 59 Iowa 173, 13 N. W. 94. **Kan.**—Cookingham *v.* Dusa, 41 Kan. 229, 21 Pac. 95. **Ky.**—J. I. Case Threshing Mach. Co. *v.* Patterson, 137 Ky. 180, 125 S. W. 287. **La.** Vancleave *v.* Nelson, 49 La. Ann. 621, 21 So. 734. **Mass.**—Dorr *v.* Fisher, 1 Cush. 271; Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103; Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Miner *v.* Bradley, 22 Pick. 457. **Minn.** Auerbach *v.* Wunderlick, 76 Minn. 42, 78 N. W. 871. **Miss.**—Jagers *v.* Griffin, 43 Miss. 134. **N. J.**—Byard *v.* Holmes, 33 N. J. L. 119. **N. Y.**—Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588. **Ohio** Reed *v.* McGrew, 5 Ohio 375, Wright 105. **W. Va.**—Ohio River Contract Co. *v.* Smith, 76 W. Va. 503, 85 S. E. 671.

[a] **Uniform Sales Act.**—Where the goods have been delivered to the buyer he can not rescind the sale . . . if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. § 69(3).

72. **Ala.**—Pacific Guano Co. *v.* Mullen, 66 Ala. 582. **Ind.**—People's Building, Loan & Savings Assn. *v.* Reynolds, 17 Ind. App. 453, 46 N. E. 1008. **Ia.** Swift & Co. *v.* Redhead, 147 Iowa 94, 122 N. W. 140. **Kan.**—First Nat. Bank *v.* Peck, 8 Kan. 660. **La.**—Richards *v.* Burke, 7 La. Ann. 242. **Mo.**—Smith *v.* Means, 170 Mo. App. 158, 155 S. W. 454. **Okla.**—Barber Medicine Co. *v.* Bradley, 48 Okla. 82, 150 Pac. 127.

73. **Ala.**—Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197. **La.**—Ware *v.* Berlin, 43 La. Ann. 534, 9 So. 490. **Me.**—Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77. **Mich.** Fournier *v.* Clutton, 146 Mich. 298, 109 N. W. 425, 117 Am. St. Rep. 638, 7 L. R. A. (N. S.) 179, 10 Ann. Cas. 392. **Mo.**—Peterson *v.* Barber, 180 Mo. App. 365, 167 S. W. 1180. **Ore.**—Jones *v.* McGinn, 70 Ore. 236, 140 Pac. 994. **Vt.**—Barrett *v.* Tyler, 76 Vt. 108, 56 Atl. 534. **Wash.**—Payne *v.* Hiram Lindsey Co., 71 Wash. 293, 128 Pac. 678. **Wis.**—Potter *v.* Taggart, 54 Wis. 395, 11 N. W. 678.

[a] **Return Excused.**—As said by the supreme court of Wisconsin, in J. I. Case Threshing Mach. Co. *v.* Johnson, 140 Wis. 534, 122 N. W. 1037: "It is a rule of law thoroughly established by many decisions that the positive declaration by one party of a determination which would render a prescribed act by the other futile excuses a specified performance or tender of that act. Guetzkow *v.* Michigan Mut. L. Ins. Co., 105 Wis. 448, 451, 81 N.

be an actual tender of the property, a mere proposal or offer to return, or mere words signifying an intention to return, not being sufficient.[74] Where, however, one receives goods and upon their inspection finds that they do not conform to the contract, it is sufficient to notify the seller promptly of their rejection without making a physical return of the property.[75] Generally, moreover, when there is a right to rescind, a notice that goods are held subject to the seller's demand is sufficient in case of a refusal to accept the goods; or where the goods, by reason of bulk or distance of transportation, cannot with reasonable practicability be delivered; or where the seller refuses to take back the goods.[76]

b. *Proceedings.* — In most cases, especially in connection with the sale of personal property, the party having a right to rescind may do

W. 652; Langnecker *v.* Trustees, 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185; Wuerfler *v.* Trustees, 116 Wis. 19, 92 N. W. 433 (96 Am. St. Rep. 940); Swanke *v.* Herdman, 138 Wis. 654, 120 N. W. 414. Clearly the declaration of plaintiff's position that defendant had no right to surrender back the machine served to render any deposit thereof at the depot in Hartland futile and unreasonable and, we conclude, absolved him from the performance of that as a condition of his right to rescind for breach of warranty."

[b] **Property Not Accepted.**—Some cases held that if, upon the buyer's tender of the goods, the seller refuses to accept them, then the buyer should resell the goods as agent for the seller. **Mich.**—Hitchcock *v.* Griffin & Skelley Co., 99 Mich. 447, 58 N. W. 373, 41 Am. St. Rep. 624. **Miss.**—Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703. **N. Y.**—Messmore *v.* New York Shot & Lead Co., 40 N. Y. 422. **Pa.**—Youghiogheny Iron & Coal Co. *v.* Smith, 66 Pa. 340.

74. Ill.—Sturges & Burn Mfg. Co. *v.* Great Western Smelting & Refining Co., 156 Ill. App. 474. **N. Y.**—Bloomingdale *v.* Southern Nat. Bank, 63 App. Div. 72, 71 N. Y. Supp. 306. **S. C.** Carter *v.* Walker, 2 Rich. L. 40; Wilson *v.* Ferguson, Cheves 190.

75. Alden *v.* Hart, 161 Mass. 576, 37 N. E. 742; Rheinstrom *v.* Steiner, 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. Rep. 699.

76. Cal.—Lindow *v.* Cohn, 5 Cal. App. 388, 90 Pac. 485. **Ia.**—Cox *v.* Cline, 139 Iowa 128, 117 N. W. 48. **Me.** Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593. **Neb.**—Mundt *v.* Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670. **Vt.**—Bailey *v.* Manley, 77 Vt. 157, 59 Atl. 200. **Wis.**—Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666.

[a] **Sufficient Tender.**—In the case of Angell *v.* Loomis, 97 Mich. 5, 55 N. W. 1008, the trial court in instructing the jury on the question of tender said: "Now, where parties are residents of the same town, it is usual, as in the case of a horse, to take it back and tender it to the person; but if it is other property that naturally belongs to a warehouse, and the person is a transient, it is proper to leave it in a warehouse, subject to the order of such person, and to give notice of the fact; and, I think, if that was done in this case, it would be a sufficient tender if it was done within a reasonable time, as soon after the discovery as could consistently be made." The Supreme Court held the instruction correct, saying, "Defendant had left the state. Plaintiff had deposited the goods and notified him where they were, and that they were subject to his order. The tender was sufficient."

[b] **Must Tender Unless Excused.** In the case of Stevens Tank & Tower Co. *v.* Berlin Mills Co., 112 Me. 336, 92 Atl. 180, it is said: "The buyer must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do, he is relieved of the obligation by a refusal to receive them if tendered. It is not sufficient for a vendee who has taken delivery of the goods, to make a proposal to return them or to notify the vendor that he holds them subject to his order." Tyler *v.* Augusta, 88 Me. 504, 34 Atl. 406; Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77.

so, ex parte, since the exercise of his option to rescind does not require the assent of the other party in order to make the rescission effective.[77] In case, however, there may be desired a formal cancellation of a contract upon grounds that justify rescission, there being no adequate remedy at law, a suit in equity for rescission and cancellation is the proper remedy, the proceedings in such a case, following the usual course of other similar suits.[78] In such a suit, the grounds of the rescission must be set forth in the bill or petition.[79]

2. Recovery of Money Paid. — a. *In General.* — Closely connected with the buyer's right of rescission is his further right, in case he does rescind, to recover by action the price or any part thereof he may have paid in advance. The right to recover money paid also includes the right to recover notes given for the price.[80]

Where there has been an over-payment for goods, the buyer may of course recover it back.[81]

b. *Prerequisites of Action.* — **(I.) In General.** — As in other actions, whatever is necessary for the buyer to do as a condition precedent to his right of action must have been performed by him.[82] If he has been guilty of fraud,[83] or has refused to accept the goods when it was his duty under the contract to do so,[84] or if he has failed to pay according to the terms of the contract,[85] he cannot recover what may have been paid by him.

77. New York Brokerage Co. *v.* Wharton, 143 Iowa 61, 119 N. W. 969; Morrill *v.* Aden, 19 Vt. 505.

78. See the title "**Rescission and Cancellation**" and the following cases: **Ala.**—Scruggs *v.* Driver's Exrs., 31 Ala. 274. **Ky.**—Wood *v.* Yeatman, 15 B. Mon. 270; Bohannon *v.* Kerr, 1 B. Mon. 87; Hardwick *v.* Forbes Admr., 1 Bibb. 212. **Md.**—Baltimore Sugar Refining Co. *v.* Campbell Zell Co., 83 Md. 36, 34 Atl. 369. **N. Y.**—Mayne *v.* Griswold, 3 Sandf. 463. **W. Va.**—Jackson *v.* Stockert, 75 W. Va. 482, 84 S. E. 919, 89 S. E. 359.

[a] **May File Cross-Bill.**—The buyer may, however, in a suit against him to enforce a vendor's lien, file a cross-bill to obtain a rescission of the contract on the ground of fraud. While, in such a case, an answer would suffice to defeat the plaintiff's demand, a cross-bill would be necessary to obtain the full measure of relief by rescission of the contract and the recovery of the purchase money. Spoor *v.* Tilson, 97 Va. 279, 33 S. E. 609. See generally the titles "**Cross-Bill;**" **Cross-Complaint.**"

79. **Ill.**—Mellon *v.* Hagen, 187 Ill. App. 486. **Ia.**—Houghtaling *v.* Hills, 59 Iowa 287, 13 N. W. 305; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53. **Mont.** Waldorf *v.* Phillips, 42 Mont. 80, 111 Pac. 546. **Tenn.**—Dorman *v.* Weakley (Tenn. Ch. App.), 39 S. W. 890.

80. Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8; Hallwood Cash Register Co. *v.* Berry, 35 Tex. Civ. App. 554, 80 S. W. 857, holding plaintiff entitled to a cancellation of note for purchase price.

81. See Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 579.

82. **U. S.**—Eddy & Bissell Live Stock Co. *v.* Blackburn, 70 Fed. 949, 17 C. C. A. 532. **Ill.**—Colvin *v.* Weedman, 50 Ill. 311. **Vt.**—Jones *v.* Marsh, 22 Vt. 144.

83. Johnson's Exr. *v.* Jennings' Admr., 10 Gratt. (51 Va.) 1, 60 Am. Dec. 323.

84. **Ill.**—Colvin *v.* Weedman, 50 Ill. 311. **Ia.**—Stevens *v.* Brown, 60 Iowa 403, 14 N. W. 735. **Kan.**—Gibbons *v.* Hayden, 3 Kan. App. 38, 44 Pac. 445. **Neb.**—Lexington Mill & Elev. Co. *v.* Neuens, 42 Neb. 649, 60 N. W. 893. **Ohio.**—Beasley *v.* Lovel, 2 Ohio Dec. 378, 2 West, L. Month. 551. **Can.**—Harvey *v.* Goodfellow, 7 Newfoundl. 834.

85. **U. S.**—Eddy & Bissell Live Stock Co. *v.* Blackburn, 70 Fed. 949, 17 C. C. A. 532. **Cal.**—Rayfield *v.* Van

(II.) Demand. — Where the seller has made wilful default in his duty to deliver the goods, it is not necessary that the buyer should make a demand for them before bringing his action,[86] otherwise, however, if the delivery is to be made upon the call of the buyer.[87] If the seller has refused to return the money no demand for it is prerequisite,[88] and a demand for payment is not necessary before suit to recover money paid by mistake, the mistake not being mutual.[89]

c. *Rescission — Return of Goods.* — Where the buyer seeks the remedy of rescission and a recovery of the money paid, he must rescind the contract,[90] and where the title in the property has passed he must return or offer to return the goods that have been delivered,[91] unless the goods are of no value.[92] If upon making an offer to return

Meter, 120 Cal. 416, 52 Pac. 666. **Ill.** Russell *v.* Excelsior Stove & Mfg. Co., 120 Ill. App. 23. **Neb.**—Walter *v.* Reed, 34 Neb. 544, 52 N. W. 682. **N. Y.** Haynes *v.* Hart, 42 Barb. 58; D'Ambrosio *v.* Russo, 153 N. Y. Supp. 113. **Vt.**—Jones *v.* Marsh, 22 Vt. 144.

86. **Ia.**—Fay *v.* Fitzpatrick, 130 Iowa 279, 105 N. W. 398. **La.**—Robinson *v.* Clark, 20 La. Ann. 384. **N. Y.** Brewster *v.* Wooster, 131 N. Y. 473, 30 N. E. 489, *reversing* 58 N. Y. Super. 10, 9 N. Y. Supp. 312, 30 N. Y. St. 251. **Vt.** Packer *v.* Button, 35 Vt. 188.

87. Andrews *v.* Cheney, 62 N. H. 404.

88. Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8.

89. Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161; Utica Bank *v.* Van Gieson, 18 Johns. (N. Y.) 485.

90. **La.**—Childs *v.* Wilson, 15 La. Ann. 512; Richardson *v.* Johnson, 1 La. Ann. 389. **Mich.**—Barbour *v.* Hurlburt, 137 Mich. 534, 100 N. W. 781. **N. J.**—Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932. **Pa.**—Morrow *v.* Rees, 69 Pa. 368. **S. C.**—Carter *v.* Walker, 2 Rich. L. 40; Wharton *v.* O'Hara, 2 Nott. & McC. 65. **Eng.**—Gompertz *v.* Denton, 1 Cromp. & M. 207, 1 Dowl. P. C. 623, 2 L. J. Exch. 82, 3 Tyrw. 233.

91. **Ala.**—Cozzins *v.* Whitaker, 3 Stew. & P. 322; Comer *v.* Franklin, 169 Ala. 573, 53 So. 797. **Ark.**—Plant *v.* Condit, 22 Ark. 454. **Ind.**—Baldwin *v.* Marsh, 6 Ind. App. 533, 33 N. E. 973. **Ia.**—Hoffman *v.* Hampton Ind. School Dist., 96 Iowa 319, 65 N. W. 322. **Ky.** Ruby Carriage Co. *v.* Kremer, 26 Ky. L. Rep. 274, 81 S. W. 251. **La.**—Bloodgood *v.* Wilson, 10 La. Ann. 302. **Me.**—Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Garland *v.* Spencer, 46 Me. 528. **Mass.** Snow *v.* Alley, 144 Mass. 546, 551, 11 N. E. 764, 59 Am. Rep. 119. **Mich.** Condon *v.* Hughes, 92 Mich. 367, 52 N. W. 638. **Mo.**—Noel *v.* Hughes, 152 Mo. App. 192, 133 S. W. 385; City Light, P. T. & S. Co. *v.* St. Mary's Mach. Co., 170 Mo. App. 224, 156 S. W. 83; Walls *v.* Gates, 6 Mo. App. 242. **N. J.**—Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932. **Pa.**—Morrow *v.* Rees, 69 Pa. 368. **S. C.** Ashley *v.* Reeves, 2 McCord 432; Wharton *v.* O'Hara, 2 Nott & McC. 65. **Vt.** Warner *v.* Wheeler, 1 D. Chip. 159, 6 Am. Dec. 717.

[a] **Mere Willingness to Return Insufficient.**—It is not sufficient for a buyer who has taken delivery of goods at the vendor's place of business merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. He must return or tender back the goods to the seller at the place of delivery. Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77. Quoted in Mundt *v.* Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670.

92. **Kan.**—Smith *v.* McNair, 19 Kan. 330, 27 Am. Rep. 117. **N. Y.**—Maas *v.* Scharbach, 13 Misc. 215, 34 N. Y. Supp. 234, 68 N. Y. St. 214. **Pa.**—Morrow *v.* Rees, 69 Pa. 368.

[a] **Must Be Absolutely of No Value.**—Where defendant undertook to sell and deliver to the plaintiff eighty-nine casks of lime, but in fact delivered lime of no value, yet the casks were of some value and should be restored in order to enable plaintiff to rescind. Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103. The doctrine of the Conner case is affirmed in Bassett *v.* Brown, 105 Mass. 551, 558, where it is said: "The defendant contends that

the goods, the seller refuses to receive them, the buyer will be relieved of his obligation to return,[93] and, under the uniform sales act, in case of a rescission for breach of warranty, if the seller refuses to accept an offer to return the goods, the buyer may hold them as bailee for the seller, and enforce against them a lien for the money he has paid.[94] Where goods are wrongfully delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them, but may hold them at the seller's risk, notifying the seller of his refusal to accept.[95] To maintain an action for the recovery of an overpayment, it is not necessary either to rescind the contract or to return the goods delivered.[96]

d. *Form of Remedy.* — At common law, where the buyer has a right to recover the price, or a proportionate part, on a contract that has been rescinded, he may bring assumpsit for money had and received to his use by the seller,[97] and a special count for the non-

the stocks were worthless; and therefore it was unnecessary, as it would be useless, to return them. Such unquestionably is the rule of law, if they were absolutely of no value to either party. But it is not sufficient that they were of no intrinsic value, or of no market value. If they were capable of serving any purpose of advantage by their possession or control, or if their loss was a disadvantage to the tenant in any way, he was entitled to have them returned. This rule is held with great strictness in actions at law; as in the case of the casks that contained worthless lime, Conner *v.* Henderson, 15 Mass. 319; and the sack that covered the rejected bale of cotton, Morse *v.* Brackett, 98 Mass. 205, and 104 Mass. 494.''

93. **Me.**—Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77. **Mont.**—Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634. **Neb.**—Mundt *v.* Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670.

[a] **Nugatory Act.**—Where the declarations of the seller are equivalent to saying that the goods will not be received if offered, their formal tender is waived. The law does not require a man to perform a nugatory act. Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634.

94. **Uniform Sales Act,** § 69(5).

95. **Ga.**—Gray *v.* Consolidated Ice Mach. Co., 103 Ga. 115, 29 S. E. 604. **Mass.**—Hunt *v.* Wyman, 100 Mass. 198; Alden *v.* Hart, 161 Mass. 576, 581, 37 N. E. 742. **Miss.**—Strauss *v.* Nat. P. Furniture Co., 76 Miss. 343, 24 So. 703. **N. J.**—Smalley *v.* Hendrickson, 29 N. J. L. 371. **Vt.**—Gibson *v.* Vail, 53 Vt. 476.

See, also, Uniform Sales Act, §50, following §36 of the English Act.

96. Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 579.

97. **U. S.**—Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527; Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595. **Fla.**—Evans *v.* Givens, 22 Fla. 476. **Md.**—Columbian I. W. & D. D. Co. *v.* Douglas, 84 Md. 44, 34 Atl. 1118, 57 Am. St. Rep. 362, 33 L. R. A. 103. **Mass.**—Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230. **Mich.**—Ripley *v.* Case, 86 Mich. 261, 49 N. W. 46; Murphy *v.* McGraw, 74 Mich. 318, 41 N. W. 917. **N. H.** Manahan *v.* Noyes, 52 N. H. 232; Stevens *v.* Lyford, 7 N. H. 360; Danforth *v.* Dewey, 3 N. H. 79. **N. J.**—Glover *v.* Collins, 18 N. J. L. 232. **N. Y.** Holtz *v.* Schmidt, 59 N. Y. 253; Moyer *v.* Shoemaker, 5 Barb. 319; Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588; Dubois *v.* Delaware & H. Canal Co., 4 Wend. 285. **N. C.**—Page *v.* Einstein, 52 N. C. 147. **Pa.**—Feay *v.* Decamp, 15 Serg. & R. 227. **S. C.**—Byers *v.* Bostwick, 2 Mill Const. 75; Martin *v.* Howil, 3 Brev. 547, 2 Tread. Const. 750; Huckson *v.* Avant, 2 Brev. 264. **Eng.**—Payne *v.* Whale, 7 East 274, 103 Eng. Reprint 105.

See generally the titles **''Assumpsit;'' ''Money Counts.''**

[a] **Misrepresentation as to Price** In Holtz *v.* Schmidt, 59 N. Y. 253, the defendants had agreed if the plaintiff would purchase the goods from them that he required in his business, they would make as low prices to him as to anyone else; and, on this understanding, he purchased the goods at different times, and the defendants charged

delivery of the goods may be joined with such a count.[98] In an action to recover an excess in payment, assumpsit in the proper common counts also lies, under the common law.[99] Under the code, however, the common counts would seem not to be proper in case of rescission.[1]

e. *Declaration or Complaint.* — In general, the declaration or complaint should allege the fact of the contract; the payment of the money; the performance, or readiness to perform, on the part of the plaintiff where the contract calls for any conditions precedent;[2] the breach or fraud of the defendant upon which the plaintiff bases his right to recover;[3] the rescission of the contract;[4] that plaintiff returned, or offered to return, the goods;[5] and the demand upon the defendant for the money.[6]

f. *Plea or Answer.* — If the defendant relies upon any other agreement than that set out in the plaintiff's petition, he must plead the same. Such a defense is new matter and must be pleaded before it can be proved.[7]

g. *Trial.* — Where the evidence is conflicting, it is for the jury to determine what the contract between the parties was,[8] also whether the facts as shown by the evidence amounted to a breach on the part of the defendant.[9]

h. *Amount of Recovery.* — The amount recoverable is what the plaintiff paid, not what the goods were worth at the time of the

him more than they were charging others. It was held that the plaintiff could sue in assumpsit for money had and received for the difference between the prices charged him and those charged other persons. See, also, Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619.

98. Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527.

99. Underhill *v.* Gaff, 48 Ill. 198.

1. Betts *v.* Bache, 14 Abb. Pr. (N. Y.) 279, 23 How. Pr. 197, 9 Bosw. 614; Lienan *v.* Lincoln, 2 Duer (N. Y.) 670; Clark *v.* Sherman, 5 Wash. 681, 32 Pac. 771; Distler *v.* Dabney, 3 Wash. 200, 28 Pac. 335.

See also cases in following notes.

But see 3 STANDARD PROC. 215.

2. Green *v.* McIntire, 2 Ind. App. 278, 28 N. E. 555; Skeen *v.* Springfield Engine & T. Co., 34 Mo. App. 485.

3. San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444; Miller *v.* Van Tassel, 24 Cal. 459.

4. San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444; Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932.

5. **Cal.**—San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444. **Ohio.**—Crooks *v.* Eldridge & Higgins Co., 64 Ohio St. 195, 60 N. E. 203. **Wis.** Potter *v.* Taggart, 54 Wis. 395, 11 N. W. 678.

6. See *infra*, this note.

[a] **Demand of Amount Received.** Plaintiff can recover interest only from the date of the suit, unless in his declaration he alleges a demand before that time. Ordway *v.* Colcord, 14 Allen (Mass.) 59. In this case, Chapman, J., said, "A special demand which entitles the plaintiff to interest as damages for the detention of money, is an important substantive fact to be proved, and should be stated."

[b] **Money Paid by Mistake.**—The party receiving money paid by mistake is under no duty to return it until he has been informed of the error. Southwick *v.* First Nat. Bank, 84 N. Y. 420. Interest cannot be charged until the defendant has been put in default. Evans *v.* Garlock, 37 Hun (N. Y.) 588.

7. Westinghouse Co. *v.* Meixel, 72 Neb. 623, 101 N. W. 238.

See generally the title "**Confession and Avoidance.**"

8. Prowers *v.* Nowles, 42 Colo. 442, 94 Pac. 347; Morse *v.* Ressler, 153 Mich. 512, 116 N. W. 1069.

9. George Lawley & Son Corp. *v.* Park, 138 Fed. 31, 70 C. C. A. 399.

breach,[10] together with interest on the amount paid from the time of its payment.[11] In an action to recover for money had and received, the plaintiff can recover interest, however, only from the date of the suit, unless in the declaration he alleges a demand before that time.[12]

3. Recovery of Goods. — Where the buyer has a right of action for the recovery of the goods by replevin,[13] the proceedings should conform, in general, to the rules governing actions in replevin generally.[14] Where the sale is established by the plaintiff and is undisputed, it is not error to direct a verdict for him,[15] but where the evidence is contradictory, it must then be left to the jury.[16] In rendering judgment, in cases where a part of the price has been paid, there should be a fair adjustment of the rights of the parties, both buyer and seller being protected to the extent of his particular interest.[17]

4. Actions for Breach of Contract. — a. *In General.* — In preceding sections,[18] the right of the buyer to maintain an action for damages in case of a breach of the contract on the part of the seller, whether the contract be executory or executed, has been discussed. In case of the seller's breach where the contract is still executory, there arises, as we have seen, only one remedy, an action for damages, providing there has been no payment in advance, while where the contract is broken by the seller after the title has passed to the buyer, the latter has, in addition to his action for damages, those remedies which belong to an owner of goods. The action for damages is, however, in either case, the same. It is, moreover, an action not peculiar to vendor and vendee, but is that right of action[19] which

10. Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416; Wilkinson *v.* Ferree, 24 Pa. 190.

[a] **Uniform Sales Act.**—"If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price." §69 (4).

[b] **Duties on Goods.**—The buyer may recover money paid to the seller under an executory contract of sale, and also money paid for duties on goods shipped under such contract, it being necessary to pay the duties to get possession of the goods, when the goods, upon examination, fail to conform to the contract and are rejected on that account. Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. *Compare,* however, Hargous *v.* Ablon, 3 Denio (N. Y.) 406, 45 Am. Dec. 481.

11. Gregg & Co. *v.* Fitzhugh, 36 Tex. 127.

12. Ordway *v.* Colcord, 14 Allen (Mass.) 59.

13. See *supra,* III, A, 2, b, (V).

14. See the title "**Replevin.**"

[a] **Showing Bill of Sale a Mortgage.**—Where plaintiff alleges ownership generally and later evidences his title by a bill of sale, the defendant may show such bill of sale to be in fact a mortgage, although such a defense was not pleaded. McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743; O'Neill *v.* Murray, 6 Dak. 107, 50 N. W. 619.

15. Barber *v.* Harper, 13 N. M. 506, 86 Pac. 546.

16. **Mich.**—Van Derhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. 792. **N. Y.** Matthews *v.* Hobby, 48 Barb. 167. **Wis.** McIver *v.* Williams, 83 Wis. 570, 53 N. W. 847.

17. **Mich.**—Mueller *v.* Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. Rep. 525. **Mo.**—Boutell *v.* Warne, 62 Mo. 350. **Ohio.**—Adler *v.* Johnston & Co., 2 Ohio C. C. 95, 1 Ohio Cir. Dec. 382.

18. See *supra,* III, A.

19. See generally 11 STANDARD PROC. 931, *et seq.*

is common to parties to contracts of every kind where there has been a breach of performance.

b. *Conditions Precedent.* — **(I.) In General.** — Before bringing his action for the seller's breach of the contract, the buyer must have performed all the terms of the contract that constitute conditions precedent or concurrent on his part,[20] or he must be ready and willing to perform,[21] or have some legal excuse for not being ready to perform, such as a positive statement by the seller, before the time of his performance arrives, that he will not stand to the contract.[22]

(II.) Demand for Delivery. — Where the contract provides that the goods shall be delivered upon the demand or request of the buyer, the latter must make demand in order to put the seller in default,[23] but where the contract calls for the delivery at a certain time and place, either by express stipulation or by implication of law, it is the duty of the seller to deliver in accord with the contract, and no demand on the part of the buyer is a condition precedent to his action.[24] Likewise when the seller, prior to the time for his delivery of specified goods, has sold them to other parties, no demand is necessary.[25]

20. Ill.—Hungate *v.* Rankin, 20 Ill. 639. **Ind.**—Peters *v.* Gooch, 4 Blackf. 515; Richards *v.* Carl, 1 Blackf. 313. **Vt.**—Packer *v.* Button, 35 Vt. 188. **Wis.** Kellogg *v.* Nelson, 5 Wis. 125.

21. U. S.—Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24. **Ala.**—Davis *v.* Adams, 18 Ala. 264. **Conn.**—Hickock *v.* Hoyt, 33 Conn. 553. **Ill.**—Metz *v.* Albrecht, 52 Ill. 491; Funk *v.* Hough, 29 Ill. 149; Hough *v.* Rawson, 17 Ill. 588. **Ind.** Beard *v.* Sloan, 30 Ind. 279; Bailey *v.* Ricketts, 4 Ind. 488; Smith *v.* Smith, 8 Blackf. 208; Chun *v.* Howard, 3 Blackf. 163. **N. Y.**—Anderson *v.* Read, 106 N. Y. 333, 13 N. E. 292; Bronson *v.* Wiman, 8 N. Y. 182; Vail *v.* Rice, 5 N. Y. 155; Cook *v.* Ferral's Admrs., 13 Wend. 285. **N. C.**—Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88; Cole *v.* Hester, 31 N. C. 23. **Wash.**—Neis *v.* O'Brien, 12 Wash. 358, 41 Pac. 59, 50 Am. St. Rep. 894.

22. U. S.—Dingley *v.* Oler, 117 U. S. 490, 503, 6 Sup. Ct. 850, 29 L. ed. 984. **Ark.**—Roberts Cotton Oil Co. *v.* Morse & Co., 97 Ark. 513, 135 S. W. 334. **Cal.**—Stum *v.* Hadrich, 7 Cal. App. 241, 94 Pac. 82; Ennis Brown Co. *v.* Hurst & Co., 1 Cal. App. 752, 82 Pac. 1056. **Colo.**—Crystal Palace Flouring Co. *v.* Butterfield, 15 Colo. App. 246, 61 Pac. 479. **Ga.**—Luke *v.* Batts, 11 Ga. App. 783, 76 S. E. 165. **Ill.**—Russell *v.* Excelsior Stove & Mfg. Co., 120 Ill. App. 23; Northwestern Iron & Metal Co. *v.* Hirsch, 94 Ill. App. 579; Follansbee *v.* Adams, 86 Ill. 13; Wolf *v.* Willitts, 35 Ill. 88. **Md.**—Williams *v.* Woods, 16 Md. 220. **Mass.**—Lowe *v.* Harwood, 139 Mass. 133, 135, 29 N. E. 538. **Mo.**—Walker *v.* Cooper, 97 Mo. App. 441, 71 S. W. 370; Price *v.* Vanstone, 40 Mo. App. 207. **Neb.**—Post *v.* Garrow, 18 Neb. 682, 26 N. W. 580. **N. J.**—Chess *v.* Vockroth, 75 N. J. L. 665, 70 Atl. 73. **N. Y.**—Woolner *v.* Hill, 93 N. Y. 576; Hawley *v.* Keeler, 53 N. Y. 114; Bunge *v.* Koop, 48 N. Y. 225, 8 Am. Rep. 546; Crist *v.* Armour, 34 Barb. 378, 386. **N. C.**—Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88, *s. c.* 133 N. C. 306, 45 S. E. 642. **S. C.**—Sprunt *v.* Gordon, 89 S. C. 426, 71 S. E. 1033. **Wis.** Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

23. Conn.—Smith *v.* Leavensworth, 1 Root 209. **Ky.**—Wilmouth *v.* Patton, 2 Bibb 280; Letcher *v.* Taylor, Hard. 79. **Minn.**—Snow *v.* Johnson, 1 Minn. 48.

24. Ark.—Patterson *v.* Jones, 13 Ark. 69, 56 Am. Dec. 296. **Ind.**—Mountjoy *v.* Adair, 1 Ind. 254, Smith 96. **Ky.** Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

25. Del.—Lea *v.* Ennis, 6 Houst. 433. **Ia.**—Boies *v.* Vincent, 24 Iowa 387. **La.** Marchesseau *v.* Chaffee, 4 La. Ann. 24. **Me.**—Bassett *v.* Bassett, 55 Me. 127. **Minn.**—Lieberman *v.* Isaacs, 43 Minn. 186, 45 N. W. 8. **N. J.**—Gruen *v.* George A. Ohl & Co., 81 N. J. L. 626, 80 Atl. 547; Parker *v.* Pettit, 43 N. J. L. 512. **N. Y.** Crist *v.* Armour, 34 Barb. 378. **N. C.** Harriss *v.* Williams, 48 N. C. 483, 67 Am. Dec. 253. **Ore.**—Bussard *v.* Hib-

(III.) Tender of Price. — The buyer must, in all cases, be ready to receive and pay for the goods at the time and place stipulated by the contract,[26] and where the goods are ready for delivery in accordance with the contract, the buyer, unless the goods are sold on credit, must tender the price before he can bring action for non-delivery, since delivery and payment are concurrent conditions.[27] If, however, the seller repudiates the contract,[28] no tender of the price is prerequisite to the buyer's remedy.

c. *Time To Sue.* — In case of an anticipatory breach by the seller, the buyer may, in some jurisdictions, accept the repudiation as an immediate breach, and bring his action at once.[29] He may, however, elect to hold to the contract until the stipulated time of its performance.[30] If the buyer accepts repudiation he must act reasonably and

ler, 42 Ore. 500, 71 Pac. 642. **Vt.** Packer *v.* Button, 35 Vt. 188. **Eng.** Bowdell *v.* Parsons, 10 East 359, 103 Eng. Reprint 811.

26. Vail *v.* Rice, 5 N. Y. 155; McDonald *v.* Williams, 1 Hilt. (N. Y.) 365; Cook *v.* Ferral's Admrs., 13 Wend. (N. Y.) 285; Grandy *v.* McCleese, 47 N. C. 142; Cole *v.* Hester, 31 N. C. 23.

27. Ga.—Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151; Pusey *v.* McElveen Comm. Co., 93 Ga. 773, 21 S. E. 150. **Ill.**—Hungate *v.* Rankin, 20 Ill. 639; Sexton *v.* Brown, 36 Ill. App. 281. **Ia.** Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174. **Ky.**—Hume *v.* Mullins, 18 Ky. L. Rep. 108, 35 S. W. 551. **Mont.**—Jenderson *v.* Hansen, 50 Mont. 216, 146 Pac. 473. **N. Y.**—Lawrence *v.* Everett, 11 N. Y. Supp. 881, 34 N. Y. St. 753. **N. C.**—Grandy *v.* Small, 48 N. C. 8; Benners *v.* Howard's Exrs., 1 N. C. 172, 1 Am. Dec. 583. **S. C.**—Mitchell *v.* Georgia R. & Banking Co., 6 Rich. L. 188. **Tex.**—Kelly *v.* Webb, 27 Tex. 368. **Vt.**—Packer *v.* Button, 35 Vt. 188. **Eng.** Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890.

[a] **What the Buyer Must Prove.** Where the buyer brings suit on the contract to recover damages for a failure to deliver goods sold for cash, at the place and within the time stipulated or fixed by law, he must prove that he paid, or offered to pay, the seller the purchase money, or some good excuse for not making the offer, to entitle him to a recovery. Offutt *v.* Wells, 42 Ala. 199.

28. U. S.—Dingley *v.* Oler, 117 U. S. 490, 503, 6 Sup. Ct. 850, 29 L. ed. 984. **Ill.**—Follansbee *v.* Adams, 86 Ill. 13; Wolf *v.* Willitts, 35 Ill. 88. **Mass.** Lowe *v.* Harwood, 139 Mass. 133, 135, 29 N. E. 538. **N. J.**—Parker *v.* Pettit, 43 N. J. L. 512, 516. **N. Y.**—Woolner *v.* Hill, 93 N. Y. 576; Hawley *v.* Keeler, 53 N. Y. 114; Bunge *v.* Koop, 48 N. Y. 225, 8 Am. Rep. 546; Crist *v.* Armour, 34 Barb. 378, 386.

29. Ill.—Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Fox *v.* Kitton, 19 Ill. 519. **Ia.**—Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Crabtree *v.* Messersmith, 19 Iowa 179. **Md.**—Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509. **Ohio.**—Pappenheimer Hardware Co. *v.* Harrison Wire Co., 8 Ohio Dec. 657, 9 Wkly. L. Bul. 131. **Vt.** Packer *v.* Steward, 34 Vt. 127. **Eng.** Tredegar Iron & Coal Co. *v.* Hawthorn Bros. & Co., 18 T. L. R. 716; Nickoll *v.* Ashton, Edridge & Co., 2 Q. B. (1900) 298, 2 K. B. (1901) 126; Frost *v.* Knight, L. R. 7 Exch. 111, 26 L. T. N. S. 77; Hochster *v.* De La Tour, 2 El. & Bl. 678, 75 E. C. L. 678, 118 Eng. Reprint 922; Danube & Black Sea Railway Co. *v.* Xenos, 11 C. B. (N. S.) 152, 103 E. C. L. 151, 142 Eng. Reprint 753.

[a] "**A mere assertion** that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promice was made, for if he afterwards continue to urge or demand compliance with the contract, it is plain he does not understand it to be at an end. Benj. Sales §860; Smoot's Case, 15 Wall. 36, Dingley *v.* Oler, 117 U. S. 490, 6 Sup. Ct. 850." Edward Hines Lumb. Co. *v.* Alley, 73 Fed. 603, 607, 19 C. C. A. 599, per Lurton, J.

30. Tredegar Iron & Coal Co. *v.*

not delay for the purpose of increasing the damages.[31] The doctrine of anticipated injury is disputed and denied, however, in other cases, it being held that there can be no breach until the time for delivery is past.[32]

d. *Pleadings.* — **(I.) Form of Action.** — For failure of the seller to deliver, the buyer's form of remedy is an action for breach of contract for non-delivery.[33] Likewise, where the seller delivers goods that do not answer to the terms of the contract, as where they are defective in quality,[34] or where the seller is guilty of fraud,[35] the purchaser may sue for a breach of the contract. At common law, for the seller's failure to deliver, assumpsit,[36] or covenant,[37] is the proper action. Under assumpsit, the contract must be sued on specially, however, the common counts not being applicable for such an action.[38]

(II.) Declaration or Complaint. — Whether at common law or under the codes, the essential allegations of the declaration or complaint are practically the same.[39] In general, the allegations, in an ordinary case for non-delivery, are the making of the contract whereby the defendant sold, or agreed to sell and deliver, to the plaintiff certain goods, to be delivered (at a certain place and time) for the payment of a certain price; that plaintiff duly performed, or was and is ready to perform, his part of the contract; that defendant did not deliver the goods, and that plaintiff has been damaged thereby.[40]

Hawthorn Bros. Co., 18 T. L. R. 716, C. A. (1902).

31. Nickoll *v.* Ashton, Edridge & Co., 2 Q. B. (1900) 298, 2 K. B. (1901) 126.

[a] **Impossible to Deliver.**—It has been said that if it is clear that it will be impossible for the seller to deliver, the buyer must accept the seller's repudiation, and do his best to mitigate the damages. Nickoll *v.* Ashton, Edridge & Co., 2 Q. B. 298 (1900), 2 K. B. 126 (1901).

32. **Me.**—South Gardiner Lumb. Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110. **Mass.**—Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384. **Eng.**—Phillpots *v.* Evans, 5 Mees. & W. 475, 9 L. J. Ex. 33.

33. Barr *v.* Logan, 5 Harr. (Del.) 52.

34. **Conn.**—Buckingham *v.* Osborne, 44 Conn. 133. **Ill.**—Shields *v.* Reibe, 9 Ill. App. 598. **Ia.**—Aller *v.* Pennell, 51 Iowa 537, 2 N. W. 385. **Miss.**—Westmoreland *v.* Walker, 25 Miss. 76. **Mo.** Morbrose Inv. Co. *v.* Flick, 187 Mo. App. 528, 174 S. W. 189; Burns *v.* Limerick, 178 Mo. App. 145, 165 S. W. 1166. **Mont.**—Doornbos *v.* Thomas, 50 Mont. 370, 147 Pac. 277. **N. Y.**—Stein Co. *v.* Robertson, 167 N. Y. 101, 60 N. E. 329; Taylor *v.* Saxe, 134 N. Y. 67, 31 N. E. 258 (*reversing* 57 Hun 411, 10 N. Y. Supp. 869, 32 N. Y. St. 727); Gurney *v.* Atlantic & G. W. R. Co., 58 N. Y. 358 (*reversing* 2 Thomps. & C. 446); Plumb *v.* Bridge, 142 App. Div. 154, 126 N. Y. Supp. 853; Tompkins *v.* J. & R. Lamb, 121 App. Div. 366, 106 N. Y. Supp. 6, *affirmed*, 195 N. Y. 518, 88 N. E. 1133. **Tex.**—Hubbs *v.* Marshall (Tex. Civ. App.), 175 S. W. 716; Handy *v.* Roberts (Tex. Civ. App.), 165 S. W. 37.

35. **Conn.**—Ives *v.* Carter, 24 Conn. 392. **Ind.**—Love *v.* Oldham, 22 Ind. 51. **Mo.**—Parker *v.* Marquis, 64 Mo. 38; Rigler *v.* Reid, 186 Mo. App. 111, 171 S. W. 952. **Mont.**—Doornbos *v.* Thomas, 50 Mont. 370, 147 Pac. 277. **N. Y.** Bowen *v.* Mandeville, 95 N. Y. 237; Van Denburg *v.* Scott, 78 Misc. 281, 138 N. Y. Supp. 149. **Tex.**—Blythe *v.* Speake, 23 Tex. 429.

36. Robinson *v.* Batchelder, 4 N. H. 40; Robison *v.* Tyson, 46 Pa. 286.

37. Bradley *v.* King, 44 Ill. 339.

38. Seckel *v.* Scott, 66 Ill. 106.

39. Camp *v.* Norton, 52 Barb. (N. Y.) 96.

Pleading in action on contract, generally, see 11 STANDARD PROC. 981, *et seq.*

40. Miles *v.* Miller, 12 Bush (Ky.) 134; Camp *v.* Norton, 52 Barb. (N. Y.) 96.

The declaration must state all the elements of the contract that are essential to a statement of a cause of action,[41] yet only such part of the contract as will show the breach of the defendant need be pleaded.[42] There must be an allegation of the sale,[43] although it is not necessary to allege facts showing compliance with the statute of frauds, since so far as the complaint is concerned they are presumed.[44] The goods should be described,[45] and the declaration should show that there was a consideration.[46] Where the contract calls for the performance of any conditions precedent on the part of the buyer, due performance, or a readiness and willingness to perform should be averred.[47] For example, although ordinarily it is not necessary to allege a demand of the goods,[48] yet, if the goods were to be delivered upon the demand or request of the buyer, the declaration must show that such demand or request was made.[49] Also, where delivery and payment are concurrent conditions, an offer or readiness to pay must be alleged,[50] and if delivery was to be made at some particular time and place, the complaint must allege a readiness to receive and pay at such place and time,[51] such allegation being sufficient without a further allegation of demand or tender.[52] There should be an al-

Forms.—See 9 STANDARD PROC. 1104, 1107. See also Chit. Pl. (17th Am. ed.), vol. II, p. 240. Non-delivery of part, see Simmons *v.* Green, 35 Ohio St. 104.

41. Staver Carriage Co. *v.* Park Steel Co., 104 Fed. 200, 43 C. C. A. 471, allegations insufficient.

See 11 STANDARD PROC. 992.

42. Squier *v.* Hunt, 3 Price (Eng.) 68.

43. **Cal.**—Cochran *v.* Goodman, 3 Cal. 244. **Mich.**—Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195. **Minn.**—Partridge *v.* Blanchard, 23 Minn. 69. **Wis.**—Bacon *v.* Eccles, 43 Wis. 227.

44. Marston *v.* Sweet, 66 N. Y. 206, 23 Am. Rep. 43. See the title "**Frauds, Statute of.**"

45. Lindman *v.* Wolf, 47 Ind. 501.

46. Manier *v.* Appling, 112 Ala. 663, 20 So. 978; Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195. See generally 11 STANDARD PROC. 986.

[a] **No Allegation of Consideration.** For the purpose of showing mutuality of the contract, the promise of the buyer to purchase and pay for the goods, in absence of an allegation of a consideration passing to the seller at the making of the contract, must be averred. Rafolovitz *v.* American Tobacco Co., 73 Hun 87, 25 N. Y. Supp. 1036.

47. **Ala.**—Long *v.* Addix, 184 Ala. 236, 63 So. 982. **Cal.**—Crosby *v.* Watkins, 12 Cal. 85. **Colo.**—Denver Horse Importing Co. *v.* Schafer, 58 Colo. 376, 14 Pac. 367. **Ga.**—Pusey *v.* Mc Elveen Comm. Co., 93 Ga. 773, 21 S. E. 150. **Ill.**—Cummings *v.* Tilton, 44 Ill. 172; Hough *v.* Rawson, 17 Ill. 588. **Ind.** Magic Packing Co. *v.* Stone-Ordean Wells Co., 158 Ind. 538, 64 N. E. 11; Beard *v.* Sloan, 30 Ind. 279; Bailey *v.* Ricketts, 4 Ind. 488; Smith *v.* Smith, 8 Blackf. 208; Chun *v.* Howard, 3 Blackf. 163. **Mich.**—Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195. **N. Y.**—Scott *v.* Lowe, 136 App. Div. 442, 120 N. Y. Supp. 959; Camp *v.* Norton, 52 Barb. 96. **N. C.**—Grandy *v.* Small, 50 N. C. 50; Cole *v.* Hester, 31 N. C. 23. **Ohio.** Simmons *v.* Green, 35 Ohio St. 104. **Pa.** Robison *v.* Tyson, 46 Pa. 286. **Vt.** Jones *v.* Marsh, 22 Vt. 144. **Wis.** Hackbarth *v.* Wollner, 88 Wis. 476, 60 N. W. 704. **Eng.**—Waterhouse *v.* Skinner, 2 B. & P. 447, 126 Eng. Reprint 1377; Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252, 102 Eng. Reprint 79. **Can.**—Russell *v.* Rowe, 7 U. C. Q. B. 484.

See generally 11 STANDARD PROC. 998.

48. Woolner *v.* Hill, 93 N. Y. 576.

49. Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252, 102 Eng. Reprint 79.

50. Chambers *v.* Frazier, 29 Ohio St. 362.

51. **Ill.**—Funk *v.* Hough, 29 Ill. 145. **N. Y.**—Coonley *v.* Anderson, 1 Hill 519. **Ohio.**—Simmons *v.* Green, 35 Ohio St. 104. **Pa.**—Robison *v.* Tyson, 46 Pa. 286.

52. Bronson *v.* Wiman, 8 N. Y. 182;

legation of the breach by the seller,[53] and if the plaintiff seeks the recovery of special damages, he must allege the facts upon which his special damages are founded.[54] Where the plaintiff counts only upon general damages, however, a general allegation will be sufficient.[55]

(III.) Plea or Answer.— The plea or answer should follow the general rules in contract actions.[56] In some jurisdictions, the statute of frauds if relied upon for defense, must be specially pleaded, not being available under a general denial,[57] and if the defendant relies upon the buyer's fraud as a defense, it is the general rule that the acts constituting the alleged fraud must be set out.[58] The plea or answer may allege the non-performance of conditions precedent on the part of the buyer,[59] and that the non-delivery was justified by the happening of certain conditions expressly provided for in the contract.[60] A plea of tender must be in accordance with the general rules elsewhere treated.[61]

Vail *v.* Rice, 5 N. Y. 155.

53. **Cal.**—Maher *v.* Riley, 17 Cal. 415; Crosby *v.* Watkins, 12 Cal. 85. **Ky.** Miles *v.* Miller, 12 Bush 134. **N. Y.** Camp *v.* Norton, 52 Barb. 96.

See generally 11 STANDARD PROC. 1006.

54. **Cal.**—Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107. **Ill.**—Wabash Western Ry. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111. **Mich.**—Heister *v.* Loomis, 47 Mich. 16, 10 N. W. 60. **Minn.**—Liljengren Furniture & L. Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306.

See generally 13 STANDARD PROC. 365, 378.

[a] **Necessity of Alleging Special Damages.**—As said by Sanborn, J., in the case of Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 293, 34 C. C. A. 351, in speaking of the necessity of showing special damages, if any, in order to recover them: "No special circumstances were pleaded or proved to have been known to the plaintiff in error at the time that the defendant in error claimed that it made the contract in suit from which it could reasonably have anticipated any other damages from its breach than those which ordinarily flow from breaking a contract to sell and deliver merchandise. The loss of the time of the purchaser, the loss of the salary of his employe, and of the expense of the board of that employe and his wife for two weeks, is certainly not the natural or probable consequences of the breach of an agreement to sell merchandise of the value of $550, and it should not have been considered by the jury. Such damages are not implied by the contract, cannot be reasonably forseen or anticipated as the result of a breach of it, do not ordinarily flow from such a breach, and cannot be permitted to form the basis of a judgment. Telegraph Co. *v.* Short, 53 Ark. 434, 443, 14 S. W. 649; Railway Co. *v.* Mudford (Ark.), 3 S. W. 814, 816; Ingledew *v.* Railway, 7 Gray, 86, 91; Railroad Co. *v.* Kennedy, 41 Miss. 671, 679."

55. **Minn.**—Partridge *v.* Blanchard, 23 Minn. 69. **N. Y.**—Harrison *v.* Argyle Co., 128 App. Div. 81, 112 N. Y. Supp. 477; Finkelstein *v.* Selwitz, 79 Misc. 28, 139 N. Y. Supp. 122. **Ore.** Bussard *v.* Hibler, 42 Ore. 500, 71 Pac. 642.

56. See 11 STANDARD PROC. 1010, *et seq.* See also the titles "**Answers;**" "**Confession and Avoidance;**" "**Denials;**" "**Pleas;**" and titles dealing with particular kinds of pleas and defenses.

57. Irlbacker *v.* Roth, 25 App. Div. 290, 49 N. Y. Supp. 538. But see fully the title "**Frauds, Statute of.**"

58. See the title "**Fraud and Deceit.**"

59. See Hudmon *v.* Cuyas, 57 Fed. 355, 6 C. C. A. 381.

See 11 STANDARD PROC. 1017, *et seq.*

60. Scott *v.* King, 12 Ind. 203.

61. See the title "**Tender.**"

[a] **That the seller tendered or was ready to deliver the quantity and quality** of goods called for by the contract. Bradley *v.* King, 44 Ill. 339; Dorman *v.* Elder, 3 Blackf. (Ind.) 490.

[b] **That he always was, and still**

e. *Issues, Proof and Variance.*[62] — The plaintiff must recover upon proof of the contract as laid, or he cannot recover at all.[63] Moreover, the proof must support the necessary averments of the declaration or petition.[64] The tendency of modern statutes has been to relieve the great strictness which once characterized the decisions upon even slight variances,[65] and no variance ought to be regarded as material where the allegation and proof substantially correspond.[66] Where, however, the legal rights and duties of the parties would be materially affected, a variance between the allegations and proof of the contractual time of delivery,[67] or the amount or quantity of the goods,[68] or the consideration,[69] or other material terms of the contract,[70] is fatal.

The defendant may show, under the general issue or the general denial, that by mutual agreement a different contract was substituted for the one sued on,[71] or that the plaintiff accepted a part

is, ready to deliver; not merely that he had the property ready to deliver. **Ind.** Dorman *v.* Elder, 3 Blackf. 490. **Tenn.** Miller *v.* McClain, 10 Yerg. 245; Tiernan *v.* Napier, Peck. 212. **Can.**—Stinson *v.* Branigan, 10 U. C. Q. B. 210; Hancock *v.* Gibson, 3 U. C. Q. B. 41.

62. See generally the title "**Variance and Failure of Proof.**"

63. **U. S.**—Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351. **Mo.** Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384. **Neb.** Traver *v.* Shaefle, 33 Neb. 531, 50 N. W. 683.

See 11 STANDARD PROC. 1036.

64. Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384; Robison *v.* Tyson, 46 Pa. 286.

[a] **The rule is** that the proofs must correspond with the allegations in the declaration, but the requirement in that behalf is fulfilled, if the substance of the declaration is proved. Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527.

65. See *infra*, this note and the title "**Variance and Failure of Proof.**"

[a] "**Recent statutes** in the States also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have superinduced in the course of judicial decision, may be said to have established the general rule in the state tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits." Nash *v.* Towne, 5 Wall. (U. S.) 689, 698, 18 L. ed. 527.

66. Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527.

See 10 STANDARD PROC. 1036, and also the following cases: **N. Y.**—Potter *v.* Hopkins, 25 Wend. 417. **Utah.**—Farnsworth *v.* Holderman, 3 Utah 381, 4 Pac. 337. **Wis.**—Cody *v.* Bemis, 40 Wis. 666.

67. **Conn.**—Hickock *v.* Hoyt, 33 Conn. 553. **Ill.**—Driggers *v.* Bell, 94 Ill. 223. **Ky.**—Bannister *v.* Weatherford, 7 B. Mon. 271. **N. Y.**—Bailey *v.* Elm City Lumb. Co., 167 App. Div. 42, 154 N. Y. Supp. 281.

See 11 STANDARD PROC. 1046.

68. **Ala.**—Touart *v.* Yellow Pine Lumb. Co., 128 Ala. 61, 29 So. 4. **Ill.** Seibert *v.* Bach, 36 Ill. 195; Davidson *v.* Johnson, 31 Ill. 523; Mastin *v.* Toncray, 3 Ill. 216. **Md.**—Hoke *v.* Wood, 26 Md. 453.

69. Trunkey *v.* Hedstrom, 131 Ill. 204, 23 N. E. 587. See 11 STANDARD PROC. 1047.

70. **Conn.**—Kellogg *v.* Denslow, 14 Conn. 411. **Colo.**—Robinson Consol. Min. Co. *v.* Johnson, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769. **Ga.**—Shomo *v.* Ransom, 92 Ga. 97, 18 S. E. 534. **Ill.** Driggers *v.* Bell, 94 Ill. 223. **Md.** Hoke *v.* Wood, 26 Md. 453. **Mo.**—Barber *v.* Ozark Imp. Co., 131 Mo. App. 717, 111 S. W. 846. **Tex.**—Flores *v.* Smith, 66 Tex. 115, 18 S. W. 224. **Vt.** Mixer *v.* Williams, 17 Vt. 457.

See 11 STANDARD PROC. 1047.

71. Davis *v.* McCrocklin, 34 **Kan.** 218, 8 Pac. 196.

of the articles prior to the time stipulated for delivery.[72]

f. *Trial.* — Questions of law and fact arise in connection with the buyer's action for damages, as in other actions, and there is no new principle to be applied in such cases. Thus, where the evidence is conflicting, it is for the jury to determine the facts,[73] as, for example, whether there was a contract between the parties,[74] whether or not the plaintiff performed his part of the contract, or was ready to perform it,[75] or whether or not there was a breach in the delivery of the goods at the alleged time.[76] Where, however, the plaintiff claims special damages by reason of certain circumstances, it is for the court to determine, as introductory to the admission of evidence thereon, whether such circumstances were reasonably within the contemplation of the parties when the contract was made.[77] The elementary principles governing instructions, likewise apply to the plaintiff's action for damages.[78] The instructions must be within the evidence,[79] should be confined to the issues,[80] should cover all the issues,[81] should not

72. Robinson *v.* Batchelder, 4 N. H. 40.

73. **U. S.**—Mangold Stave & C. Co. *v.* Lucas E. Moore Stave Co., 197 Fed. 20, 116 C. C. A. 542; Joslyn *v.* Cadillac Auto Co., 177 Fed. 863, 101 C. C. A. 77. **Mass.**—Chandler Grain & Milling Co. *v.* Shea, 213 Mass. 398, 100 N. E. 663. **Minn.**—Mason *v.* Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125. **Mo.** Morbrose Inv. Co. *v.* Flick, 187 Mo. App. 528, 174 S. W. 189; Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628. **N. Y.** Atlanta Mach. Wks. *v.* Felthousen, 167 App. Div. 946, 151 N. Y. Supp. 922; Lowenstein *v.* Hargraves Mills, 141 App. Div. 232, 125 N. Y. Supp. 1090; Friend *v.* Rosenwald, 124 App. Div. 226, 108 N. Y. Supp. 701; Peck *v.* Will & Baumer Co., 98 App. Div. 628, 90 N. Y. Supp. 272; Hyde *v.* Payne, 46 Hun 675, 10 N. Y. St. 837 **N. C.**—Davidson Hardware Co. *v.* Delker Buggy Co., 167 N. C. 423, 83 S. E. 557. **Pa.**—Boyd *v.* Merchants & Farmers Peanut Co., 25 Pa. Super. 199.

See the title "**Province of Judge and Jury.**"

74. Eiseman *v.* Heine, 158 N. Y. 45, 52 N. E. 667.

75. **Ill.**—Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826. **N. C.**—Blalock *v.* Clark, 133 N. C. 306, 45 S. E. 642; Burbank *v.* Wood, 48 N. C. 30. **Ore.** Catlin *v.* Jones, 52 Ore. 337, 97 Pac. 546. **Va.**—Smokeless Fuel Co. *v.* Seaton & Sons, 105 Va. 170, 52 S. E. 829.

76. **U. S.**—Brauer *v.* Macbeth, 138 Fed. 977, 71 C. C. A. 231. **N. Y.**—Fenn *v.* Dryfoos, 69 App. Div. 112, 74 N. Y. Supp. 528; Wilber *v.* Leonard, 56 Hun 364, 10 N. Y. Supp. 350, 32 N. Y. St. 384. **S. D.**—Schull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654. **Va.**—Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829.

77. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

78. See the title "**Instructions.**"

79. **Ala.**—Johnson *v.* Carden, 187 Ala. 142, 65 So. 813. **Ark.** — Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052. **Ga.**—Sanders *v.* Allen, 135 Ga. 173, 68 S. E. 1102. **Mich.**—Pitt *v.* Emmons, 92 Mich. 542, 52 N. W. 1004. **Mo.**—Bank *v.* Wood, 189 Mo. App. 62, 173 S. W. 1093; Gourley *v.* American Hdw. Lumb. Co., 185 Mo. App. 360, 170 S. W. 339. **N. C.** Hassard-Short *v.* Hardison, 117 N. C. 60, 23 S. E. 96. **Pa.**—Rugg *v.* Moore, 110 Pa. 236, 1 Atl. 320. **Tex.**—Empire Timber & Lumber Co. *v.* Mooney, 60 Tex. Civ. App. 581, 128 S. W. 907; Earnest *v.* Waggoner, 49 Tex. Civ. App. 298, 108 S. W. 495. **Vt.**—Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

80. **Ala.**—Middleton *v.* Wilson, 84 Ala. 264, 4 So. 228. **Ill.**—Seckel *v.* Scott, 66 Ill. 107. **Md.**—Sloan *v.* Allegheny Co., 91 Md. 501, 46 Atl. 1003. **N. C.**—Burbank *v.* Wood, 48 N. C. 30. **Vt.**—Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

81. **Del.**—Barnesville Mfg. Co. *v.* Love, 3 Penne. 569, 52 Atl. 267. **Ia.** Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827. **Ky.**—Greenberg *v.* Hyman, 159 Ky. 618,

invade the province of the jury in passing upon the facts in the case,[82] must be correct as to the law governing the measure of damages,[83] and must be based upon the whole contract between the parties and not a mere part of it.[84]

5. Action, Recoupment, or Counterclaim for Breach of Warranty. a. *In General.* — In addition to the remedy of rescission the buyer, in case of a breach of warranty, may elect to stand by the contract, retaining the property, and seeking his remedy upon the warranty itself. Instead, however, of bringing his independent action, he may, if sued for the price, set up against the seller the breach of warranty by way of recoupment, set-off, or counterclaim. Each of these remedies are to be considered in turn.[85]

b. *Action for Breach of Warranty.* — **(I.) In General.** — The right of a buyer after receiving and accepting the goods to bring an action for damages for breach of a warranty connected with the sale, falls under the general rule applying to all breaches of contract, namely, that an action for damages lies in every case of a breach of promise made by one person to another for a good and valuable consideration.[86]

(II.) Prerequisites of Action. — The title must have fully passed to the buyer as a condition precedent to his action upon a warranty,[87] and in order to enforce the contract of warranty the buyer must have complied with all conditions imposed upon him by the contract,[88] unless such performance on the part of the warrantee has been waived.[89] For example, where the transfer of the title is dependent

167 S. W. 914. **Mich.**—Durfee *v.* Newkirk, 83 Mich. 522, 47 N. W. 351. **Mo.** Perry *v.* Van Matre, 176 Mo. App. 100, 161 S. W. 643. **Ore.**—Hockersmith *v.* Hanley, 29 Ore. 27, 44 Pac. 497. **Tex.** Wolf & Co. *v.* Galbraith, 35 Tex. Civ. App. 505, 80 S. W. 648.

82. Mich.—Pitt *v.* Emmons, 92 Mich. 542, 52 N. W. 1004. **Mo.**—Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628. **N. Y.**—Hyde *v.* Payne, 46 Hun 675, 10 N. Y. St. 837. **Can.**—Baker *v.* Fawkes, 35 U. C. Q. B. 302.

83. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

84. Schneider Granite Co. *v.* J. C. Fink Mineral Milling Co., 78 Mo. App. 622.

85. See the discussion following and *supra*, III, A, 3, e.

86. Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719; Poulton *v.* Lattimore, 9 B. & C. 259, 17 E. C. L. 122, 109 Eng. Reprint 96; Benjamin on Sales, 7th Am. ed., p. 947.

87. Mich.—Moneyweight Scale Co. *v.* David, 180 Mich. 8, 146 N. W. 391. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381; English *v.* Hanford, 75 Hun 428, 27 N. Y. Supp. 672, 57 N. Y. St. 352; Carpenter *v.* Chapman, 139 N. Y. Supp. 849. **R. I.** Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082. **Can.**—Frye *v.* Milligan, 10 Ont. 509.

88. U. S.—Crane Co. *v.* Columbus Const. Co., 73 Fed. 984, 20 C. C. A. 233. **Dak.**—J. I. Case Threshing Mach. Co. *v.* Vennum, 4 Dak. 92, 23 N. W. 563. **Ill.**—Eichelroth *v.* Long, 156 Ill. App. 108; Hasenwinkle Grain Co. *v.* Dooley & Co., 130 Ill. App. 75. **Ind.**—Sanderson *v.* Trump Mfg. Co., 180 Ind. 197, 218, 102 N. E. 2. **Ia.**—Sandwich Mfg. Co. *v.* Trindle, 71 Iowa 600, 33 N. W. 79. **Mo.**—Brooks Tire Mach. Co. *v.* Wells, 182 Mo. App. 50, 167 S. W. 604; Nichols-Shepard Co. *v.* Rhoadman, 112 Mo. App. 299, 87 S. W. 62. **Neb.** Worden *v.* Marsh Harvester Co., 11 Neb. 116, 7 N. W. 756; Nichols *v.* Hail, 4 Neb. 210. **N. Y.**—Shearer Co. *v.* Kakoulis, 144 N. Y. Supp. 1077. **N. C.** Chas. Hackley Piano Co. *v.* Kennedy, 152 N. C. 196, 67 S. E. 488. **Vt.**—Reynolds *v.* Roberts, 57 Vt. 392.

89. Kan.—Campbell *v.* Lodge No. 99, A. F. & A. M., 76 Kan. 400, 92 Pac. 53; Davis *v.* Gosser, 41 Kan. 414,

upon the prepayment of the price, the price must be paid before the action is brought,[90] although, in absence of such a condition it is not necessary that the price should have been paid.[91] A purchaser, in absence of an agreement to the contrary, is not even required to inform the seller that there has been a breach of warranty.[92] Where, however, the terms of the contract stipulate as a condition that notice shall be given by the purchaser, of the failure of the goods to comply with a warranty,[93] or to give notice of the existence of defects,[94] or to allow the seller a certain time to remedy defects if any[95] such requirements must be met before an action on the warranty will lie.

As a rule, an action for breach of warranty may be maintained without a return, or a precedent tender, or an offer to return the property,[96] and even though the contract, as is not infrequently the case, stipulates that the goods may be returned should they fail to comply with the warranty,[97] yet the buyer may keep the goods and rely upon his action for damages.[98] Where, however, the return of

21 Pac. 240. **Neb.**—Westinghouse Co. *v.* Meixel, 72 Neb. 623, 101- N. W. 238. **N. Y.**—Laing *v.* Pelton Water Wheel Co., 122 App. Div. 677, 107 N. Y. Supp. 686. **S. D.**—Lee *v.* Neumen, 15 S. D. 642, 91 N. W. 320.

90. English *v.* Hanford, 75 Hun 428, 27 N. Y. Supp. 672, 57 N. Y. St. 352.

91. **Ill.**—Staver Carriage Co. *v.* American & B. Mfg. Co., 188 Ill. App. 634. **Ia.**—Aultman & Co. *v.* Wheeler, 49 Iowa 647. **Minn.**—Skoog *v.* Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193; Thoreson *v.* Minneapolis Harv. Works, 29 Minn. 341, 13 N. W. 156; Frohreich *v.* Gammon, 28 Minn. 476, 11 N. W. 88. **Neb.**—Volland *v.* Baker, 32 Neb. 391, 49 N. W. 381, 13 L. R. A. 140. **S. C.** Wiggins *v.* Hunter, Harp. 80.

[a] **Note for Price.**—The fact that the buyer has given his note for the price after knowing of the breach of the warranty does not bar his action for damages for the breach. Wheelock *v.* Berkley, 38 Ill. App. 518.

92. Means *v.* Means, 88 Ind. 196.

93. Russell *v.* Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. Rep. 348.

94. Fahey *v.* Esterley Harv. Mach. Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

95. Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339, even though the buyer did not know what the defect was.

96. **U. S.**—Andrews *v.* Schreiber, 93 Fed. 367. **Ala.**—Marshall *v.* Wood, 16 Ala. 806. **Ark.**—Plant *v.* Condit, 22 Ark. 454. **Cal.**—Hughes *v.* Bray, 60 Cal. 284. **Ill.**—Devine *v.* Ryan, 115 Ill. App. 498. **Ia.**—Short *v.* Matteson, 81 Iowa 638, 47 N. W. 874. **Md.**—Horn *v.* Buck, 48 Md. 358. **Mass.**—Vincent *v.* Leland, 100 Mass. 432. **Minn.**—Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636. **Mo.**—Ross *v.* Barker, 30 Mo. 385. **N. J.**—Phillips *v.* Crosby, 69 N. J. L. 612, 55 Atl. 814. **N. Y.**—Wadley *v.* Davis, 63 Barb. 500; Brigg *v.* Hilton, 11 Daly 335; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719, *affirmed*, 63 Barb. 506. **N. C.**—Lewis *v.* Rountree & Co., 78 N. C. 323. **Pa.**—Borrekins *v.* Bevan, 3 Rowle 23, 23 Am. Dec. 85. **S. C.**—Parker *v.* Pringle, 2 Strobh. 242. **Tenn.** Southern Brass Iron Co. *v.* Exeter Mach. Works, 109 Tenn. 67, 70 S. W. 614. **Tex.**—Smith *v.* Oldham, 26 Tex. 533. **Vt.**—Richardson *v.* Grandy, 49 Vt. 22. **Wis.**—Nauman *v.* Ullman, 102 Wis. 92, 78 N. W. 159.

97. **Ill.**—Pennell *v.* McAfferty, 84 Ill. 364; Owens *v.* Sturges, 67 Ill. 366; Dallum *v.* Birdsall, 66 Ill. 378. **Ia.** Hallowell *v.* McLaughlin, 136 Iowa 279, 111 N. W. 428. **Kan.**—Champion Mach. Co. *v.* Mann, 42 Kan. 372, 22 Pac. 417. **Ky.**—Walters *v.* Akers, 31 Ky. L. Rep. 259, 101 S. W. 1179. **Neb.**—McCormick Harv. Mach. Co. *v.* Knoll, 57 Neb. 790, 78 N. W. 394; Sandwich Mfg. Co. *v.* Feary, 34 Neb. 411, 51 N. W. 1026. **S. D.**—Davis *v.* Iverson, 5 S. D. 295, 58 N. W. 796.

98. **U. S.**—Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595; Eyers *v.* Haddem, 70 Fed. 648. **Conn.**—Shupe *v.* Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339. **Ill.**—Cook *v.* Lantz, 116 Ill. App. 472. **Ia.**—Elwood *v.* McDill,

the goods is made a condition of the contract, the buyer must return, or tender them, before beginning his action,[99] and the parties may, of course, agree that a return of the goods shall be the buyer's sole remedy.[1]

(III.) Time To Sue. — Where a note is given in payment of warranted goods, an action for breach of the warranty may be brought before the maturity of the note.[2] In case of a breach of warranty of title, the cases are not in accord as to the time when the action accrues, some holding that the warranty is broken at the time of the sale,[3] while, on the other hand it is held that it is not broken until the buyer is dispossessed.[4]

(IV.) Parties and Pleadings. — (A.) PARTIES. — The contract of warranty is a personal one to the contracting parties, and cannot be relied upon by others not in privity.[5] Moreover, a warranty on the

105 Iowa 437, 75 N. W. 340. **Ky.**—Walters *v.* Akers, 31 Ky. L. Rep. 259, 101 S. W. 1179. **Mass.**—Douglass Axe Mfg. Co. *v.* Gardner, 10 Cush. 88. **Mich.** Hull *v.* Belknap, 37 Mich. 179. **Minn.** Gaar Scott & Co. *v.* Patterson, 65 Minn. 449, 68 N. W. 69. **Mo.**—Moore *v.* Emerson, 63 Mo. App. 137. **N. J.**—Perrine *v.* Serrell, 30 N. J. L. 454. **N. Y.** Rochevot *v.* Wolf, 96 App. Div. 506, 89 N. Y. Supp. 142. **N. C.**—Blacknall *v.* Rowland, 118 N. C. 418, 24 S. E. 1. **Pa.** Seigworth *v.* Leffel, 76 Pa. 476. **Tex.** Osborne & Co. *v.* Poindexter (Tex. Civ. App.), 34 S. W. 299. **Wis.**—Park *v.* Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572.

99. **Ga.**—J. A. Fay & Eagan Co. *v.* Dudley, 129 Ga. 314, 58 S. E. 826. **Ia.** Bomberger, Wright & Co. *v.* Griener, 18 Iowa 477. **Mo.**—Jasper County Bank *v.* Barts, 130 Mo. App. 635, 109 S. W. 1057. **N. J.**—Sturtevant Mill Co. *v.* Kingsland Brick Co., 74 N. J. L. 492, 70 Atl. 732. **Tex.**—Haynes *v.* Plano Mfg. Co., 36 Tex. Civ. App. 567, 82 S. W. 532. **Wis.**—Manny *v.* Glendenning, 15 Wis. 50. **Eng.**—Bywater *v.* Richardson, 1 Ad. & El. 508, 3 L. J. K. B. 164, 3 N. & M. 748, 28 E. C. L. 246, 110 Eng. Reprint 1301. **Can.**—Hamilton *v.* Northey Mfg. Co., 31 Ont. 468.

1. **Ia.**—McCormick Harvesting Mach. Co. *v.* Brower, 94 Iowa 144, 62 N. W. 700. **Me.**—Tyler *v.* Augusta, 88 Me. 504, 34 Atl. 406. **Pa.**—Himes *v.* Kiehl, 154 Pa. 190, 25 Atl. 632. **S. D.** Aultman & Taylor Co. *v.* Gunderson, 6 S. D. 226, 60 N. W. 859, 55 Am. St. Rep. 837. **Tenn.**—Lewis *v.* Hubbard, 1 Lea. 436, 27 Am. Rep. 775. **Utah**—Wasatch Orchard Co. *v.* Morgan Canning Co., 32 Utah 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540.

[a] **Agreement As To Remedy.**—It is competent for the parties to provide by contract that a particular course shall be pursued on the failure of a warranty. Love *v.* Ross, 89 Iowa 400, 56 N. W. 528; King *v.* Towsley, 64 Iowa 75, 19 N. W. 859.

2. Bach *v.* Levy, 18 Jones & S. (N. Y.) 519.

3. Perkins *v.* Whelan, 116 Mass. 542; Grose *v.* Hennessey, 13 Allen (Mass.) 389.

4. Gross *v.* Kierski, 41 Cal. 111; Hull *v.* Caldwell, 3 S. D. 451, 54 N. W. 100.

5. Bordwell *v.* Collie, 45 N. Y. 494.

[a] **Husband and Wife.**—An action is not maintainable by a wife for a personal injury received by reason of a breach of warranty made to the husband. Longmeid *v.* Holliday, 6 Eng. Law & Eq. 562.

[b] **Remote Vendor.**—A vendee has a direct cause of action in himself only against the immediate and not a remote vendor, for there is no privity of contract except between the immediate vendor and the vendee; but if the cause of action of a former vendee against his vendor is assigned to the present vendee, he may sue on it. Bordwell *v.* Collie, 45 N. Y. 494.

[c] **Not Assignable at Common Law.**—A contract of warranty cannot be assigned, at common law, so as to enable an assignee to maintain a suit thereon in his own name, or make it a subject of set off in a suit by the warrantor against the assignee. Zuckermann *v.* Solomon, 73 Ill. 130. See, also,

sale of personal property does not run with the property; each buyer can resort only to his immediate seller.[6] Where, however, a sale with warranty is made to several persons jointly, they may join in an action for the breach.[7]

(B.) Form of Action. — At common law, assumpsit is the proper remedy for an action based upon a breach of a contract of warranty, whether the warranty be express or implied.[8] The plaintiff must, however, count specially on the contract, since its breach is the gravamen of the action,[9] but in pleading a general warranty of quality, it is not necessary to state whether the warranty was express or implied.[10] Under the common law practice, a count for money had and received, if the price has been paid to the defendant, may be added to the special one.[11] Under the codes, the action is known as "an

Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220.

[d] **Assignee of Bill of Lading.**—Out of accord with the generally accepted doctrine, it has been held, in at least two cases, that an assignee of a bill of lading with draft attached is liable, upon receiving payment for the draft, for the return of the money, in case of a breach of warranty (where the goods did not comply with the contract) by the seller. See Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48; Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, for a note reviewing the authorities.

6. **Ark.**—Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288. *Compare,* however, Boyd *v.* Whitfield, 19 Ark. 447. **Ga.**—Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; Dukes *v.* Nelson, 27 Ga. 457, 463. **Ky.**—Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918. **N. Y.**—Bordwell *v.* Collie, 45 N. Y. 494.

7. Daugherty *v.* Robert Burgess & Son, 118 Mo. App. 557, 94 S. W. 594.

8. **Ala.**—Wren *v.* Wardlaw, Minor 363, 12 Am. Dec. 60. **Ark.**—Johnson *v.* McDaniel, 15 Ark. 109; Penn *v.* Stuart, 11 Ark. 41. **Ill.**—Dallum *v.* Birdsall, 66 Ill. 378; Russell *v.* Gillmore, 54 Ill. 147. **Mich.**—Tatro *v.* Brower, 118 Mich. 615, 77 N. W. 274; Thomas *v.* Schram, 52 Mich. 213, 17 N. W. 815. **Ohio.**—McMillan *v.* Theaker, 12 Ohio 24. **S. C.**—Wood *v.* Ashe, 3 Strobh. 64. **Vt.**—Richardson *v.* Grandy, 49 Vt. 22; Parlin *v.* Bundy, 18 Vt. 582. **W. Va.**—Wolf *v.* Spence, 39 W. Va. 491, 20 S. E. 610. **Eng.**—Stuart *v.* Wilkins, 1 Doug. 18, 99 Eng. Reprint 15.

[a] **Action of Assumpsit.**—The case of Stuart *v.* Wilkins, 1 Doug. 18, 99 Eng. Reprint 15, is the first reported decision that assumpsit is a proper action upon a warranty. The earliest cases regarded a breach of warranty rather as a tort than a breach of contract. See Williston on Sales, § 196.

[b] **False Warranty.**—(1) The ancient remedy for a false warranty was an action on the case sounding in tort. Shippen *v.* Bowen, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. ed. 1172; Schuchardt *v.* Allens, 1 Wall. (U. S.) 359, 17 L. ed. 642; Stuart *v.* Wilkins, 1 Doug. 18, 99 Eng. Reprint 15. (2) At a later period, the plaintiff's right to sue either in tort or in contract (assumpsit) was recognized. See **U. S.**—Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810. **Conn.**—Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338. **Pa.**—Vanleer *v.* Earle, 26 Pa. 277. **Eng.**—Stuart *v.* Wilkins, 1 Doug. 18, 99 Eng. Reprint 15.

9. Russell *v.* Gillmore, 54 Ill. 147; Hunt *v.* Sackett, 31 Mich. 18.

10. Long Bros. *v.* J. K. Armsby Co., 43 Mo. App. 253; Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Burch *v.* Spencer, 15 Hun (N. Y.) 504.

[a] **Ambiguity.**—However, an allegation that defendant expressly "or" impliedly warranted that a quantity of Paris green sold would kill potato bugs, was held bad for ambiguity and uncertainty. Kent *v.* Halliday, 23 R. I. 182, 49 Atl. 700.

11. Cahoon *v.* Burford, 13 Mees. & W. (Eng.) 136.

[a] **Common Court as Surplusage.**—If a declaration count upon the warranty of a horse, and aver a breach, and that the horse was of no use to the plaintiff, and then conclude with an averment, that so the defendant be-

action for a breach of warranty," but it need not be specifically entitled in this way, in order to enable plaintiff to recover.[12]

(C.) ALLEGATIONS. — (1.) *In General.* — A declaration or complaint that alleges the facts of a sale and the making of a warranty, that plaintiff bought the goods relying upon such warranty, that there was a breach of the warranty, and alleging facts of plaintiff's damages thereby, will, generally, be sufficient.[13]

(2.) *Sale and Warranty.* — The sale should be stated but the terms of it are immaterial.[14] The fact that a warranty was made should be distinctly alleged,[15] and in pleading a statement on the part of the seller as a warranty, it should be made to appear as an undertaking which entered into and became part of the contract of sale.[16] It is customary to allege that the defendant by warranting a certain thing sold it to the plaintiff, but it is not necessary to use the word "warrant," "warranting," or "warranted,"[17] although an affirmation or a promise must be alleged,[18] not merely that the seller induced the purchase by false representations.[19] Ordinarily, a general allegation

came indebted to the plaintiff for so much money had and received as the plaintiff paid for the horse, and proceed in the common form of indebitatus assumpsit for money had and received, this latter averment and conclusion will, on motion in arrest of judgment, be treated as surplusage. Parlin *v.* Bundy, 18 Vt. 582.

12. Russell *v.* Corning Mfg. Co., 49 App. Div. 610, N. Y. Supp. 640.

13. As to allegations in general held sufficient, see the following cases: **U. S.**—Cleveland Linseed Oil Co. *v.* A. F. Buchanan & Sons, 120 Fed. 906, 57 C. C. A. 498. **Cal.**—Moody *v.* Peirano (Cal. App.), 84 Pac. 783. **Conn.** Clark *v.* Wooster, 79 Conn. 126, 64 Atl. 10. **Ind.**—Hardwick *v.* Wilson, 40 Ind. 321; Fitzmaurice *v.* Puterbaugh, 17 Ind. App. 318, 45 N. E. 524. **Ia.**—Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751. **Minn.**—Segerstrom *v.* Swenson, 105 Minn. 115, 117 N. W. 478; Plano Mfg. Co. *v.* Richards, 86 Minn. 94, 90 N. W. 120. **Mo.**—Kenny *v.* James, 50 Mo. 316; Haines *v.* Neece, 116 Mo. App. 499, 92 S. W. 919; Narr *v.* Norman, 113 Mo. App. 533, 88 S. W. 122. **Neb.** Unland *v.* Garton, 48 Neb. 202, 66 N. W. 1130. **N. J.**—Phillips *v.* Crosby, 69 N. J. L. 612, 55 Atl. 814. **Tex.**—Routh *v.* Caron, 64 Tex. 289; Hume *v.* Sherman Oil & Cotton Co., 27 Tex. Civ. App. 366, 65 S. W. 390. **Vt.**—Goodenough *v.* Snow, 27 Vt. 720; Parlin *v.* Bundy, 18 Vt. 582. **Wis.**—Klipstein *v.* Raschein, 117 Wis. 248, 94 N. W. 63; Bergeler *v.* Michel, 84 Wis. 627, 54 N. W. 995; Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757.

Forms, See 9 STANDARD PROC. 1259, and cross-references there found.

14. Webster *v.* Hodgkins, 25 N. H. 128, 139.

15. Woodridge *v.* Brown, 149 N. C. 299, 62 S. E. 1076.

[a] **Good Averment of Warranty.**— In the case of Curtis *v.* Moore, 15 Wis. 134, the court said: "The complaint was obviously good. It is a model for brevity and perspicuity, well worthy of imitation in higher courts. There is no mistaking the allegation that the warranty was made at the time and in consideration of the exchange. The plaintiff exchanged the oxen, etc., for a horse, *which horse* the demendant expressly declared and warranted to be of the age of nine, coming ten years. Such an averment would be good under any system of pleading, and is especially so under ours, which declares that the allegations shall be liberally construed with a view to substantial justice."

16. Lincoln *v.* Ragsdale, 7 Ind. App. 354, 31 N. E. 581.

17. Smith *v.* Borden, 160 Ind. 223, 66 N. E. 681; Bergeler *v.* Michel, 84 Wis. 627, 54 N. W. 995.

18. **Mass.**—Cooper *v.* Landon, 102 Mass. 58. **Minn.**—Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139. **Neb.** Unland *v.* Garton, 48 Neb. 202, 66 N. W. 1130. **W. Va.**—Wolf *v.* Spence, 39 W. Va. 491, 20 S. E. 610.

19. Cooper *v.* Landon, 102 Mass. 58.

that the seller warranted the goods to be of good quality will be sufficient,[20] although all matter which materially qualifies and alters the legal nature of the promise must be averred.[21] For example, it is not sufficient to aver a warranty that an article was fit for use, but the purpose for which it was warranted fit must be specially alleged,[22] and, in general, in case of an implied warranty the facts which form the basis of such a warranty must be set forth.[23] Moreover, the substance and meaning, or exact terms of the warranty must be stated. If it were a warranty with an exception as to a particular defect, for example, the exception should be stated.[24] In actions for breach of warranty, it is not necessary to allege that the seller knew that the warranty was false,[25] or that there was fraud on his part.[26]

20. **Neb.**—Unland *v.* Garton, 48 Neb. 202, 66 N. W. 1130. **N. H.**—Webster *v.* Hodgkins, 25 N. H. 128. **N. Y.**—Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Burch *v.* Spencer, 13 Hun 504.

[a] **Express or Implied Warranty.**—A general averment that the seller warranted the article to be of good quality will support proof either of an express or implied warranty. Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

21. Howard *v.* Chiles, 8 B. Mon. (Ky.) 377.

22. Shepherd *v.* Pybus, 3 Mann. & G. 868, 42 E. C. L. 542, 4 Scott N. R. 434, 11 L. J. C. P. 101, 133 Eng. Reprint 1390.

23. **Ala.**—Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12; Parker *v.* McFerrin, 103 Ala. 132, 15 So. 518. **Ill.**—Misner *v.* Granger, 9 Ill. 69. **Ind.** Fitzmaurice *v.* Puterbaugh, 17 Ind. App. 318, 45 N. E. 524; Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557. **Tex.**—Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385.

24. See Jones *v.* Cowley, 4 B. & C. 445, 10 E. C. L. 653, 6 D. & R. 533, 3 L. J. K. B. O. S. 263, 107 Eng. Reprint 1126; Gray *v.* Cox, 4 B. & C. 108, 10 E. C. L. 502, 6 D. & R. 200, 107 Eng. Reprint 999; Button *v.* Corder, 7 Taunt. 405, 2 E. C. L. 420, 1 Moore 109, 129 Eng. Reprint 162.

25. **U. S.**—Shippen *v.* Bowen, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. ed. 1172. **Conn.**—Booth's Admr. *v.* Northrop, 27 Conn. 325. **Ill.**—Wallace *v.* Tanner, 118 Ill. App. 639. **Ind.**—House *v.* Fort, 4 Blackf. 293. **Ky.**—Tyler *v.* Moody, 111 Ky. 191, 63 S. W. 433, 98 Am. St. Rep. 406, 54 L. R. A. 417. **Md.** Osgood *v.* Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317. **Minn.**—Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814; Wilson *v.* Fuller, 58 Minn. 149, 59 N. W. 988; Johnson *v.* Wallower, 15 Minn. 472. **N. Y.**—Holman *v.* Dord, 12 Barb. 336, 1 Code R. (N. S.) 331, 2 Edm. Sel. Cas. 270; Fowler *v.* Abrams, 3 E. D. Smith 1. **N. C.**—Blanton *v.* Wall, 49 N. C. 532. **Ohio.**—Gartner *v.* Corwine, 57 Ohio St. 246, 48 N. E. 945. **R. I.**—Fogarty *v.* Barnes, 16 R. I. 627, 18 Atl. 982; Place *v.* Merrill, 14 R. I. 578. **S. C.**—Iler *v.* Jennings, 87 S. C. 87, 68 S. E. 1041; Houston *v.* Gilbert, 3 Brev. 63, 5 Am. Dec. 542. **Vt.**—Pinney *v.* Andrus, 41 Vt. 631; Goodenough *v.* Snow, 27 Vt. 720; Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571. **Va.**—Gerst *v.* Jones & Co., 32 Gratt. (73 Va.) 518, 34 Am. Rep. 773; Trice *v.* Cockran, 8 Gratt. (49 Va.) 442, 56 Am. Dec. 151. **Wash.**—Ford *v.* Smith, 48 Wash. 398, 93 Pac. 909. **Eng.** Gresham *v.* Postan, 2 C. & P. 540, 12 E. C. L. 721; Williamson *v.* Allison, 2 East 446, 102 Eng. Reprint 439.

[a] **If, however, scienter is alleged** it must be proved. Sweeney *v.* Vroman, 60 Wis. 278, 19 N. W. 46. *Contra*, Ross *v.* Mather, 47 Barb. (N. Y.) 582.

[b] **When Scienter Necessary.**—Assumpsit will lie upon a limited warranty of the soundness of a horse "so far as the warrantor knows", in case the declaration avers the unsoundness and the scienter. Parlin *v.* Bundy, 18 Vt. 582.

26. Schuchardt *v.* Allen, 1 Wall. 359, 17 L. ed. 642; Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562; Bosworth *v.* Higgins, 54 Hun 635, 7 N. Y. Supp. 210, 26 N. Y. St. 474, 4 Silver. 203; Case *v.* Boughton, 11 Wend. (N. Y.) 106; Holman *v.* Dord, 12 Barb. (N. Y.) 336, 1 Code R. (N. S.) 331, 2 Edm. Sel. Cas. 270; Ross *v.* Mather, 47 Barb. (N. Y.) 582.

(3.) *Consideration.* — The warranty must be given at the time of the sale when the warranty is dependent on the sale for its consideration,[27] but if the warranty be subsequent to the sale, a separate consideration must be alleged to support it.[28] When the consideration is based upon the sale, it is not necessary to allege the price,[29] and it is not necessary to aver that the price has been paid.[30] Moreover, as a rule, a general allegation of the consideration is all that is required.[31]

(4.) *Reliance Upon Warranty.* — That the buyer relied upon the warranty or representations of the seller, is an essential part of the allegations,[32] and it must appear that the seller was actually misled by relying on the warranty.[33]

(5.) *Compliance With Conditions.* — That the plaintiff complied with all conditions precedent, when such conditions are a part of the contract, must be shown.[34]

(6.) *Breach.* — The breach of the warranty must be alleged,[35] but

27. Wightman *v.* Carlisle, 14 Vt. 296.

[a] **Time of Sale.**—In general, where the warranty was made at the time of the sale, the allegations should so show. Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139; Curtis *v.* Moore, 15 Wis. 134.

[b] **Exchange of Property.**—An exchange of property may also be averred as a consideration of a warranty. For example, an allegation that the plaintiff exchanged a certain property with the defendant for a horse, "which the defendant expressly warranted," etc., sufficiently shows that the warranty was made at the time and in consideration of the exchange. Curtis *v.* Moore, 15 Wis. 134.

[c] **Quantity Sold.**—The consideration of a warranty may be the quantity bought and the terms of payment. For example, under an averment of warranty, in consideration that the plaintiff should take five hundred bushels of the article, paying on delivery, proof that the consideration was that the plaintiff should take an indefinite quantity, paying at delivery or within a reasonable time thereafter, was held as a variance. Pulford *v.* Johnson, 35 Conn. 30.

28. Brooks *v.* Matthews, 78 Ga. 739, 3 S. E. 627; Summers *v.* Vaughan, 35 Ind. 323, 9 Am. Rep. 741.

29. See *infra*, this note.

[a] **Though a valid sale is to be averred as a consideration,** it is sufficient to aver that it was for a certain price, without specifying it; but if the consideration is alleged, and the contract shows a different one, it is a variance. McMillan *v.* Theaker, 12 Ohio 24.

30. McMillan *v.* Theaker, 12 Ohio 24.

31. **Ky.**—Howard *v.* Chiles, 8 B. Mon. 377. **N. H.**—Badger *v.* Burleigh, 13 N. H. 507. **Vt.**—Wightman *v.* Carlisle, 14 Vt. 296.

But see 11 STANDARD PROC. 986.

32. **Ind.**—Lincoln *v.* Ragsdale, 7 Ind. App. 354, 31 N. E. 581. **Mo.**—Kenney *v.* James, 50 Mo. 316. **Ore.**—Abilene Nat. Bank *v.* Nodine, 26 Ore. 53, 37 Pac. 47. **Wis.**—Red Wing Mfg. Co. *v.* Moe, 62 Wis. 240, 22 N. W. 414; Austin *v.* Nickerson, 21 Wis. 542.

33. **Ind.**—Barker *v.* McGinnis, 22 Ind. 257. **Ia.**—Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356. **N. Y.**—Holman *v.* Dord, 12 Barb. 336, 1 Code R. (N. S.) 331, 2 Edm. Sel. Cas. 270; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440.

34. See *infra*, this note.

[a] **Thus, where a machine is warranted** to do certain work, as shown by a test, a test must be alleged, since it is not sufficient, in such a case, merely to state that a machine will not do the work as warranted. Robinson Machine Works *v.* Chandler, 56 Ind. 575; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

[b] **Generally, however, where a test is not made a condition precedent,** no allegation of a test is required. Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; Ohio Thresher & Engine Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716; Springfield Engine & T. Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856.

35. **Ind.**—Lincoln *v.* Ragsdale, 7 Ind.

it is usually sufficient to allege the breach in the words of the contract, either negatively or affirmatively,[36] although a breach of an affirmative character should be stated with more particularity than a breach of a negative character.[37] Some cases hold, however, that the nature and particulars of the breach must be pleaded, and that it is necessary to show wherein the breach fails to comply with the warranty, or the particular defects by reason of which there is a failure to comply, must be set out.[38] Generally, moreover, the allegations must show that the defects complained of as a breach were within the terms of the warranty.[39]

(7.) *Damages.* — There must be an allegation of damages,[40] and if the plaintiff seeks to recover special damages they must be specially declared,[41] as, for example, the communication of infectious diseases by animals warranted sound.[42]

App. 354, 31 N. E. 581. **Ky.**—Lucile Min. Co. *v.* Fairbanks, Morse & Co., 27 Ky. L. Rep. 1100, 87 S. W. 1121. **Neb.** Fetzer & Co. *v.* Johnson, 93 Neb. 763, 141 N. W. 823. **Tex.**—Lemmon *v.* Hanley, 28 Tex. 219.

36. **Cal.**—Moore *v.* Besse, 30 Cal. 570. **Ky.**—Reed *v.* Rogers, 3 T. B. Mon. 173. **N. Y.**—Brown *v.* Stebbins, 4 Hill 154; Rowland *v.* Phalen, 1 Bosw. 43. **Vt.**—Goodenough *v.* Snow, 27 Vt. 720. **Wis.**—Seely *v.* Hills, 44 Wis. 484.

[a] **Warranties of Soundness.**—In a declaration upon a warranty, the particular unsoundness upon which the plaintiff relies need not be stated. An averment of unsoundness is ordinarily sufficient. **Ala.**—Stone *v.* Watson, 37 Ala. 279. **Ia.**—Schurtz *v.* Kleinmeyer, 36 Iowa 392. **Tex.**—Blythe *v.* Speake, 23 Tex. 429. **Vt.**—Wheeler *v.* Wheelock, 33 Vt. 144, 78 Am. Dec. 617.

[b] **Evidence of Other Defects.**—Although a particular description of the unsoundness need not be given, yet if particular defects are stated, other defects may be shown under a general averment of unsoundness. Fleming *v.* Toler, 7 Gratt. (48 Va.) 310.

37. Leeper *v.* Shawman, 12 Ind. 463.

[a] **Defects Not Patent.**—In case of defects in warranted property, it is not necessary to allege that the defects were not patent. Labeaume *v.* Poetlington, 21 Mo. 35.

38. **Cal.**—Dabovich *v.* Emerie, 7 Cal. 209. **Ill.**—Farris *v.* Alfred, 171 Ill. App. 172. **Ind.**—Halstead *v.* Dean & Co., 182 Ind. 446, 105 N. E. 903; Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850; Aultman *v.* Seichting, 126 Ind. 137, 25 N. E. 894; McClamroke *v.* Flint, 101 Ind. 278; Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; McClure *v.* Jeffrey, 8 Ind. 79; Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312; Seiberling & Co. *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38. **Md.**—Fenwick *v.* Forrest, 5 Harr. & J. 414. **Ohio.**—Fred. W. Wolf Co. *v.* Sheriff St. Market & S. Co., 11 Ohio Cir. Dec. 582; Jonte *v.* Toledo Foundry & M. Co., 5 Ohio S. & C. P. Dec. 162, 7 Ohio N. P. 388. **Pa.** Gould *v.* Gage, 118 Pa. 559, 12 Atl. 476; Lee *v.* Baylie, 10 Sad. 570, 13 Atl. 950.

39. **Ga.**—Woolfolk *v.* Beach, 61 Ga. 67. **Ind.**—Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850; H. B. Smith Co. *v.* Williams, 29 Ind. App. 336, 63 N. E. 318. **Ia.**—Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623. **N. Y.**—Harris *v.* Combs, 134 App. Div. 975, 119 N. Y. Supp. 297.

40. Bessemer Ice Delivery Co. *v.* Brannon, 138 Ala. 157, 35 So. 56; Crooker *v.* Willard, 28 N. H. 134.

41. See 13 STANDARD PROC. 365, 379, *et seq.*

[a] **In Contemplation of Parties.**—Not only must special or consequential damages be alleged, but the party seeking to recover such damages must also allege (and prove) that such damages were in contemplation of the parties at the time the contract was made. Ellis *v.* Tips, 16 Tex. Civ. App. 82, 40 S. W. 524; Wells, Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353; Railway Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320. See 13 STANDARD PROC. 380, note 24.

42. **Mass.**—Bradley *v.* Rea, 14 Allen 20. **N. Y.**—Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476. **Neb.**—Long *v.*

(8.) *Joinder.* — Joinder of a cause of action for breach of warranty with other causes of action is governed by the general rules elsewhere treated.[43]

(9.) *Amendments.* — A declaration or complaint for a breach of warranty may be amended in accord with the local rules governing amendments in general.[44]

(10.) *Plea or Answer.* — At common law, defendant may plead the general issue if he would deny the sale and warranty,[45] or he may deny the warranty,[46] or he may traverse the alleged breach, or plead by way of confession and avoidance.[47] Under the codes, the plea may assume the form of a specific denial of the sale, the warranty, or the breach, or may set up new matter in defense.[48]

c. *Using Breach as Defense, Recoupment, Set-off or Counterclaim.* **(I.) In General.** — Instead of bringing an independent action for breach of a warranty, the buyer may, if sued for the price,[49] or in

Clapp, 15 Neb. 417, 19 N. W. 467. **Eng.** Smith *v.* Green, 16 Eng. Rep. 441; Mullett *v.* Mason, L. R., 1 C. P. 559.

43. See the title "**Joinder of Actions.**"

[a] **Misjoinder.**—(1) A complaint setting forth a cause of action upon a warranty, and also a cause of action for fraud in inducing the sale, may be demurrable on the ground of misjoinder. See Seymour *v.* Lorillard, 8 N. Y. Civ. Proc. 90. (2) In Ohio, however, it has been held that a cause of action for breach of warranty and another for fraud, both growing out of the same transaction, may properly be joined in the same petition. Gartner *v.* Corwine, 57 Ohio St. 246, 48 N. E. 945.

44. Lewis *v.* Bracken, 97 Ga. 337, 22 S. E. 943 (declaration amended by an allegation of reliance upon the warranty); Bosworth *v.* Higgins, 54 Hun (N. Y.) 635, 7 N. Y. Supp. 210, 26 N. Y. St. 474, 4 Silv. 203, complaint amended by striking out allegations of fraud in making the warranty.

See generally the titles "**Amendments and Jeofails;**" "**New Cause of Action or Defense;**" "**Parties.**"

45. See *infra*, this note and generally the titles "**Assumpsit;**" "**Denials.**"

[a] **The general issue,** non assumpsit, does not deny the breach, but only the sale and warranty. Smith *v.* Parsons, 8 C. & P. 199, 34 E. C. L. 688; Chitty, Plds., 16th Am. ed. II. 475. See, also, Cress *v.* Henry, 1 Browne (Pa.) 66, appendix.

46. See *infra*, this note.

For example, "That he did not warrant, as alleged." Chit. Pl. (16th Am. Ed.), Vol. II, p. 475. See 9 STANDARD PROC. 1266.

47. See generally the title "**Confession and Avoidance.**"

[a] **Infancy.**—The defendant in an action upon a warranty may plead his infancy in bar. Green *v.* Greenbank, 2 Marsh. (Eng.) 485, 4 E. C. L. 496. See the title "**Infants.**"

48. See 9 STANDARD PROC. 1266, and generally the titles "**Answers;**" "**Confession and Avoidance;**" "**Denials.**"

[a] **Sale on Sunday.**—If defendant relies for a defense upon a sale made on Sunday, it must be pleaded specially as new matter. Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

49. **Ala.**—Baer & Co. *v.* Mobile etc. Mfg. Co., 159 Ala. 491, 49 So. 192; McCoy *v.* Prince, 11 Ala. App. 388, 66 So. 950. **Ark.**—Stevens Co. *v.* Whalen, 95 Ark. 488, 129 S. W. 1081. **Cal.**—Harron *v.* Sisk, 19 Cal. App. 628, 127 Pac. 355. **Ga.**—Alpine Safe & Lock Co. *v.* W. E. Parsons & Bro., 13 Ga. App. 154, 78 S. E. 1023. **Ill.**—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; McIlvrid *v.* Murphy, 190 Ill. App. 515; Madsen *v.* Hogans, 189 Ill. App. 589. **Ind.**—Edwards Mfg. Co. *v.* Stoops, 54 Ind. App. 361, 102 N. E. 980. **Kan.**—Lyman *v.* Wederski, 95 Kan. 438, 148 Pac. 642; International Filter Co. *v.* Caney Ice etc. Co., 84 Kan. 705, 115 Pac. 635. **Mont.**—Busbee *v.* Gagnon Co., 50 Mont. 203, 146 Pac. 275. **N. Y.**—Coble *v.* Potter, 155 App. Div. 716, 140 N. Y. Supp. 855; Blaisdell Mach. Co. *v.* Brasher Breakwater Co., 70 Misc. 257, 126 N. Y. Supp. 634. **N. C.**—Cable Co. *v.* Macon, 153 N. C. 150,

an action against him upon his note given for the price,[50] recover his damages by way of recoupment, set-off, or counterclaim. There is much confusion, however, in the reports in the employment of the words "recoupment," "set-off," "counterclaim," and "defense," particularly in the use of the terms recoupment and counterclaim.[51] This is, doubtless, due in many instances to the fact that many of the codes include both set-off and recoupment in the term counterclaim.[52] The terms, however, are essentially different. In recoupment, the plaintiff's damages are cut down, either diminished or extinguished, but no judgment for affirmative relief can be obtained, and, consequently, the defendant's consequential damages, if any, cannot be considered under recoupment.[53] For example, where in New York, before the code, one elected to recoup, he could not recover a balance in his favor,[54] although in counterclaim, under the code, he may so recover.[55] Moreover, in jurisdictions where a set-off is yet confined to a liquidated debt,[56] an unliquidated demand for a breach of warranty cannot be pleaded as a set-off.[57]

69 S. E. 14. **Pa.**—Standard Auto Co. *v.* Thurston, 54 Pa. Super. 160. **S. D.** Spaulding *v.* Pitts, 26 S. D. 78, 127 N. W. 610. **Va.**—King & Co. *v.* C. W. Hancock & Sons, 114 Va. 596, 77 S. E. 510. **Wash.**—Houser & Haines Mfg. Co. *v.* McKay, 53 Wash. 337, 101 P. 894, 27 L. R. A. (N. S.) 925. **W. Va.** Wilson *v.* Wiggins, 73 W. Va. 560, 564, 81 S. E. 842. **Wis.**—Kelsey *v.* J. W. Ringrose Net Co., 152 Wis. 499, 140 N. W. 66. **Can.**—Wellington *v.* Fraser, 19 Ont. L. R. 88, 14 Ont. W. R. 291.

50. **Cal.**—Snow *v.* Holmes, 71 Cal. 142, 11 Pac. 856. **Ga.**—Kirkpatrick *v.* State, 12 Ga. App. 252, 77 S. E. 104; Tygart *v.* Sutton, 8 Ga. App. 20, 68 S. E. 488. **Me.**—Tainter *v.* Wentworth, 107 Me. 439, 78 Atl. 572. **Minn.**—Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604; Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149; Stevens *v.* Johnson, 28 Minn. 172, 9 N. W. 677; Geiser Threshing Mach. Co. *v.* Farmer, 27 Minn. 428, 8 N. W. 141. **Miss.**—Millsaps *v.* Merchants & P. Bank, 69 Miss. 918, 13 So. 837. **N. H.**—Rumsey *v.* Sargent, 21 N. H. 397. **N. C.**—Standing Stone Nat. Bank *v.* Walser, 162 N. C. 53, 77 S. E. 1006. **S. D.**—First Nat. Bank *v.* Sayer, 35 S. D. 581, 153 N. W. 652; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. **Tex.** Aultman & Taylor Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861. **Can.**—New Hamburg Mfg. Co. *v.* Webb, 23 Ont. L. R. 44, 18 Ont. W. R. 216, 2 Ont. W. N. 588.

51. See, for example, **Ill.**—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40. **Mich.**—Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421. **Wis.**—Parry Mfg. Co. *v.* Tobin, 106 Wis. 286, 82 N. W. 154, *cited* in Williston on Sales, p. 1006, as using the word "recoupment" where doubtless "counterclaim" is intended. And see, in general, the same work, sec. 605, and the title "**Set-Off, Counterclaim and Recoupment.**"

52. See Vasser *v.* Livingston, 13 N. Y. 248. Some of the codes expressly so provide. Others, however, include set-off, although the term itself may not be employed, in the code provisions stating for what purposes a counterclaim may be used. See the title "**Set-off, Counterclaim and Recoupment.**"

53. See Mondell *v.* Steel, 8 Mees. & W. (Eng.) 858 (the leading case upon this subject) and the title "**Set-Off, Counterclaim and Recoupment.**"

54. Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355.

55. See *infra*, III, B, 5, c, (III), and the title "**Set-Off, Counterclaim and Recoupment.**"

56. So expressly provided by the statute of IV & V, Anne, c. 17, which originated the right of set-off.

57. W. T. Adams Mach. Co. *v.* Thomas, 87 Miss. 391, 39 So. 810. See, also, Shropshire *v.* Conrade, 2 Metc. (Ky.) 143; Boyer *v.* Clark, 3 Neb. 161. But see Stevens *v.* Able, 15 Kan. 584; Needham *v.* Pratt, 40 Ohio St. 186; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312.

(II.) Recoupment. — Originally, the buyer when sued for the price was obliged to secure his remedy by a cross action,[58] but, later, by provision of statute,[59] he was permitted to obtain a reduction of damages by way of set-off, in nature of a cross action, and as a substitute therefor.[60] In fact, the tendency of modern decisions has been to avoid circuity and multiplicity of actions, by allowing matters growing out of the same transaction to be given in evidence in mitigation of damages, instead of requiring a cross action,[61] and where a cross action will lie to recover damages upon a breach of warranty on a sale, the same may be given in evidence, and in assessing damages in a suit by the vendor for the price, the buyer's damages may be deducted from the purchase money.[62] The remedy is a defense, pro tanto, that is, either in reduction of the amount of the plaintiff's recovery,[63] or, if the goods are worthless, it may defeat the whole claim.[64] At common law, in an action for the price, the defendant may, under the general issue, prove the breach of warranty, and recoup the amount of his damages from the price.[65] The matter upon which the

[a] **Importance of Question.**—Attention has been called to this distinction between recoupment and counterclaim, for the reason that "recoupment" as used in the Uniform Sales Act, in connection with remedies for breach of warranty, was used by the draftsman in its correct and technical meaning. See *supra,* III, A, 3, e, (II). Particular attention is called further to the provision of the same act, that where the buyer has set up the breach of warranty by way of recoupment in diminution or extinction of the price, no other remedy can thereafter be granted. § 69(2). In England, however, and under the express provision of the Sales Act of that country, the fact that the buyer has set up the breach by way of recoupment does not prevent him from maintaining an action for the same breach if he has suffered further damage. Rigge *v.* Burbidge, 15 Mees. & W. 598; Mondel *v.* Steel, 8 Mees. & W. 858; Sale of Goods Act, § 53(4).

58. Dorr *v.* Fisher, 1 Cush. (Mass.) 271, per Shaw, C. J.

59. IV. & V. Anne, c. 17; extended by 2 Geo. II, c. 22, § 13, and 8 Geo. II, c. 24, §§ 4 and 5.

60. Dorr *v.* Fisher, 1 Cush. (Mass.) 271.

61. **U. S.**—Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847. **Cal.**—Polhemus *v.* Heiman, 45 Cal. 573. **Conn.**—Hitchcock *v.* Hunt, 28 Conn. 343. **Ill.**—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Ruff *v.* Jarrett, 94 Ill. 475; Wilson *v.* King, 83 Ill. 232. **Mass.**—Bradley *v.* Rea, 14 Allen 20; Goodwin *v.* Morse, 9 Met. 278; Harrington *v.* Stratton, 22 Pick. 510. **N. J.** Bouker *v.* Randles, Helm & Co., 31 N. J. L. 335. **N. Y.**—Muller *v.* Eno, 14 N. Y. 597; McAllister *v.* Reab, 4 Wend. 483, *s. c.* 8 Wend. 109; Judd *v.* Dennison, 10 Wend. 512. **Ohio.**—Dayton *v.* Hooglund, 39 Ohio St. 671. **Pa.**—Ogden *v.* Beatty, 137 Pa. 197, 20 Atl. 620, 21 Am. St. Rep. 862; Seigworth *v.* Leffel, 76 Pa. 476. **Tex.**—Houchins *v.* Williams (Tex. Civ. App.), 25 S. W. 730. **Vt.**—Walker *v.* Hoisington, 43 Vt. 608.

62. Dorr *v.* Fisher, 1 Cush. (Mass.) 271; Perley *v.* Balch, 23 Pick. (Mass.) 283 ,34 Am. Dec. 56; Poulton *v.* Lattimore, 9 B. & C. 259, 7 L. J. K. B. O. S. 225, 4 M. & R. 208, 17 E. C. L. 122, 109 Eng. Reprint 96.

63. **U. S.**—Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139. **Conn.**—Hitchcock *v.* Hunt, 28 Conn. 343. **Ga.**—Williams *v.* Wylly, 45 Ga. 580; Dukes *v.* Nelson, 27 Ga. 457. **Me.**—Pratt *v.* Johnson, 100 Me. 443, 62 Atl. 242. **Eng.** Poulton *v.* Lattimore, 9 B. & C. 259, 7 L. J. K. B. O. S. 225, 4 M. & R. 208, 17 E. C. L. 122, 109 Eng. Reprint 96.

64. **U. S.**—Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139. **Ga.**—Pryor *v.* Ludden & Bates S. Music House, 134 Ga. 288, 67 S. E. 654. 28 L. R. A. (N. S.) 267. **Kan.**—Thompson *v.* Wheeler & Wilson Mfg. Co., 29 Kan. 476. **S. D.** Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

65. **Ill.**—Owens *v.* Sturges, 67 Ill.

recoupment is based may, however, be specially pleaded,[66] and, in some jurisdictions, rules of court may require the defendant, who pleads the general issue, to file with his plea a notice of his intention to recoup, as a condition precedent to his introduction of evidence upon the breach of warranty for such purpose.[67] Under the New York practice, a recoupment for breach of warranty should be asserted by way of counterclaim.[68] For the general rules with respect to these matters see a subsequent article of this work.[69]

(III.) Counterclaim. — (A.) IN GENERAL. — A strict counterclaim is based upon an independent right of action, and by it the defendant may obtain affirmative relief, even exceeding, it may be, the plaintiff's claim.[70] Moreover, a counterclaim is not limited to matters arising out of the same cause of action, but in an action against him for the price of goods sold, the buyer may counterclaim the damages arising from a breach of warranty in other sales made to him by the plaintiff.[71] While recoupment or set-off is usually regarded as a defense,

366; Murray *v.* Carlin, 67 Ill. 286; McCormick Harvesting Mach. Co. *v.* Robinson, 60 Ill. App. 253. **Ind.**—Comparet *v.* Johnson, 6 Blackf. 59. **Vt.**—Allen *v.* Hooker, 25 Vt. 137.

66. See Williams *v.* Miller, 21 Ark. 469.

[a] **Is Not a Plea in Bar.**—A plea of breach of warranty of quality in an action for the price of goods sold should be one of set-off or recoupment, and not in bar. Eastern Granite Roofing Co. *v.* Chapman & Co., 140 Ala. 440, 37 So. 199, 103 Am. St. Rep. 58.

[b] **Evidential Facts.**—Pleas of breach of warranty should not allege evidential facts. Warren *v.* Cash, 143 Ala. 158, 39 So. 124.

67. J. Richardson & Co. *v.* Noble, 143 Mich. 546, 107 N. W. 274, holding the notice of recoupment insufficient in that it failed to make necessary allegations.

68. Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Kent. *v.* Friedman, 101 N. Y. 616, 3 N. E. 905; Briggs *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Gurney *v.* Atlantic & G. W. R. Co., 58 N. Y. 358; Dounce *v.* Dow, 57 N. Y. 16; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719; Rose *v.* Wells, 36 App. Div. 593, 55 N. Y. Supp. 874.

[a] **How Pleaded.**—A defendant desiring to interpose his cross claim by way of recoupment or set-off only, should not demand an affirmative judgment upon, but in other respects it should be pleaded as a counterclaim. See Vassear *v.* Livingston, 13 N. Y. 248; Clinton *v.* Eddy, 1 Lans. (N. Y.) 61.

69. See the title "**Set-Off, Counterclaim and Recoupment.**"

70. **U. S.**—Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810. **Ind.**—Love *v.* Oldham, 22 Ind. 51. **Mass.**—Bradley *v.* Rea, 14 Allen 20. **Va.**—Huff *v.* Broyles, 26 Gratt. (67 Va.) 283. **Can.**—New Hamburg Mfg. Co. *v.* Webb, 23 Ont. L. R. 44, 18 Ont. W. R. 216, 2 Ont. W. N. 588; Wellington *v.* Fraser, 19 Ont. L. R. 88, 14 Ont. W. R. 291.

[a] **The counterclaim** may be treated as an action upon a warranty when the rights of the parties are adjudicated. Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406.

[b] **Statutes.**—In many states, other than code states, there are modern statutes of counterclaim much extending the right of mere set-off. These statutes vary in their provisions, however, and must be consulted locally. It is a familiar code provision, however, that "when a counterclaim established at the trial exceeds the plaintiff's claim so established, judgment for the defendant must be given for the excess, or, when it appears that the defendant is entitled to any affirmative relief, judgment shall be given therefor." See the various statutes and the title "**Set-Off, Counterclaim and Recoupment.**"

71. **Mich.**—Chicago Rubber Clothing Co. *v.* Powers, 91 Mich. 466, 51 N. W. 1116; Gutta Percha & Rubber Mfg. Co. *v.* Wood, 84 Mich. 452, 48 N.

either pro tanto or absolutely,[72] it is usually held, under the codes, that a breach of warranty is not pleadable as a technical defense but as a counterclaim.[73]

(B.) To Whom Available. — A counterclaim may be pleaded either by a principal or an agent who fails to disclose his principal,[74] but it cannot be pleaded by a mere guarantor of the payment of the price.[75] Moreover, a surety on a note given for the price cannot maintain a counterclaim, for he could not bring an independent action upon the warranty, not being a party to it.[76] The same principle also applies to an accommodation indorser of a note given for the price of goods sold with a warranty.[77]

(C.) Time To Assert. — The right of the buyer to counterclaim requires no prompt assertion, but may be enforced at any time when the seller brings suit for the price,[78] or even after the buyer has paid in part.[79] Moreover, although the contract stipulates that no claim for damages shall be made after the year of the sale, it is held that the buyer is not bound by such a provision, and that he may plead the warranty in an action on the purchase note.[80] Even though the buyer when sued for the price should not set up the breach of warranty at all, he is not remediless, since he may later bring his action for damages,[81] although he should pay the seller's claim in full,[82] or permit judgment to be taken.[83]

W. 28. **N. Y.**—Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Seymour *v.* Davis, 2 Sandf. 239; Judd *v.* Dennison, 10 Wend. 512. **Ohio.** Needham *v.* Pratt, 40 Ohio St. 186.

72. See *supra*, III, B, 5, c, (II).

73. **Cal.**—Earl *v.* Bull, 15 Cal. 421. **Mont.**—Best Mfg. Co. *v.* Hutton, 49 Mont. 78, 141 Pac. 653. **N. Y.**—Norton *v.* Dreyfus, 106 N. Y. 90, 12 N. E. 428; Nash *v.* Weidenfeld, 41 App. Div. 511, 58 N. Y. Supp. 609 (*affirmed*, 166 N. Y. 612, 59 N. E. 1127); Pease Oil Co. *v.* Monroe, etc. Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; Shoenberg *v.* Thorner, 140 N. Y. Supp. 1028; Ginsberg *v.* Lawrence, 121 N. Y. Supp. 337; Atwater *v.* Orford Copper Co., 85 N. Y. Supp. 426. **Wis.**—Peerless Reaper Co. *v.* Conway, 79 Wis. 622, 48 N. W. 854; Croninger *v.* Paige, 48 Wis. 229, 4 N. W. 106.

[a] **Not Pleadable as a Defense.**—A breach of warranty cannot be pleaded as a defense to an action on a note given for the price, but must be pleaded as a counterclaim. Nash *v.* Weidenfeld, 41 App. Div. 511, 58 N. Y. Supp. 609, *affirmed*, 166 N. Y. 612, 59 N. E. 1127.

74. Dukes *v.* Nelson, 27 Ga. 457.

75. Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905.

76. Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Chase *v.* Evoy, 58 Cal. 348.

[a] **Surety on Note.**—A counterclaim for damages is not available in favor of a surety when sued upon a note given for the price, since such an action is available to the principal alone. Where, however, a sale has been rescinded on account of a breach of warranty, such a defense is available to a surety. Stockton Savings & Loan Soc. *v.* Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181, 21 L. R. A. 406.

77. Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355.

78. Estell *v.* Myers, 54 Miss. 174.

79. Elliott *v.* Puget Sound & C. A. S. S. Co., 22 Wash. 220, 60 Pac. 410.

80. Ohio Thresher & Engine Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

81. **Ill.**—Healy Ice Mach. Co. *v.* Clow & Sons, 148 Ill. App. 421. **Minn.** Phoreson *v.* Minneapolis Harv. Works, 29 Minn. 341, 13 N. W. 156. **N. Y.** Cook *v.* Moseley, 13 Wend. 277.

82. Cook *v.* Moseley, 13 Wend. (N. Y.) 277, 279; Davis *v.* Hedges, L. R. 6 Q. B. 687, 690, 40 L. J. Q. B. 276, 25 L. T. N. S. 155, 20 W. R. 60.

83. **Mass.**—Gilmore *v.* Williams, 162 Mass. 351, 38 N. E. 976; Bodurtha *v.*

(D.) CONDITIONS PRECEDENT. — Generally, the buyer may counterclaim for his damages without returning the goods, and without notifying the seller of the breach of warranty.[84] The buyer must comply, however, with all the terms or conditions precedent of the warranty,[85] and in case a return of the goods is made such a condition, the buyer must show a compliance therewith.[86]

(E.) FORM OF REMEDY. — Under the common law procedure, a statutory right of counterclaim is in the nature of an action of assumpsit upon the alleged warranty.[87] In code states, the counterclaim is embodied in the answer.[88]

(F.) PLEADINGS. — The cause of action, in a counterclaim must be set forth with the same particularity, completeness, and exactness as if the defendant were bringing an original action thereon.[89] When a breach of warranty is pleaded as a defense or counterclaim, it is necessary to aver the character and extent of the warranty,[90] that the

Phelon, 13 Gray 413, 414. **Minn.** Thoreson *v.* Minneapolis Harv. Works, 29 Minn. 341, 13 N. W. 156. **Neb.** Volland *v.* Baker, 32 Neb. 391, 49 N. W. 381, 13 L. R. A. 140.

84. **Ala.**—Roden Grocery Co. *v.* Gipson, 9 Ala. App. 164, 62 So. 388. **Ark.** Williams *v.* Miller, 21 Ark. 469. **Ga.** Woodruff *v.* Graddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33. **Ill.**—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40, *affirming*, 31 Ill. App. 637. **Kan.**—International Filter Co. *v.* Caney Ice etc. Co., 84 Kan. 705, 115 Pac. 635. **Ky.**—Harrigan *v.* Advance Thresher Co., 26 Ky. L. Rep. 317, 81 S. W. 261. **Mich.**—Hull *v.* Belknap, 37 Mich. 179. **Minn.**—W. W. Kimball Co. *v.* Massey, 126 Minn. 461, 148 N. W. 307. **Miss.**—Ferguson *v.* Oliver, 8 Sm. & M. 332. **N. Y.**—Marshuetz *v.* McGreevy, 23 Hun 408. **Pa.** Steigleman *v.* Jeffries, 1 Serg. & R. 477, 7 Am. Dec. 626. **Tex.**—Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264. **Vt.**—Best *v.* Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570. **Wis.**—Buffalo Barb. Wire Co. *v.* Phillips, 67 Wis. 129, 30 N. W. 295.

Contra.—Crane Co. *v.* Collins, 103 App. Div. 480, 93 N. Y. Supp. 174.

85. **Ill.**—Eichelroth *v.* Long, 156 Ill. App. 108; Hasenwinkle Grain Co. *v.* Dooley & Co., 130 Ill. App. 75. **Ind.** Sanderson *v.* Trump Mfg. Co., 180 Ind. 197, 218, 102 N. E. 2. **Ia.**—Sandwich Mfg. Co. *v.* Trindle, 71 Iowa 600, 33 N. W. 79. **Mo.**—Brooks Tire Mach. Co. *v.* Wells, 182 Mo. App. 50, 167 S. W. 604. **Neb.**—Worden *v.* Sycamore Marsh Harv. Co., 11 Neb. 116, 7 N. W. 756. **N. Y.**—Shearer Co. *v.* Kakoulis, 144 N. Y. Supp. 1077. **N. C.**—Hackley Piano Co. *v.* Kennedy, 152 N. C. 196, 67 S. E. 488. **Vt.**—Reynolds *v.* Roberts, 57 Vt. 392.

86. **Ill.**—Hoover *v.* Doetsch, 45 Ill. App. 631. **Ia.**—Williams *v.* Donaldson, 8 Iowa 108. **Ky.**—McCormick Harvesting Mach. Co. *v.* Arnold, 116 Ky. 508, 76 S. W. 323. **Mich.**—Horner *v.* Fellows, 1 Doug. 51.

87. See Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810, referring to the Pennsylvania practice.

88. Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112.

89. See the title **"Set-Off, Counterclaim and Recoupment,"** and Wright *v.* Bacheller, 16 Kan. 259. See, also, Sale *v.* Bugher, 24 Kan. 432, where it is said that if a plaintiff dismisses and defendant elects to proceed to trial with the counterclaim, the counterclaim will be regarded as an original petition. Consequently, if it omits any essential element of a cause of action it will be bad.

90. **Ala.**—Troy Groc. Co. *v.* Potter, 139 Ala. 359, 36 So. 12. **Ind.**—D. M. Osborne & Co. *v.* Hanlon, 158 Ind. 325, 63 N. E. 572; Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850; Booher *v.* Goldsborough, 44 Ind. 490. **Minn.**—Miamisburg Twine & Cordage Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175; Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416. **N. Y.**—Smith *v.* Coe, 170 N. Y. 162, 63 N. E. 57, 170 N. Y. 612, 63 N. E. 342.

[a] **Evidence of Breach.**—An answer denying indebtedness for the

purchaser relied upon the warranty,[91] performance by the defendant of any conditions precedent,[92] and the nature and extent of the breach.[93] Allegations as to the character and amount of the damages sustained by the breach must also be set forth.[94] As in an original action for damages for breach of warranty, the return of the goods need not be alleged,[95] unless the remedy relied upon is a rescission of the contract on account of the breach.[96] Likewise, a charge of fraud or knowledge of the defect is not necessary.[97]

A reply must be responsive to the allegations of the counterclaim, otherwise it will raise no issue and be bad.[98]

d. *Issues, Proof, and Variance.* — In actions based upon a breach of warranty, the issues of the case are only such as are properly raised by the pleadings, and evidence upon matters not thus in issue must be excluded.[99] In some jurisdictions, moreover, in actions connected with the sale of personal property, no evidence at all of a warranty

amount claimed for goods sold and delivered and averring delivery of part to other persons, will not sustain evidence that some of the goods were unsound, as no question of warranty is raised by the pleadings. Fetherly *v.* Burke, 54 N. Y. 646.

[b] **Averment as to Written Warranty.**—It is not necessary to aver whether the warranty was in writing or by parol. Warren *v.* Cash, 143 Ala. 158, 39 So. 124.

[c] **Implied Warranty.**—If the warranty relied upon be an implied warranty, the warranty should nevertheless be alleged, not the facts which imply the warranty. Misner *v.* Granger, 9 Ill. 69.

[d] **Pleading "Defense" or "Counterclaim."**—An answer may be insufficient when pleaded as a strict defense, although the facts if so pleaded may sustain a good counterclaim. See Waller *v.* Bowles, 10 Ky. L. Rep. 875.

91. Abilene Nat. Bank *v.* Nodine, 26 Ore. 53, 37 Pac. 47.

92. Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215.

93. **Ala.**—Berlin Mach. Works *v.* Marbury Lumb. Co., 146 Ala. 542, 40 So. 951. **Ind.**—McClamrock *v.* Flint, 101 Ind. 278; H. B. Smith Co. *v.* Williams, 29 Ind. App. 336, 63 N. E. 318; J. F. Seiberling & Co. *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38. **Ky.**—Lucile Min. Co. *v.* Fairbanks, Morse & Co., 27 Ky. L. Rep. 1100, 87 S. W. 1121. **Mo.**—Maugh *v.* Hornbeck, 98 Mo. App. 389, 72 S. W. 153.

94. Ala.—Bessemer Ice Delivery Co. *v.* Brannon, 138 Ala. 157, 35 So. 56. **Ind.** Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215. See Kern *v.* Saul, 14 Ind. App. 72, 42 N. E. 496. **Tex.**—Ellis *v.* Tips, 16 Tex. Civ. App. 82, 40 S. W. 524.

[a] **An affidavit of defense** must set forth the terms of the warranty, the facts constituting the breach, and also sufficient allegations concerning the contract price and the market value of the goods for the purpose of assessing the damages. See, in general, Newton Rubber Works *v.* Kahn, 186 Pa. 306, 40 Atl. 483; Baugh & Sons Co. *v.* Mitchell, 166 Pa. 577, 31 Atl. 341; Bacon *v.* Scott, 154 Pa. 250, 26 Atl. 422; Gould *v.* Gage, 118 Pa. 559, 12 Atl. 476; Kaufman & Co. *v.* Cooper Iron Min. Co., 105 Pa. 537. See, also, Hoopes *v.* Northern Nat. Bank, 102 Fed. 448, 42 C. C. A. 436.

95. Hillenbrand *v.* Stockman, 123 Ind. 598, 24 N. E. 370; Palmer *v.* Wilks, 17 Tex. 105. See *supra*, III, B, 5, c, (III), (D); III, B, 5, b, (IV), (C).

96. Fleetwood *v.* Dorsey Mach. Co., 95 Ind. 491; Dill *v.* O'Ferrell, 45 Ind. 268.

97. Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557; Williams *v.* Harris, F. & Co., 2 How. (Miss.) 627.

98. Pullen *v.* Wright, 34 Minn. 314, 26 N. W. 394.

99. **Ala.**—Bessemer Ice Delivery Co. *v.* Brannon, 138 Ala. 157, 35 So. 56; Abraham *v.* Browder, 114 Ala. 287, 21 So. 818. **Ia.**—McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537. **N. Y.**—Bank of North Collins *v.* Cary Safe Co., 42 App. Div.

is admissible by way of defense unless the warranty is pleaded.[1] Generally, however, a breach of warranty can be taken advantage of under the general issue,[2] or, according to the practice in some states, by filing a notice of such defense with a plea of the general issue.[3] The rule that the evidence must be limited to the issues raised by the pleadings applies to questions relating to the nature and extent of the warranty,[4] the breach of it,[5] and to the damages involved.[6] Thus, for example, where the breach of a written warranty is alleged, the breach of a parol warranty cannot be proved;[7] and under a denial of performance of the contract by the seller, the buyer cannot set up a breach of warranty;[8] and there can be no proof of special damages unless they are alleged.[9] All essential elements of the cause of action must be proved,[10] and in case of a material variance between the allegations and the proof, a recovery will be precluded.[11]

233, 59 N. Y. Supp. 643. **Tex.**—Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118.

1. See *infra*, this note.

[a] **Thus** in an action to recover the price of a pump, it is error to admit evidence of the warranty of the pump, and its failure, unless the same is pleaded in the answer. Garvey & Co. *v.* Hauck, 85 Mo. App. 14. See, also, Fetherly *v.* Burke, 54 N. Y. 646.

[b] **Allegations Confined to Fraud.** When the allegations are limited to fraudulent representations, evidence of a breach of warranty is not admissible. **Ia.**—Humbert *v.* Larson, 89 Iowa 258, 56 N. W. 454. **Mass.**—Cooper *v.* Landon, 102 Mass. 58. **Wis.**—Sweeney *v.* Vroman, 60 Wis. 278, 19 N. W. 46.

2. **Ala.**—Robinson *v.* Windham, 9 Port. 397. **Ill.**—Owens *v.* Sturges, 67 Ill. 366; Murray *v.* Carlin, 67 Ill. 286. **Ind.**—Comparet *v.* Johnson, 6 Blackf. 59. **Mo.**—Garvey & Co. *v.* Hauck, 85 Mo. App. 14. **Vt.**—Allen *v.* Hooker, 25 Vt. 137.

See *supra*, II, B, 3, g, (II).

3. **Mich.**—Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601. **N. Y.**—Stever *v.* Lamoure, Lalor's Supp. (Hill & Denio) 352. **Ohio.**—Kinnear *v.* Thomas, 1 Ohio Dec. (Reprint) 413, 9 West. L. J. 187.

4. **Ind.**—Morgan *v.* Garr, Scott & Co., 64 Ind. 213. **Miss.**—Houston *v.* Burney, 2 Smed. & M. 583. **N. Y.** Bartlet *v.* Hoppock, 34 N. Y. 118, 88 Am. Dec. 428. **Tex.**—Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118.

5. **Ga.**—Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121. **Ill.**—National Time Recorder Co. *v.* Iowa Mantel Mfg. Co., 108 Ill. App. 95. **Mich.**—See Watkins *v.* Phelps, 165 Mich. 180, 130 N. W. 618. **N. Y.**—Sprout *v.* Newton, 48 Hun 209, 15 N. Y. St. 699.

6. Register Gazette Co. *v.* Larash, 109 Ill. App. 236.

7. Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312; Barrett *v.* Wheeler, 66 Iowa 560, 24 N. W. 38.

8. Chambers *v.* Lancaster, 3 App. Div. 215, 38 N. Y. Supp. 253, 73 N. Y. St. 862, 160 N. Y. 342, 54 N. E. 707.

9. **Ga.**—Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110. **Ill.**—Wallace *v.* Tanner, 118 Ill. App. 639. **Ia.**—Cole *v.* Laird, 121 Iowa 146, 96 N. W. 744. **Me.** Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310. **Minn.**—Meacham *v.* Cooper, 36 Minn. 227, 30 N. W. 669. **N. C.** Huyett & Smith Mfg. Co. *v.* Gray, 111 N. C. 92, 15 S. E. 940.

10. **Ark.**—Penn *v.* Stuart, 11 Ark. 41. **Conn.**—Booth's Admr. *v.* Northrop, 27 Conn. 325; Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338. **Ga.**—Hall *v.* Studebaker Corp., 13 Ga. App. 632, 79 S. E. 750. **Ill.**—Woodford Distilling Co. *v.* Remington Typewriter Co., 174 Ill. App. 244. **Ind.**—Postel *v.* Oard, 1 Ind. App. 252, 27 N. E. 584. **Md.**—White Auto Co. *v.* Dorsey, 119 Md. 251, 86 Atl. 617. **Minn.**—Day *v.* Raguet, 14 Minn. 273. **N. C.**—Parker *v.* Fenwick, 138 N. C 209, 50 S. E. 627. **Tex.**—Standefer *v.* Aultman & Taylor Mach. Co., 34 Tex. Civ. App. 160, 78 S. W. 552.

11. **Ark.**—Buckman *v.* Haney 11 Ark. 339; Penn *v.* Stuart, 11 Ark. 41. **Conn.**—Pulford *v.* Johnson, 35 Conn. 30; Ferris *v.* Comstock, Ferre & Co., 33 Conn. 513. **Mass.**—Whitney *v.* Houghton, 127 Mass. 527; Goulding *v.* Skinner, 1 Pick. 162. **Ohio.**—McMillan *v.*

e. *Trial.* — In the trial of a cause based upon an alleged breach of warranty, it is for the jury to determine whether the affirmations, representations, or statements of the seller amounted to or were intended for a warranty,[12] or whether they were mere expressions of opinion.[13] In the case of a verbal warranty, it is also for the jury to determine the scope and extent of the warranty,[14] because, the warranty being verbal, it is not the province of the court to construe it as in case of a written warranty, but it is for the jury to interpret

Theaker, 12 Ohio 24. **Tenn.**—Martin *v.* Edwards, 11 Humph. 374. **Vt.**—Allen *v.* Lansing, 10 Vt. 114. **Eng.** Blyth *v.* Bampton, 3 Bing. 472, 4 L. J. C. P. O. S. 157, 11 Moore C. P. 387, 11 E. C. L. 233, 130 Eng. Reprint 595.

[a] **Variance Must Be Material.**— Where between the allegations of the terms of the warranty and the proof there is a mere variance in words but not in substance, the variance is not material. **Conn.**—Ferris *v.* Comstock, Ferre & Co., 33 Conn. 513. **Ill.**—Phelan *v.* Andrews, 52 Ill. 486. **Mass.** Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420. **Wis.**—Leopold *v.* Van Kirk, 29 Wis. 548.

12. **U. S.**—Shippen *v.* Bowen, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. ed. 1172. **Ala.**—Claghorn *v.* Lingo, 62 Ala. 230; Williams *v.* Cannon, 9 Ala. 348; Ricks *v.* Dillahunty, 8 Port. 133. **Ark.** Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429; Buckman *v.* Haney, 11 Ark. 339. **Cal.**—McLennan *v.* Ohmen, 75 Cal. 558, 17 Pac. 687; Polhemus *v.* Heiman, 45 Cal. 573; Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 Pac. 351. **Ill.**—Myers *v.* Siville, 155 Ill. App. 96; Forster, W. & Co. *v.* Peer, 120 Ill. App. 199; Thorne *v.* McVeagh, 75 Ill. 81; Kankakee Stone & Lime Co. *v.* Ugrow, 36 Ill. App. 448. **Ia.**—Bice *v.* Siver, 170 Iowa 255, 152 N. W. 498; Figge *v.* Hill, 61 Iowa 430, 16 N. W. 339; Hughes *v.* Funston, 23 Iowa 257. **Md.**—Greer *v.* Whalen, 125 Md. 273, 93 Atl. 521. **Mass.**—Edgar *v.* Joseph Breck & Sons Corp., 172 Mass. 581, 52 N. E. 1083. **Mich.**—Dake Engine Mfg. Co. *v.* Hurley, 99 Mich. 16, 57 N. W. 1044. **Miss.**—Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108. **N. J.**—Phillips *v.* Crosby, 70 N. J. L. 785, 59 Atl. 142; Wolcott, Johnson & Co. *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438. **N. Y.** Titus *v.* Poole, 145 N. Y. 414, 40 N. E. 228; Coleman *v.* Simpson, Hendee & Co., 162 App. Div. 335, 147 N. Y. Supp. 865; Riley *v.* Rea, 63 Hun 636, 18 N. Y. Supp. 597, 44 N. Y. St. 801; Debany *v.* Rosenthal, 152 N. Y. Supp. 1043. **N. C.** Robertson *v.* Halton, 156 N. C. 215, 72 S. E. 316, 37 L. R. A. (N. S.) 298; Harriss *v.* Cannady, 149 N. C. 81, 62 S. E. 771; Wrenn *v.* Morgan, 148 N. C. 101, 61 S. E. 641; Starnes *v.* Erwin, 32 N. C. 226; Foggart *v.* Blackweller, 26 N. C. 238; Baum *v.* Stevens, 24 N. C. 411. **N. D.**—Larson *v.* Calder, 16 N. D. 248, 113 N. W. 103. **Vt.**—Hobart *v.* Young, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; Foster *v.* Caldwell's Estate, 18 Vt. 176. **Wis.**—Boothby *v.* Scales, 27 Wis. 626.

13. **Cal.**—McLennan *v.* Ohmen, 75 Cal. 558, 17 Pac. 687. **Ia.**—Bice *v.* Siver, 170 Iowa 255, 152 N. W. 498. **Md.**—Horner *v.* Parkhurst, 71 Md. 110, 17 Atl. 1027. **Mo.**—Galbreath *v.* Carnes, 91 Mo. App. 512; Ransberger *v.* Ing, 55 Mo. App. 621. **N. Y.**—Murray *v.* Smith, 4 Daly 277. **N. C.**—McKinnon *v.* McIntosh, 98 N. C. 89, 3 S. E. 840.

[a] **Instructions.**—If the instructions fail to submit such question to the jury they are fatally defective. Galbreath *v.* Carnes, 91 Mo. App. 512.

[b] **No Doubt Upon the Evidence.**— Where the evidence is such as leaves no doubt as to the legal force of the language of the representation, the court may and should declare its effect, but otherwise it should be left to the jury to determine. Halliday *v.* Briggs, 15 Neb. 219, 18 N. W. 55. See, also, **Mass.**—Tuttle *v.* Brown, 4 Gray 457. 64 Am. Dec. 80. **N. H.**—Morrill *v.* Wallace, 9 N. H. 111. **N. Y.**—Whitney *v.* Sutton, 10 Wend. 411.

[c] **What Constitutes a Warranty.** When the language used is not a warranty in terms, it is a question for the jury whether the words used were intended on the one hand and relied upon on the other as a warranty, and this is to be determined from the language used and all the attendant circumstances. Jones *v.* Quick, 28 Ind. 125.

14. **Ohio.**—Covalt *v.* Thompson, 2

the language used.[15] Likewise, it is the province of the jury to determine whether or not there was a breach of the warranty,[16] or, if so, whether, under the evidence, there was a waiver of the breach.[17] The question of the amount of damages is also one of fact and for the jury to decide.[18] The court must not, when there is any evidence that should go to the jury, instruct that the existence or breach of a warranty is a matter of law,[19] and instructions must conform to the nature and character of the warranty alleged and not include other warranties.[20] The instructions, moreover, must fairly cover all the issues arising in the case.[21]

f. *Verdict and Findings.* — As in other actions, the verdict must be based upon the law and the evidence,[22] and special findings must

Ohio Dec. 374. **Va.**—Thornton *v.* Thompson, 4 Gratt. (45 Va.) 121. **Wis.** Brooks *v.* McDonnell, 41 Wis. 139.

15. **Ga.**—Americus Grocery Co. *v.* Brackett & Co., 119 Ga. 489, 46 S. E. 657. **Ill.**—Murphy *v.* Lever, 147 Ill. App. 460. **Mo.**—Lindsay *v.* Davis, 30 Mo. 406. **Wis.**—Brooks *v.* McDonnell, 41 Wis. 139.

16. **Ala.**—Kennebrew *v.* Southern Automatic Electric Shock Mach. Co., 106 Ala. 377, 17 So. 545. **Ga.**—Hall *v.* Studebaker Corp., 13 Ga. App. 632, 79 S. E. 750. **Ill.**—Foster *v.* Smith, 184 Ill. App. 255; Gutmann *v.* Eichner, 167 Ill. App. 313; Lanz *v.* Wachs, 50 Ill. App. 262; Kankakee Stone & Lime Co. *v.* Ugrow, 36 Ill. App. 448. **Ia.**—Fulton Bank *v.* Mathers, 161 Iowa 634, 143 N. W. 400; Cooper *v.* Scott Co., 143 Iowa 744, 120 N. W. 631. **Ky.**—Gardner *v.* J. T. Winter & Co., 117 Ky. 382, 78 S. W. 143, 63 L. R. A. 647. **N. Y.**—Egbert *v.* Hanford Produce Co., 92 App. Div. 252, 86 N. Y. Supp. 1118; Van Pub. Co. *v.* Westinghouse etc. Co., 72 App. Div. 121, 76 N. Y. Supp. 340; Carleton *v.* Lombard, 19 App. Div. 297, 46 N. Y. Supp. 120, *affirmed*, 56 N. E. 1133. **N. C.**—Lexington Groc. Co. *v.* Vernoy, 167 N. C. 427, 83 S. E. 567; Tyson *v.* Tyson, 92 N. C. 288. **Pa.**—Whitaker *v.* Alexander Lumb. Co., 3 Pa. Super. 325; Butz *v.* Manwiller, 2 Woodw. Dec. 260. **Wash.**—Buchanan *v.* Laber, 39 Wash. 410, 81 Pac. 911; Elliott *v.* Puget Sound & C. A. S. S. Co., 22 Wash. 220, 60 Pac. 410. **Wis.**—Bowser & Co. *v.* Savidusky, 154 Wis. 76, 142 N. W. 182.

17. **U. S.**—English *v.* Spokane Commission Co., 48 Fed. 196. **Ga.**—Bateman *v.* Warfield, 12 Ga. App. 259, 77 S. E. 104. **Ia.**—Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; Robinson *v.* Berkey, 111 Iowa 550, 82 N. W. 972. **Mass.**—Brummett *v.* Nemo Heater Co., 177 Mass. 480, 59 N. E. 58. **Mo.**—Fairbanks, Morse & Co. *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113.

18. **Mich.**—Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921. **N. Y.**—Golding *v.* Russell, 131 App. Div. 540, 115 N. Y. Supp. 359. **N. C.** Lexington Grocery Co. *v.* Vernoy, 167 N. C. 427, 83 S. E. 567. **Wis.**—Liebermann *v.* Lippert, 109 Wis. 1, 85 N. W. 126.

19. **Ill.**—Dooley & Co. *v.* Hasenwinkle Grain Co., 120 Ill. App. 43. **Ind.**—Reynolds *v.* Cox, 11 Ind. 262; Oil-Well Supply Co. *v.* Priddy, 41 Ind. App. 200, 83 N. E. 623. **Ia.**—McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556, 53 N. W. 310. **Me.**—Works *v.* Croswell, 10 Atl. 494. **N. C.**—Drake *v.* Bains, 53 N. C. 122; Henson *v.* King, 48 N. C. 419. **Wis.**—Larson *v.* Aultman & Taylor Co., 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

20. **Ind.**—Walter A. Wood Mowing & Reaping Mach. Co. *v.* Field, 8 Ind. App. 107, 35 N. E. 516. **Ia.**—Storrs *v.* Emerson, 72 Iowa 390, 34 N. W. 176. *Compare* Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286. **Mont.**—Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406.

21. **Ill.**—Mathers *v.* Morris, 95 Ill. App. 541. **Mich.**—Fitzpatrick *v.* Manheimer, 157 Mich. 307, 122 N. W. 83. **Mo.**—Monumental Bronze Co. *v.* Doty, 92 Mo. App. 5. **Ohio.**—Palmer & Son *v.* Cowie, 27 Ohio C. C. 617. **Tex.** Murray Co. *v.* Putnam (Tex. Civ. App.), 154 S. W. 245. **Wash.**—Mullerleile *v.* Brandt, 64 Wash. 280, 116 Pac. 868. **Wis.**—Klipstein *v.* Raschein, 117 Wis. 248, 94 N. W. 63.

22. American Seeding Mach. Co. *v.* Slocum, 58 Misc. 458, 108 N. Y. Supp.

be consistent with the general verdict.[23]

IV. CONDITIONAL SALES. — A. MEANING OF PHRASE. — Although the term "conditional sale" is a broad one and susceptible of many possible forms, yet it has acquired a trade and popular meaning in connection with contracts to sell upon credit, whereby the possession of the goods is delivered to the buyer to be retained by him, and the goods to be used by him, although upon the agreement that the legal title and right of property in the goods is to remain in the seller until the payment of the purchase price, either in toto upon the expiration of the credit period, or, as frequently provided, in instalments from time to time. It is in connection with such contracts that the following remedies are discussed.[24]

B. REMEDIES OF THE SELLER. — **1. In General.** — Upon the default of the buyer, various remedies may be open to the seller. His remedies may be determined by the express stipulations of the contract,[25] or by the common law, or by statute.[26] Moreover, even before the buyer's default, the title being in the seller, he may maintain any action based upon ownership,[27] and, after default by the purchaser, the seller having, then, the right of possession in addition to

1042; Aultman & Taylor Mach. Co. *v.* Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243.

23. **Ga.**—Hook *v.* Stovall, Dunn & Co., 26 Ga. 704, *s. c.* 30 Ga. 418. **Ind.** Blacker *v.* Slown, 114 Ind. 322, 16 N. E. 621. **Mo.**—Fairbanks-Morse Co. *v.* Mercurio Bros., 170 Mo. App. 668, 154 S. W. 425. **Ore.**—Oregon Auto-Dispatch *v.* Portland Cordage Co., 51 Ore. 583, 94 Pac. 36, 95 Pac. 498.

24. See the discussion following.

[a] **Uniform Conditional Sales Act.** The National Conference of Commissioners on Uniform State Laws, at its conference at Cleveland, Ohio, in August, 1918, adopted and approved for submission to the legislatures of the several states, the third tentative draft of an Act Concerning Conditional Sales and to Make Uniform the Law Relating Thereto. For three years the Conference has been carefully considering this subject. The definition of a "conditional sale" as finally approved by the conferences, is as follows: Section 1. (Definition of Terms). In this act "Conditional Sale" means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

25. See White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537, where the court, speaking through Mr. Justice Holmes, says, "If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum." See, also, National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100. However, as to the buyer's liability, in general, for the price, see *infra*, IV, B, 4.

26. See *infra*, this section.

27. St. Louis, I. M. & S. Ry. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724; Harrington *v.* King, 121 Mass. 269.

[a] **Injuries to the Goods.**—The conditional seller may recover damages for injuries to the goods although not entitled to the possession thereof at the time of the injury. **Kent** *v.* **Buck, 45 Vt. 18.**

title, may bring actions based upon such rights.[28] Under the varying terms of the contract, express or implied, the seller may, upon the buyer's default, have an election of remedies. For example, he may rescind the contract and recover the goods;[29] or he may waive his right to rescind and to recover the goods and sue the buyer for the price;[30] or he may retake the goods as his own and treat the contract as in force, and bring an action for damages against the buyer for his breach of the contract;[31] or, according to some of the decisions, he may retake the goods, not for the purpose of rescission but merely to enforce his security, and sue the buyer for any balance that may be due on the price.[32] The seller's remedies under the contract are usually held not concurrent, and he must elect which remedy he will follow, and having made his election he will be bound by the election so made.[33]

2. Statutory Provisions. — In a number of states, the seller's remedies, in case of the buyer's default in a conditional sale, are affected or modified by statutes. In many states, for example, the local statutes require conditional sales to be recorded or filed in order to protect the seller against the buyer's subsequent purchasers, and, in some states, his creditors.[34] In some juridictions, the seller may be

28. Fields *v.* Williams, 91 Ala. 502, 8 So. 808.

29. See *infra*, IV, B, 3.

30. See *infra*, IV, B, 4.

31. See *infra*, IV, B, 5.

32. See *infra*, IV, B, 6.

33. **U. S.**—*In re* Levin, Kronenberg & Co., 220 Fed. 451, 136 C. C. A. 279; Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588. **Ala.**—Davis *v.* Millings, 141 Ala. 378, 37 So. 737. **Ark.**—Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023. **Cal.** Muncy *v.* Brain, 158 Cal. 300, 110 Pac. 945. **Idaho.**—Pease *v.* Teller Corp., 22 Idaho 807, 128 Pac. 981. **Mass.** Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. **Minn.** Skoog *v.* Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193. **N. D.**—Poirier Mfg. Co. *v.* Kitts, 18 N. D. 556, 120 N. W. 558. **Pa.**—Seanor *v.* McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; McMillan *v.* Davis, 54 Pa. Super. 154. **S. C.**—Munroe *v.* Williams, 35 S. C. 272, 15 S. E. 279. **Wash.**—Stewart & Holmes Drug Co. *v.* Reed, 74 Wash. 401, 133 Pac. 577.

34. See the following cases: **Colo.** See Tufts *v.* Beach, 8 Colo. App. 33, 44 Pac. 771. **Conn.**—National Cash Register Co. *v.* Lesko, 77 Conn. 276, 58 Atl. 967; Lee Bros. Furniture Co. *v.* Cram, 63 Conn. 433, 28 Atl. 540. **Fla.**—Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791. **Ga.**—Anderson *v.* Adams & Co., 117 Ga. 919, 43 S. E. 982; Bond *v.* Brewer, 96 Ga. 443, 23 S. E. 421; Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206. **Ia.**—Pash *v.* Weston, 52 Iowa 675, 3 N. W. 713. **Me.** Hopkins *v.* Maxwell, 91 Me. 247, 39 Atl. 573. **Mo.**—Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67. **Neb.**—Regier *v.* Carver, 54 Neb. 507, 74 N. W. 830. **N. J.**—Wooley *v.* Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. 789. **N. Y.**—Kirk *v.* Crystal, 118 App. Div. 32, 103 N. Y. Supp. 17. **Ohio.**—See York Mfg. Co. *v.* Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. ed. 782, construing Ohio statute, and holding an unrecorded sale good against a trustee in bankruptcy. **Wis.** Mississippi Logging Co. *v.* Miller, 109 Wis. 77, 85 N. W. 193.

[a] **Statutes** requiring the recording or filing of conditional sale contracts now exist in twenty-nine states, namely: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, North Carolina, Ohio, Oklahoma, South Dakota, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In four other states, recording statutes partially covering the filing of conditional sales have been passed, namely in Massachusetts, Michigan, Oregon, and Pennsylvania. In Kentucky and Texas

required, upon taking possession of the goods, to notify the buyer of the balance due, and the buyer may have a certain time in which he may redeem the goods.[35] Again, the statute may provide that, in case the seller retakes the goods, only so much of the payments, made by the purchaser, as will reasonably compensate the seller for the use and wear of the goods, shall be retained.[36] The local statute may also provide that the property retaken shall be sold at public auction, the excess of the proceeds of such sale, after deducting the amount of the seller's claim and expenses, to be returned to the buyer.[37]

3. Recovery of the Goods or Proceeds. — a. *From the Buyer.* **(I.) In General.** — In connection with conditional sales the contract usually expressly provides that the seller, upon the buyer's default, may retake the goods,[38] yet such a right is held to be implied regard-

these contracts are treated as chattel mortgages and required to be recorded as such.

[b] **Uniform Conditional Sales Act.** Section 5. (Conditional Sales Void as to Certain Persons). Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from, or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

[c] **Creditors.**—In some states, the statutes protect only those creditors whose rights accrue subsequent to the conditional sale. See the statutes of Alabama, Georgia, North Dakota, South Carolina, and Washington. In some other states, however, previous creditors are also protected. See Patton *v.* Phoenix Brick Co., 167 Mo. App. 8, 150 S. W. 1116; Huffard *v.* Akers, 52 W. Va. 21, 43 S. E. 124.

[d] **England.**—By force of the English Factors' Act, 40 & 41 Vict. C. 39, the buyer in a conditional sale may give good title to a bona fide purchaser. Lee *v.* Butler, (1893) 2 Q. B. 318.

35. In Maine, Massachusetts, Nebraska, New York, Pennsylvania, Vermont, and Wisconsin, the statutes provide for redemption by the buyer. The period of redemption varies from 15 days to 40 days. See Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556; Smith *v.* Wood, 63 Vt. 534, 22 Atl. 575.

[a] **Uniform Act.**—The Uniform Conditional Sales Act, Sec. 18, expressly provides for redemption by the buyer within ten days after the seller retakes the goods.

36. Such statutes exist in Missouri and Ohio.

[a] **In Ohio,** the seller is required to return payments only in cases where the buyer has paid more than twenty-five per cent. of the purchase price. See Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643, holding constitutional the Ohio statute providing that the amount retainable for the reasonable use of the goods shall not exceed fifty per cent. of the price.

37. In Massachusetts and Pennsylvania, the buyer may demand a resale at his option. In New York and Tennessee, a resale is required.

[a] **The excess** of the amount received on the resale over the price and the expenses of resale, must be returned to the buyer. See Cowan *v.* Singer Mfg. Co., 92 Tenn. 376, 21 S. W. 663.

[b] **Uniform Act.**—The Uniform Conditional Sales Act provides (§19) for a compulsory resale where the buyer has paid fifty per cent. of the purchase price. If less than fifty per cent. has been paid, the buyer, at his option has a right to demand a resale. See §20.

38. See *infra,* this note.

[a] **Rescission.**—It is not necessary, however, that the word "rescission" or "rescind" should be used in order to provide expressly for the remedy. See Seanor *v.* McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467. In this case, the court said: "Rescission is a fact; the word itself may be used by the contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of

less of any such stipulation,[39] and it is well settled that where the seller has reserved title in himself, and he has not waived the right, he may, upon the buyer's default, recover possession of his property.[40]

the parties which shall constitute the fact of rescission."

39. Ryan *v.* Wayson, 108 Mich. 519, 66 N. W. 370.

40. **U. S.**—Segrist *v.* Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. ed. 125; Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588; The Oriole, 1 Sprague 31, 18 Fed. Cas. No. 10,574. **Ala.**—Davis *v.* Millings, 141 Ala. 378, 37 So. 737; Jones *v.* Pullen, 66 Ala. 306. **Ark.**—Hollenberg Music Co. *v.* Bankston, 107 Ark. 337, 154 S. W. 1139; Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Butler *v.* Dodson, 78 Ark. 569, 94 S. W. 703. **Conn.**—Griffin *v.* Ferris, 76 Conn. 221; 56 Atl. 494; Hughes *v.* Kelly, 40 Conn. 148; United Mach. Co. *v.* Etzel & Sons, 89 Conn. 336, 94 Atl. 356. **Del.**—Staunton *v.* Smith, 6 Penne. 193, 65 Atl. 593; Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192. **D. C.**—Walker Furniture Co. *v.* Dyson, 32 App. Cas. 90, 19 L. R. A. (N. S.) 606. **Ga.**—Wilmerding *v.* Rhodes-Haverty Furn. Co., 122 Ga. 312, 50 S. E. 100; Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100. **Idaho.**—Pease *v.* Teller Corp., 22 Idaho 807, 128 Pac. 981. **Ill.**—Smeby *v.* Grupczynski, 187 Ill. App. 33; O'Neil *v.* Rogers, 110 Ill. App. 622; Walkau *v.* Manitowoc Seating Co., 105 Ill. App. 130; Campion *v.* Smith, 46 Ill. App. 501. **Ind.**—Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Hodson *v.* Warner, 60 Ind. 214; Quality Clothes Shop *v.* Koeney, 57 Ind. App. 500, 106 N. E. 541. **Kan.**—Hydraulic Press Mfg. Co. *v.* Whetstone, 63 Kan. 704, 66 Pac. 989; Hall *v.* Draper, 20 Kan. 137. **Mass.**—Pels & Co. *v.* Millen, 192 Mass. 13, 77 N. E. 1152; Blanchard *v.* Cooke, 147 Mass. 215, 17 N. E. 313; Hill *v.* Freeman, 3 Cush. 257; Barrett *v.* Pritchard, 2 Pick. 512, 13 Am. Dec. 449. **Mich.**—Atkinson *v.* Japink, 186 Mich. 335, 152 N. W. 1079; Ryan *v.* Wayson, 108 Mich. 519, 66 N. W. 370; Baird *v.* Grand Rapids School Furniture Co., 98 Mich. 457, 57 N. W. 729; Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991. **Minn.**—Skoog *v.* Mayer Bro. Co., 122 Minn. 209, 142 N. W. 193. **Miss.**—Williams *v.* Williams, 23 So. 291. **Mo.** Ridgeway *v.* Kennedy, 52 Mo. 24; Twentieth Century Mach. Co. *v.* Excelsior etc. Bottling Co. (Mo. App.), 171 S. W. 944. **Neb.**—Edward Thompson Co. *v.* Baldwin, 62 Neb. 530, 87 N. W. 307; Richardson Drug Co. *v.* Teasdall, 52 Neb. 698, 72 N. W. 1028. **N. H.**—Clay *v.* Bohonon, 54 N. H. 474. **N. Y.** Munsell *v.* Flood, 13 Jones & S. 460; Roach *v.* Curtis, 115 App. Div. 765, 101 N. Y. Supp. 333; Plumiera *v.* Bricka, 79 Misc. 468, 140 N. Y. Supp. 171; Iserman *v.* Conklin, 21 Misc. 194, 47 N. Y. Supp. 107. **N. C.**—Thomas *v.* Cooksey, 136 N. C. 148, 41 S. E. 2; Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916. **N. D.**—Poirier Mfg. Co. *v.* Kitts, 18 N. D. 556, 120 N. W. 558. **Pa.**—Seanor *v.* McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; McMillan *v.* Davis, 54 Pa. Super. 154; Frech *v.* Lewis, 32 Pa. Super. 279; Swope *v.* Crawford, 16 Pa. Super. 474, 18 Lanc. L. Rev. 177. **S. C.**—Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279; Straub *v.* Screven, 19 S. C. 445. **Tex.**—Henderson *v.* Mahoney, 31 Tex. Civ. App. 539, 72 S. W. 1019. **Utah.**—Lippincott *v.* Rich, 19 Utah 140, 56 Pac. 806. **W. Va.**—McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746. **Wis.**—Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170. **Wyo.** Gregory *v.* Morris, 1 Wyo. 213. **Can.** Traders Bank *v.* G. & J. Brown Mfg. Co., 18 Ont. 430; Mason *v.* Johnson, 27 U. C. C. P. 208.

[a] **Uniform Conditional Sales Act.** §16. (Retaking Possession). When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law.

[b] **Increase of Goods.**—The increase of goods delivered under a conditional sale becomes the property of the seller until the condition is performed, and they pass to the buyer with

The tender of the price, however, by the buyer bars the seller from recovering the goods,[41] and in case of an illegal sale, the seller cannot recover the goods.[42]

(II.) Waiver of Right. — The seller may expressly waive his right to retake the goods and he may impliedly do so by his conduct.[43] For example, where the contract to sell was conditional, a subsequent unconditional delivery of the goods will operate as a waiver of the right to possession upon non-payment.[44] Likewise, after the conditional delivery of the goods, the failure of the seller to reclaim the goods within a reasonable time,[45] or the extension of the time of payment,[46] will usually constitute a waiver. Moreover, the bringing of an action for the price is generally regarded as an election to treat the sale as absolute, and the election of such a remedy is held inconsistent with a right to reclaim the goods,[47] unless the contract may

the original goods. **Ga.**—Anderson *v.* Leverette, 116 Ga. 732, 42 S. E. 1026. **Me.**—Allen *v.* Delano, 55 Me. 113, 92 Am. Dec. 573. **Vt.**—Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309. See, also, Uniform Conditional Sales Act, §27, where it is thus expressly provided.

41. Christenson *v.* Nelson, 38 Ore. 473, 63 Pac. 648.

[a] **Uniform Conditional Sales Act.** §17 of this act provides that the seller must serve notice upon the buyer of the intention to retake the goods, and that the buyer may, upon service of the notice, perform his obligations in which he has made default.

42. Singer Mfg. Co. *v.* Draper, 103 Tenn. 262, 52 S. W. 879; Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960.

43. Robbins *v.* Phillips, 68 Mo. 100.

[a] **Question of Fact.**—Whether the conduct of the seller amounted to a waiver of his right to retake the goods is a question for the jury. **Me.**—Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Goslen *v.* Campbell, 88 Me. 450, 34 Atl. 265. **Vt.**—Page *v.* Edwards, 64 Vt. 124, 23 Atl. 917. **Wis.**—Wing *v.* Thompson, 78 Wis. 256, 47 N. W. 606.

44. Albright *v.* Brown, 23 Neb. 136, 36 N. W. 297.

45. Mathews *v.* Smith, 8 Houst. (Del.) 22, 31 Atl. 879; Marston *v.* Baldwin, 17 Mass. 606.

46. Cole *v.* Hines, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; Hutchings *v.* Munger, 41 N. Y. 155, *affirming* 41 Barb. 396.

47. **Ark.**—Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Butler *v.* Dodson, 78 Ark. 569, 94 S. W. 703. **Cal.**—Holt Mfg. Co. *v.* Ewing, 109 Cal. 353, 42 Pac. 435; Parke & Lacy Co. *v.* White River Lumb. Co., 101 Cal. 37, 35 Pac. 442; Waltz *v.* Silveria, 25 Cal. App. 717, 145 Pac. 169. **Conn.**—Crompton *v.* Beach, 62 Conn. 25, 25 Atl. 446, 36 Am. St. Rep. 323, 18 L. R. A. 187. **Ind.**—Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014. **Ia.**—Richards *v.* Schreiber, C. & W. Co., 98 Iowa 422, 67 N. W. 569. **Mass.** Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144; Whitney *v.* Abbott, 191 Mass. 59, 77 N. E. 524; Bailey *v.* Hervey, 135 Mass. 172. **Mich.**—Fuller *v.* Byrne, 102 Mich. 461, 60 N. W. 980. **Minn.**—Alden *v.* Dyer, 92 Minn. 134, 99 N. W. 784. **Neb.** Fredrickson *v.* Schmittroth, 77 Neb. 724, 112 N. W. 564. **N. Y.**—Orcutt *v.* Rickenbrodt, 42 App. Div. 238, 59 N. Y. Supp. 1008; Wright *v.* Pierce, 4 Hun 351, 6 Thomp. & C. 651. **N. D.**—Dowagiac Mfg. Co. *v.* Mahon, 13 N. D. 516, 101 N. W. 903. **Okla.**—Osborne & Co. *v.* Walther, 12 Okla. 20, 69 Pac. 953. **Pa.**—Durr *v.* Replogle, 167 Pa. 347, 31 Atl. 645. **Tex.**—Parlin & Orendorff Co *v.* Moline Plow Co. (Tex. Civ. App.), 27 S. W. 1087. **Can.**—Plessisville Foundry *v.* Levesque, 22 Quebec Super. 306; Purtle *v.* Heney, 33 N. Bruns. 607.

Contra.—**Ala.**—E. E. Forbes Piano Co. *v.* Wilson, 144 Ala. 586, 39 So. 645; Thomason *v.* Lewis, 103 Ala. 426, 15 So. 830. **Ga.**—Jones *v.* Snider, 99 Ga. 276, 25 S. E. 668. **N. J.**—Campbell Printing Press & Mfg. Co. *v.* Rockaway Pub. Co., 56 N. J. L. 676, 29 Atl. 681, 44 Am. St. Rep. 410.

[a] **Uniform Conditional Sales Act.** The minority view, upon this question has been adopted by the uniform act. See §24. This view is in accord with

permit him to maintain both remedies.[48] It has been held that an acceptance of a payment after default does not prevent the seller from retaking the goods in case of a subsequent default,[49] although it is held generally that an acceptance of a part of the price, after the buyer's default, will operate as a waiver of the particular default, and that only by a subsequent demand and failure thereupon of the buyer to perform, can the seller recover the goods.[50] The taking of a note for the price, or the taking of new and additional security, does not, however, amount to a waiver.[51]

(III.) Action for Conversion. — In case the conditional buyer sells the property, the seller may bring an action for conversion against the buyer,[52] and even while the property remains in the possession of the buyer, if he refuses to deliver it upon the rightful demand of the seller, the latter may assert his title by an action for conversion.[53]

the chattel mortgage theory of a conditional sale. The section provides: "Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in Section 16. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer."

[b] **Recovery of Judgment.**—The seller's right to retake the goods will be barred by a recovery of judgment for the price of the goods. Parke & Lacy Co. *v.* White River Lumb. Co., 101 Cal. 37, 35 Pac. 442.

[c] **Judgment Unsatisfied.** — The right of the seller to recover the property is not affected by his recovering judgment against the buyer, the judgment remaining unsatisfied. Root *v.* Lord, 23 Vt. 568. See, also, E. E. Forbes Piano Co. *v.* Wilson, 144 Ala. 586, 39 So. 645; Thomason *v.* Lewis, 103 Ala. 426, 15 So. 830; Campbell Printing Press & Mfg. Co. *v.* Rockaway Pub. Co., 56 N. J. L. 676, 29 Atl. 681, 44 Am. St. Rep. 410.

[d] **Part Satisfaction of Judgment.** A recovery of judgment and its part satisfaction does not bar a remedy against the goods. Jones *v.* Snider, 99 Ga. 276, 25 S. E. 668.

[e] **Mississippi.**— The seller may bring replevin for the goods and at the same time, sue upon the note given for the price, but he can have only one satisfaction. McPherson *v.* Acme Lumb. Co., 70 Miss. 649, 12 So. 857.

[f] **Mechanic's Lien.**—An attempt, although fruitless, to establish a material-man's lien upon the property is an election to treat the sale as absolute. Hickman *v.* Richburg, 122 Ala. 638, 26 So. 136.

[g] **Attachment of Goods.** — The seller does not waive his right to the goods by attaching them. Reed *v.* Starkey, 69 Vt. 200, 37 Atl. 297. See, also, Matthews *v.* Lucia, 55 Vt. 308.

48. See Dederick *v.* Wolfe, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283, holding, under the terms of the contract, that the seller who had retaken the goods and resold them could recover the balance of the price due on the goods.

49. Bunker *v.* McKenny, 63 Me. 529.

50. **Ark.**—Carpenter *v.* Crow, 77 Ark. 522, 92 S. W. 779. **Md.**—Cole *v.* Hines, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455. **Mich.**—Cable *v.* Wasegizig, 130 Mich. 387, 90 N. W. 24. **N. H.** Hervey *v.* Dimond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673. **N. Y.** O'Rourke *v.* Hadcock, 114 N. Y. 541, 22 N. E. 33. **R. I.**—Mosby *v.* Goff, 21 R. I. 494, 44 Atl. 930.

51. Monitor Drill Co. *v.* Mercer, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. (N. S.) 1065.

52. **Ga.**—Rhodes *v.* Dickinson, 79 Ga. 724, 4 S. E. 164. **N. Y.**—Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun 545, 11 N. Y. Supp. 448, 33 N. Y. St. 189. **Vt.** Watson *v.* Goodno, 66 Vt. 229, 28 Atl. 987.

53. **Ga.**—Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100; Jowers *v.* Blandy, 58

b. *From Third Persons.* — By a great preponderance of authority, the seller may, at common law, assert his claim to the goods against purchasers from the buyer,[54] although, in a few jurisdictions, bona fide purchasers are protected.[55] In many jurisdictions, however, subsequent purchasers may get good title unless the conditional sale has been recorded as required by statute.[56] Where, however, the seller has authorized, either expressly or impliedly, the buyer to resell the goods, particularly where he has permitted the buyer to place the goods in his stock in trade, the seller cannot recover them from bona fide purchasers.[57]

Ga. 379; Spiers *v.* Hubbard, 12 Ga. App. 676, 78 S. E. 136; Moon *v.* Wright, 12 Ga. App. 659, 78 S. E. 141. **Mass.** Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. **N. Y.** Katz *v.* Diamond, 16 Misc. 577, 38 N. Y. Supp. 766, 74 N. Y. St. 174. **Pa.** Abel *v.* Pickering Co., 58 Pa. Super. 439.

54. **U. S.**—Harkness *v.* Russell & Co., 118 U. S. 663, 7 Sup. Ct. 51, 30 L. ed. 285, holding that the federal courts will apply the local law. **Ala.** Riley *v.* Dillon, 148 Ala. 283, 41 So. 768; Bronson *v.* Russell, 142 Ala. 360, 37 So. 672. **Ark.**—Triplett *v.* Mansur & Tebbetts Imp. Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284. **Cal.**—Liver *v.* Mills, 155 Cal. 459, 101 Pac. 299; Holt Mfg. Co. *v.* Collins, 154 Cal. 265, 97 Pac. 516. **Conn.**—Brown *v.* Fitch, 43 Conn. 512. **D. C.**—Minnix Co. *v.* Smith & Bros. Typewriter Co., 33 App. Cas. 357. **Ind.**—Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403. **Me.**—Eaton *v.* Munroe, 52 Me. 63. **Mass.**—Lorain Steel Co. *v.* Norfolk & B. St. R. Co., 187 Mass. 500, 73 N. E. 646. **Miss.**—Fairbanks Co. *v.* Graves, 90 Miss. 453, 43 So. 675; Young *v.* Salley, 83 Miss. 362, 35 So. 571. **Mo.**—Wangler *v.* Franklin, 70 Mo. 659; Ridgeway *v.* Kennedy, 52 Mo. 24; American Clay Mach. Co. *v.* Sedalia Brick & Tile Co., 174 Mo. App. 485, 160 S. W. 902. **N. H.**—Partridge *v.* Philbrick, 60 N. H. 556. **N. Y.**—Comer *v.* Cunningham, 77 N. Y. 391, 33 Am. Rep. 626; Crocker-Wheeler Co. *v.* Genesee Recreation Co., 140 App. Div. 726, 125 N. Y. Supp. 721. **Tenn.**—Holmark *v.* Molin, 5 Coldw. 482. **Utah.** Lippincott *v.* Rich, 19 Utah 140, 56 Pac. 806. **Can.**—Canadian Westinghouse Co. *v.* Murray Shoe Co., 31 Ont. L. R. 11, 6 Ont. W. N. 5.

[a] **Action of Trespass.**—The seller may maintain an action of trespass against third persons who tortiously take the property from the possession of the buyer. Fields *v.* Williams, 91 Ala. 502, 8 So. 808.

55. **Colo.**—Jones *v.* Clark, 20 Colo. 353, 38 Pac. 371. **Ill.**—Van Duzor *v.* Allen, 90 Ill. 499; Murch *v.* Wright, 46 Ill. 487, 95 Am. Dec. 455. **Md.**—Lincoln *v.* Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446. **Pa.**—Dearborn *v.* Raysor, 132 Pa. 231, 20 Atl. 690.

[a] **England.**—Under the English Factor Act, 52 & 53 Vict. c. 45, a conditional vendee may transfer title to a bona fide purchaser. Lee *v.* Butler (1893) 2 Q. B. 318. See, however, Helby *v.* Matthews, [1895] A. C. 471, holding that a hirer of goods with option to purchase cannot transfer a valid title.

56. See *supra*, IV, B, 2.

57. **U. S.**—*In re* Gilligan, 152 Fed. 605, 81 C. C. A. 595. **Ala.**—Bass *v.* International Harv. Co., 169 Ala. 154, 53 So. 1014, 33 L. R. A. (N. S.) 374; Stone *v.* Waite, 88 Ala. 599, 7 So. 117. **Del.**—Flint Wagon Works *v.* Maloney, 3 Boyce 137, 81 Atl. 502; South Bend Iron Works *v.* Reedy, 5 Penne. 361, 60 Atl. 698. **Ga.**—Clarke Bros. *v.* McNatt, 132 Ga. 610, 64 S. E. 795, 26 L. R. A. (N. S.) 585. **Ill.**—Barbour *v.* Perry, 41 Ill. App. 613. **Ind.**—Winchester Wagon Works & Mfg. Co. *v.* Carman, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382. **Me.** Rogers *v.* Whitehouse, 71 Me. 222. **Mass.** — Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839; Burbank *v.* Crooker, 7 Gray 158, 66 Am. Dec. 470. **Mich.**—Pratt *v.* Burhans, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703. **Miss.**—Columbus Buggy Co. *v.* Turley, 73 Miss. 529, 19 So. 232, 55 Am. St. Rep. 550, 32 L. R. A. 260. **Mo.**—Lawrence *v.* Owens, 39 Mo. App. 318. **N. Y.** Fitzgerald *v.* Fuller, 19 Hun 180. **Tenn.** Star Clothing Mfg. Co. *v.* Nordeman, 118 Tenn. 384, 100 S. W. 93; Wilder & Co. *v.* Wilson, 16 Lea 548.

Likewise, the buyer's creditors, by weight of authority, have no right to attach or to seize the goods, and if they do so the goods may be reclaimed by the seller,[58] particularly in those jurisdictions where subsequent purchasers are not protected,[59] although some cases hold that creditors, as well as purchasers, may retain the goods.[60] Moreover, the recording statutes apply to creditors, in some states, as in the case of purchasers.[61] Where the rights of third persons are not protected, the seller may, instead of reclaiming the goods, bring his action for conversion, and recover, in some jurisdictions, the entire value of the goods at the time of the conversion,[62] although, according to other decisions, the amount of recovery will be limited to whatever may be unpaid by the buyer on the contract price.[63]

c. *Conditions Precedent.* — Where a part of the purchase price has been paid, as is often the case where the price is to be paid in instalments, or where a note has been given for the price, there is a conflict of opinion whether, as a condition precedent to reclaiming

[a] **Uniform Conditional Sales Act.** So expressly provided in Sec. 9, "even though the contract or a copy thereof shall be filed according to the provisions of this act."

58. **U. S.**—Harkness *v.* Russell & Co., 118 U. S. 663, 7 Sup. Ct. 51, 30 L. ed. 285; Gaylor *v.* Dyer, 5 Cranch C. C. 461, 10 Fed. Cas. No. 5,283. **Cal.** Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448. **D. C.**—Baum *v.* Knabe & Co. Mfg. Co., 33 App. Cas. 237. **Ga.** Twin Theatre Co. *v.* Liquid Carbonic Co., 134 Ga. 460, 67 S. E. 1033. **Me.** Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630. **Mass.**—Nichols *v.* Ashton, 155 Mass. 205, 29 N. E. 519. **Mich.**—Edwards *v.* Symons, 65 Mich. 348, 32 N. W. 796. **Mo.**—Wangler *v.* Franklin, 70 Mo. 659; Ridgeway *v.* Kennedy, 52 Mo. 24. **Neb.**—Aultman *v.* Mallory, 5 Neb. 178, 25 Am. Rep. 478.

[a] **Buyer's Defeasible Interest Attachable.**—Yet the buyer's creditors may attach the interest the buyer has in the goods, which would be perfected upon the payment of the price. Newhall *v.* Kingsbury, 131 Mass. 445; Hurd *v.* Fleming, 34 Vt. 169.

[b] **Creditor May Hold Goods When.** Where the buyer's creditor attaches the goods, he may hold the same against the conditional seller if he seasonably tenders the balance of the price which may be due. Hervey *v.* Dimond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673.

[c] **Seller's Creditors.**—The title being in the seller, he has an interest in the goods, although in the possession of the buyer, which may be attached by the seller's creditors. **Me.**—Everett *v.* Hall, 67 Me. 497. **Mich.**—McMillan *v.* Larned, 41 Mich. 521, 2 N. W. 662. **Vt.**—Burnell *v.* Marvin, 44 Vt. 277.

59. See *supra*, this section.

60. **U. S.**—Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003. **Colo.**—George *v.* Tufts, 5 Colo. 162. **Ill.**—Van Duzor *v.* Allen, 90 Ill. 499; Lucas *v.* Campbell, 88 Ill. 447. **Pa.**—Duplex Printing Press Co. *v.* Clipper Pub. Co. 213 Pa. 207, 62 Atl. 841.

61. See *supra*, IV, B, 2.

62. **Ala.**—McEntire, W. & T. Co. *v.* Rock Hill Buggy Co., 172 Ala. 637, 55 So. 494. **Ga.**—Sims *v.* James, 62 Ga. 260; Elder *v.* Woodruff Hdw. & Mfg. Co., 9 Ga. App. 484, 71 S. E. 806. **Ill.** Herbert *v.* Rhodes-Burford Furniture Co., 106 Ill. App. 583. **Me.**—Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14; Brown *v.* Haynes, 52 Me. 578; Whipple *v.* Gilpatrick, 19 Me. 427. **Mass.**—Lorain Steel Co. *v.* Norfolk & B. St. R. Co., 187 Mass. 500, 73 N. E. 646; Angier *v.* Taunton Paper Mfg. Co., 1 Gray 621, 61 Am. Dec. 436. **N. Y.**—Brewer *v.* Ford, 54 Hun 116, 7 N. Y. Supp. 244, 26 N. Y. St. 888; Schleicher *v.* Wirth, 86 N. Y. Supp. 265. **S. C.**—Bennett *v.* Sims, Rice 421. **Vt.**—Morgan *v.* Kidder, 55 Vt. 367. **Can.**—Joseph Hall Mfg. Co. *v.* Hazlitt, 11 Ont. App. 749; Blackley *v.* Dooley, 18 Ont. 381.

63. **U. S.**—Homans *v.* Newton, 4 Fed. 880. **N. Y.**—Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458. **Pa.**—Rose *v.* Story, 1 Pa. 190, 44 Am. Dec. 121.

the goods, the seller must return the payments or the note. The weight of authority is that such payments or note need not be returned.[64] Some contracts expressly provide that, in case of the buyer's default, all money previously paid shall be forfeited, and some of the cases ground their decisions upon this fact.[65] Some of the cases distinguish, however, between a taking of the goods in connection with a rescission of the contract, and a mere recovery of their possession without an intent to rescind, holding a return of the payments to be necessary in the former case,[66] but not in the latter.[67] The harsh rule that the seller may recover the goods for himself, that is, in connection with a rescission of the contract, and, at the same time, retain all the payments thereon, even though only a small part of the price remains unpaid,[68] has been changed by statute in some states,[69] and, in other states, the courts have applied the equitable principle that only so much of the money paid as will fairly compensate the seller for the buyer's use of the property may be retained by the seller.[70]

64. **Ala.**—Fields *v.* Williams, 91 Ala. 502, 8 So. 808. **Ark.**—Kirby *v.* Tompkins, 48 Ark. 273, 3 S. W. 363. **Cal.** Bray *v.* Lowery, 163 Cal. 256, 124 Pac. 1004. **Conn.**—Hughes *v.* Kelly, 40 Conn. 148. **D. C.**—Wall *v.* De Mitkiewicz, 9 App. Cas. 109. **Ill.**—Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79; Fairbanks *v.* Malloy, 16 Ill. App. 277; Singer Mfg. Co. *v.* Treadway, 4 Ill. App. 57. **Kan.**—Fleck *v.* Warner, 25 Kan. 492. **Me.**—White *v.* Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14. **Mass.**—Haynes *v.* Temple, 198 Mass. 372, 84 N. E. 467; Lorain Steel Co. *v.* Norfolk & B. St. R. Co., 187 Mass. 500, 73 N. E. 646. **Mich.**—Tufts *v.* D'Arcambal, 85 Mich. 185, 48 N. W. 497, 24 Am. St. Rep. 79, 12 L. R. A. 446. **Minn.**—Raymond Co. *v.* Kahn, 124 Minn. 426, 145 N. W. 164, 51 L. R. A. (N. S.) 251. **Miss.**—Duke *v.* Shackleford, 56 Miss. 552. **N. Y.**—National Cash Register Co. *v.* Ferguson, 25 Misc. 363, 55 N. Y. Supp. 592. **Vt.**—Morgan *v.* Kidder, 55 Vt. 367.

65. **Conn.**—Pierce *v.* Staub, 78 Conn. 459, 62 Atl. 760, 112 Am. St. Rep. 163, 3 L. R. A. (N. S.) 785. **Ill.**—Singer Mfg. Co. *v.* Treadway, 4 Ill. App. 57. *Compare*, Singer Mfg. Co. *v.* Ellington, 103 Ill. App. 517. **Mich.**—Van Den Bosch *v.* Bouwman, 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336.

[a] **Rent for Use of Property.**—The contract often provides that the money paid shall be rent for the use of the property, and as such, may be retained by the seller. **N. Y.**—Woodman *v.* Needham Piano & Organ Co., 47 Misc. 683, 94 N. Y. Supp. 371. **R. I.**—Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082. **Tenn.**—Meagher *v.* Hollenberg, 9 Lea 392.

66. Latham *v.* Davis, 44 Fed. 862; Ketchum *v.* Brennan, 53 Miss. 596.

67. **Ill.**—Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79; Fairbanks *v.* Malloy, 16 Ill. App. 277. **Me.**—White *v.* Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592. **Miss.**—Duke *v.* Shackleford, 56 Miss. 552.

68. See Whelan *v.* Couch, 26 Grant's Ch. (Ont.) 74, where all but $9 had been paid on a sale for $1078.

69. See *supra*, IV, B, 2, and also, the following cases: **Ohio.**—Speyer *v.* Baker, 59 Ohio St. 11, 51 N. E 442. **Tenn.**—Lieberman *v.* Puckett, 94 Tenn. 273, 29 S. W. 6. **Vt.**—French *v.* Osmer, 67 Vt. 427, 32 Atl. 254.

70. **Ala.**—Hill *v.* Townsend, 69 Ala. 286. **Conn.**—Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170. **Ga.**—Commercial Pub. Co. *v.* Campbell Printing-Press & Mfg. Co., 111 Ga. 388, 36 S. E. 756; Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364; Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Guilford Wood & Co. *v.* McKinley, 61 Ga. 230. **Ind.** Quality Clothes Shop *v.* Keeney, 57 Ind. App. 500, 106 N. E. 541. **N. C.**—A. D. Puffer & Sons Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682. **Pa.**—Simon *v.* Edmundson, 10 Pa. Co. Ct. 315. **Utah.**—Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559. **Can.**—Tufts *v.* Giroux, 12 Quebec Super. 530.

Under this rule, some cases hold that unless the seller returns an equitable portion of the price paid, a money judgment reduced by a fair allowance for the use of the goods will be given.[71] Where the seller recovers the goods from the purchasers from the conditional buyer, it is the general rule that a return of the consideration paid by such subsequent purchaser need not be made as a condition precedent to the seller's recovery.[72]

The terms of the contract may call for a demand of the goods before the seller has a right to exercise his privilege, upon the buyer's default, to retake them,[73] and, even in the absence of any stipulation to that effect, some cases hold that a demand is a condition precedent,[74] but, on the other hand, it is also held that no demand is necessary.[75]

d. *Proceedings To Recover Goods.* — (I.) **In General.** — Conditional sale contracts often expressly provide that for the purpose of recovering possession of the goods, the seller, upon the buyer's default, may enter the premises of the buyer.[76] However, even if the contract is silent upon this point, the seller has an implied right to enter peaceably, and without the aid of legal process regain the possession.[77] If the entry is made at a reasonable time and in a peaceable way, the seller is not liable as a trespasser,[78] but a reservation of a right

71. Ga.—Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Commercial Pub. Co. *v.* Campbell Ptg.-Press & Mfg. Co, 111 Ga. 388, 36 S. E. 756. **Ill.** Hamilton *v.* Singer Mfg. Co., 54 Ill. 370. **Ohio.**—National Cash Register Co. *v.* Cervone, 76 Ohio St. 12, 80 N. E. 1033.

72. Ala.—Riley *v.* Dillon, 148 Ala. 283, 41 So. 768. **Cal.**—Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339. **Miss.** See Duke *v.* Shackleford, 56 Miss. 552, *overruling* a contrary dictum in Ketchum *v.* Brennan, 53 Miss. 596. **Mo.** Toledo Computing Scale Co. *v.* Aubuchon, 187 Mo. App. 687, 173 S. W. 85; Barnes *v.* Rawlings, 74 Mo. App. 531.

73. Kimball *v.* Farnum, 61 N. H. 348, (extension of time of payment); Davis *v.* Emery, 11 N. H. 230, bailee had election whether he would buy or not. See Wheeler & Wilson Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155.

74. Ark.—Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100. **Ill.**—Hamilton *v.* Singer Mfg. Co., 54 Ill. 370. **Kan.**—Hydraulic Press Mfg. Co. *v.* Whetstone, 63 Kan. 704, 66 Pac. 989. **Mich.**—New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326.

75. Conn.—Hughes *v.* Keely, 40 Conn. 148, the court saying, "As the contract says nothing of any demand to be made previous to taking possession in default of payment, we find no warrant for interpolating such a provision into the contract." **Mass.**—Salomon *v.* Hathaway, 126 Mass. 482. **N. H.**—Proctor *v.* Tilton, 65 N. H. 3, 17 Atl. 638.

76. North *v.* Williams, 120 Pa. 109, 13 Atl. 723, 6 Am. St. Rep. 695, holding that, under such a contract, the seller who obtains entrance by fraud (as where in the conditional sale of a piano, the agent of the seller gained admission by falsely representing that he wanted to tune the piano) is not guilty of trespass in so entering and removing, without violence, the goods.

[a] **The License Irrevocable.**—Such a license is held to be irrevocable. Walsh *v.* Taylor, 39 Md. 592.

77. Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; Heath *v.* Randall, 4 Cush. (Mass.) 195.

[a] **Written Authority.**—The agent of the seller who has been instructed to retake the goods need not exhibit or have any authority in writing. North *v.* Williams, 120 Pa. 109, 13 Atl. 723, 6 Am. St. Rep. 695.

[b] **Uniform Conditional Sales Act.** "Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process," §16.

78. Del.—Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192. **Ga.**—Boyd *v.* Lofton, 34 Ga. 494. **Md.**—Walsh *v.* Taylor, 39 Md. 592. **Pa.**—North *v.*

of entry upon the premises gives the seller no right to use force in retaking the property,[79] and where the buyer uses force or removes the goods in an unreasonable way or manner unwarranted by the circumstances or terms of the contract, he may be liable in an action for damages.[80] Instead, however, of obtaining possession by his own act, the seller may replevy the goods.[81]

(II.) Pleadings. — In an action to recover the goods, the failure of the buyer to comply with the conditions of the sale must be alleged,[82] but the buyer's default to pay a note executed for the price need not be made a part of the complaint, since the action is not based upon the note.[83] In his plea or answer, the defendant may allege full payment for the goods,[84] and he may set off or counterclaim his damages, if any, for the plaintiff's failure to deliver all the goods.[85] In case the defendant sets up fraud in defense, he must aver that he relied upon and was misled by the false representations.[86]

(III.) Judgment. — The judgment except as affected by the conditional character of the sale should be in accord with the rules elsewhere discussed.[87]

e. *Recovery of Price or Balance After Retaking Goods.* — If the seller has exercised his option of remedies by retaking the goods, an

Williams, 120 Pa. 109, 13 Atl. 723, 6 Am. St. Rep. 695.

79. Drury *v.* Hervey, 126 Mass. 519; Churchill *v.* Hulbert, 110 Mass. 42, 14 Am. Rep. 578.

80. Van Wren *v.* Flynn, 34 La. Ann. 1158; Drury *v.* Hervey, 126 Mass. 519.

81. **U. S.**—Sugar Beets Product Co. *v.* Lyons Beet Sugar Refin. Co., 161 Fed. 215. **Cal.**—Lambert *v.* McCloud, 63 Cal. 162. **D. C.**—Wall *v.* De Mitkiewicz, 9 App. Cas. 109. **Fla.**—Scotch Mfg. Co. *v.* Carr, 53 Fla. 480, 43 So. 427. **Ill.**—Thompson Co. *v.* Collins, 151 Ill. App. 545; Campion *v.* Smith, 46 Ill. App. 501. **Ind.**—Hodson *v.* Warner, 60 Ind. 214; Orner *v.* Stattley Mfg. Co., 18 Ind. App. 122, 47 N. E. 644. **Kan.**—Hydraulic Press Mfg. Co. *v.* Whetstone, 63 Kan. 704, 66 Pac. 989; Hall *v.* Draper, 20 Kan. 137. **Mass.**—Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. **Mich.**—Atkinson *v.* Japink, 186 Mich. 335, 152 N. W. 1079; Baird *v.* Grand Rapids School Furniture Co., 98 Mich. 457, 57 N. W. 729; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788. **Mo.**—Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070. **Neb.**—Richardson Drug Co. *v.* Teasdale, 52 Neb. 698, 72 N. W. 1028. **N. Y.**—Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283; Vogel Co. *v.* Wolff, 156 App. Div. 584, 141 N. Y. Supp. 756; Herbert *v.* Humphreys, 66 Misc. 150, 121 N. Y. Supp. 235. **N. C.** Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916. **Wis.**—Mississippi River Logging Co. *v.* Miller, 109 Wis. 77, 85 N. W. 193; Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170.

[a] **Replevin.**—Where a buyer of a piano under a conditional sale contract made default in payment of the price, and refused to deliver the possession to the seller, the latter could recover the piano in replevin. Hollenberg Music Co. *v.* Barron, 100 Ark. 403, 140 S. W. 582, Ann. Cas. 1913C, 659, 36 L. R. A. (N. S.) 594.

82. Brunswick & Balke Co. *v.* Tacoma Mill Co., 3 Wash. Ter. 164, 13 Pac. 902.

83. Payne *v.* June, 92 Ind. 252.

84. Powers *v.* Burdick, 126 App. Div. 179, 110 N. Y. Supp. 883.

85. Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063.

86. Smith *v.* Estey Organ Co., 100 Ga. 628, 28 S. E. 392.

87. See *supra*, II, B, 4, a, (III).

[a] **Where the defendant pleads damages for nondelivery of part of the goods, and offers to pay** the amount due in excess of such damages, the judgment should be that the defendant should be allowed a reasonable time to pay the balance due, and interest, and in the event of his failure to do so, the plaintiff should be given possession of the property, or the value thereof,

action for the price, or for the balance due, cannot, according to the weight of authority, be maintained.[88] It is elsewhere held, however, that the seller may, if he wishes, obtain possession of the goods merely for the enforcement of his security. In which case he could recover the unpaid price.[89]

4. Action for Price or Value. — a. *Right of Action.* — Where there is an express or implied promise to pay for the goods, the seller, instead of rescinding the contract or reclaiming the goods, may bring an action for the price,[90] even in those states where normally an action

in case a delivery could not be made. Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063.

88. **U. S.**—Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588; *In re* Norton, 181 Fed. 901. **Ala.**—Davis *v.* Millings, 141 Ala. 378, 37 So. 737. **Ark.**—Nashville Lumber Co. *v.* Robinson, 91 Ark. 319, 121 S. W. 350. **Cal.**—Muncy *v.* Brain, 158 Cal. 300, 110 Pac. 945; Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448. **Conn.**—Loomis *v.* Bragg, 59 Conn. 228, 47 Am. Rep. 638; Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170. **D. C.** Campbell Printing Press & Mfg. Co. *v.* Henkle, 8 Mackey 95. **Ga.**—Mallary Bros. Mach. Co. *v.* Thomas, 142 Ga. 786, 83 S. E. 783; Glisson *v.* Heggie, 105 Ga. 30, 31 S. E. 118. **Ind.**—Reeves & Co. *v.* Miller (Ind. App.), 91 N. E. 812; Turk *v.* Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85. **Mich.**—Perkins *v.* Grobben, 116 Mich. 172, 74 N. W. 469, 72 Am. St. Rep. 512, 39 L. R. A. 815. **Minn.**—A. F. Chase & Co. *v.* Kelly, 125 Minn. 317, 146 N. W. 1113, L. R. A. 1916A, 912; Raymond Co. *v.* Kahn, 124 Minn. 426, 145 N. W. 164, 51 L. R. A. (N. S.) 251; Keystone Mfg. Co. *v.* Casselius, 74 Minn. 115, 76 N. W. 1028; Aultman & Co. *v.* Olson, 43 Minn. 409, 45 N. W. 852. **Miss.**—Dederick *v.* Wolfe, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283. **Mo.**—Laclede Power Co. *v.* Ennis Stationery Co., 79 Mo. App. 302. **N. Y.**—Nelson *v.* Gibson, 143 App. Div. 894, 129 N. Y. Supp. 702; Edmead *v.* Anderson, 118 App. Div. 16, 103 N. Y. Supp. 369; White *v.* Gray's Sons, 96 App. Div. 154, 89 N. Y. Supp. 481; Earle *v.* Robinson, 91 Hun 363, 36 N. Y. Supp. 178, 70 N. Y. St. 831. **Okla.**—McCormick Harv. Mach. Co. *v.* Koch, 8 Okla. 374, 58 Pac. 626. **Pa.** Kelley Springfield R. R. Co. *v.* Schlimme, 220 Pa. 413, 69 Atl. 867, 123 Am. St. Rep. 707; Seanor *v.* McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467. **Wis.**—Tufts *v.* Brace, 103 Wis. 341, 79 N. W. 414. **Wash.**—Thompson Co. *v.* Murphine, 79 Wash. 672, 140 Pac. 1073; Stewart & Holmes Drug Co. *v.* Reed, 74 Wash. 401, 133 Pac. 577. **Can.** Abell *v.* Campbell, 37 Can. L. J. N. S. 316; Arnold *v.* Playter, 22 Ont. 608; Sawyer *v.* Pringle, 18 Ont. App. 218; Travis *v.* Way, 33 Nova Scotia 551.

89. **Cal.**—Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124. **Ill.**—Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79. **Mich.**—Tufts *v.* D'Arcambal, 85 Mich. 185, 48 N. W. 497, 24 Am. St. Rep. 79, 12 L. R. A. 446. **Miss.**—Dederick *v.* Wolfe, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283. **N. Y.**—White *v.* A. W. Gray's Sons, 96 App. Div. 154, 89 N. Y. Supp. 481. **Okla.**—McCormick Harvesting Mach. Co. *v.* Koch, 8 Okla. 374, 58 Pac. 626.

[a] **Uniform Conditional Sales Act.** On the principle that the buyer ought not to be liable for the price, in case of the seller's retaking the goods, unless the goods are not a sufficient compensation to the seller, the Uniform Conditional Sales Act provides (Sec. 24) that "After the retaking of possession as provided in Section 16 the buyer shall be liable for the price only after a resale and only to the extent provided in Section 22."

90. **U. S.**—Sugar Beets Products Co. *v.* Lyons Beet Sugar Refin. Co., 161 Fed. 215. **Ala.**—Davis *v.* Millings, 141 Ala. 378, 37 So. 737. **Ark.**—Bowser Furniture Co. *v.* Johnson, 117 Ark. 496, 175 S. W. 516; Hollenberg Music Co. *v.* Bankston, 107 Ark. 337, 154 S. W. 1139; Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Butler *v.* Dodson, 78 Ark. 569, 94 S. W. 703; Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384. **Conn.**—United Mach. Co. *v.* Etzel & Sons, 89 Conn. 336, 94 Atl. 356; *In re* Beach's Appeal, 58 Conn. 464, 20 Atl. 475. **Ga.** Thomason *v.* Moore, 139 Ga. 341, 77 S. E. 155; Jordan *v.* Jenkins, 17 Ga. App. 58, 86 S. E. 278. **Idaho.**—Pease *v.*

for the price cannot be maintained until after title has passed to the buyer;[91] and, by weight of authority, even though the goods have been destroyed after delivery, and before payment, an action for the price may be maintained,[92] and even before delivery where the agreement

Teller Corp., 22 Idaho 807, 128 Pac. 981. **Ill.**—Fleury *v.* Tufts, 25 Ill. App. 101. **Ind.**—Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Kilmer *v.* Moneyweight Scales Co., 36 Ind. App. 568, 76 N. E. 271; Quality Clothes Shop *v.* Keeney, 57 Ind. App. 500, 106 N. E. 541. **Mass.**—Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144; Haynes *v.* Temple, 198 Mass. 372, 84 N. E. 467; Whitney *v.* Abbott, 191 Mass. 59, 77 N. E. 524; Smith *v.* Aldrich, 180 Mass. 367, 62 N. E. 381. **Minn.** Skoog *v.* Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193. **Mo.**—Twentieth Century Mach. Co. *v.* Excelsior etc. Bottling Co. (Mo. App.), 171 S. W. 944. **N. H.**—Clay *v.* Bohonon, 54 N. H. 474. **N. J.**—Bartley Co. *v.* Lee, 87 N. J. L. 19, 93 Atl. 78. **N. Y.**—Breakstone *v.* Buffalo Fdy. etc. Co., 167 App. Div. 62, 152 N. Y. Supp. 394; Gray *v.* Booth, 64 App. Div. 231, 71 N. Y. Supp. 1015, 10 N. Y. Ann. Cas. 204; Gormully & Jeffery Mfg. Co. *v.* Catharine, 25 Misc. 338, 55 N. Y. Supp. 475; Norton *v.* Abbott, 113 N. Y. Supp. 669. **N. C.** Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745. **N. D**—Poirier Mfg. Co. *v.* Kitts, 18 N. D. 556, 120 N. W. 558. **Ore.**—Thienes *v.* Francis, 69 Ore. 171, 134 Pac. 1195, 138 Pac. 845; Herring-Marvin Co. *v.* Smith, 43 Ore. 315, 72 Pac. 704, 73 Pac. 340. **Pa.**—Kelley Springfield Road Roller Co. *v.* Schlimme, 220 Pa. 413, 69 Atl. 867, 123 Am. St. Rep. 707; Seanor *v.* McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; McMillan *v.* Davis, 54 Pa. Super. 154. **S. C.**—Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279; Straub *v.* Screnen, 19 S. C. 445. **S. D.**—Sioux Falls Adjustment Co. *v.* Aikens, 32 S. D. 154, 142 N. W. 651. **Tex.**—Bensinger Self-Adding Cash Register Co. *v.* Cain, 4 Wills. Civ. Cas., §289, 18 S. W. 136. **Va.**—Stewart *v.* Rogers, 117 Va. 836, 86 S. E. 161. **Wash. Ter.**—Singer Mfg. Co. *v.* Hatley, 3 Wash. Ter. 198, 21 Pac. 384.

[a] **Uniform Conditional Sales Act.** § 3 (Primary Rights of Seller). The buyer shall be liable to the seller for the purchase price, or for installments thereof, as the same shall become due, and for breach of all promises made by him in the conditonal sale contract, whether or not the property in the goods has passed to the buyer.

[b] **Effect of Statute.**—The statute may, however, provide that the seller shall be limited to his action for damages, and the seller, consequently, may have no election to sue for the purchase price. See Dowagiac Mfg. Co. *v.* White Rock Lumber & H. Co., 18 S. D. 105, 99 N. W. 854, *construing* § 2303 of the Rev. Civ. Code.

91. See cases in preceding note and Haynes *v.* Temple, 198 Mass. 372, 84 N. E. 467; Smith *v.* Aldrich, 180 Mass. 367, 62 N. E. 381. See, also, Marvin Safe Co. *v.* Emanuel, 21 Abb. N. C. (N. Y.) 181, 12 N. Y. St. 662, 14 N. Y. St. 681.

Compare supra, II, A, 4, b.

[a] **Form of Action.**—Under the common law system of pleading, however, neither a count for goods sold and delivered nor for goods bargained and sold can be maintained for the price in such a sale, but the plaintiff should declare upon a special count based upon the particular contract. See Clay *v.* Bohonon, 54 N. H. 474. Elsewhere it has been held, however, that the plaintiff may waive the provision that the title is not to pass till payment is made, and recover the amount due under the common counts. Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709, *affirming,* 70 Ill. App. 72.

92. **U. S.**—Chicago Ry. Equip. Co. *v.* Merchants' Bank, 136 U. S. 268, 283, 10 Sup. Ct. 999, 34 L. ed. 349. **Ark.** Phillips *v.* Hollenberg Music Co., 82 Ark. 9, 99 S. W. 1105. **Ill.**—Cooper *v.* Chicago Cottage Organ Co., 58 Ill. App. 248. **Ind.**—Jessup *v.* Fairbanks, Morse & Co., 38 Ind. App. 673, 78 N. E. 1050. **Miss.**—Burnley *v.* Tufts, 66 Miss. 48, 5 So. 627, 14 Am. St. Rep. 540. **N. J.** American Soda Fountain Co. *v.* Vaughn, 69 N. J. L. 582, 55 Atl. 54. **N. Y.** Hintermister *v.* Lane, 27 Hun 497. **N. C.**—Tufts *v.* Griffin, 107 N. C. 47, 12 S. E. 68, 22 Am. St. Rep. 863, 10 L. R. A. 526.

Contra.—**U. S.**—Arthur & Co. *v.* Blackman, 63 Fed. 536. **Ala.**—Ameri-

to pay is absolute.[93] As previously pointed out,[94] an action for the price is generally regarded as an affirmation of the sale,[95] an election to treat the conditional sale as absolute,[96] or executed,[97] and is a waiver of the right to recover the goods.[98] Even in the case of an executory contract, where the buyer refuses to accept the goods, some courts hold that an action for the price may be brought,[99] basing the decision, at times, upon the terms of the contract rather than upon the passing of the title.[1]

b. *Conditions Precedent.* — Where the contract calls for the seller's performance of certain conditions before title can pass, he cannot elect to treat the sale as absolute and sue for the purchase price until he has performed such conditions.[2] A specific waiver of the right to reclaim the goods is not a condition precedent,[3] nor is a formal act of delivery or tender of the goods.[4] It has been held, however, that

can Soda Fountain Co. *v.* Blue, 146 Ala. 682, 40 So. 218, 150 Ala. 165, 43 So. 709; Bishop *v.* Minderhout, 128 Ala. 162, 29 So. 11, 86 Am. St. Rep. 134, 52 L. R. A. 395. **Ga.**—Mountain City Mill Co. *v.* Butler, 109 Ga. 469, 34 S. E. 565. **Mass.**—Sloan *v.* McCarty, 134 Mass. 245.

93. See Whitlock *v.* Auburn Lumb. Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214, where the goods were destroyed while in possession of the seller subject to the order of the buyer.

94. See *supra,* IV, B, 3, a, (II).

95. See cases in preceding note.

[a] **Election.**—Where a buyer makes default under a conditional sale contract, the seller may take the property and thereby cancel the debt, or he may sue to recover the debt and affirm the sale. Hollenberg Music Co. *v.* Barron, 100 Ark. 403, 140 S. W. 582, Ann. Cas. 1913C, 659, 36 L. R. A. (N. S.) 594.

96. Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; D. M. Osborne & Co. *v.* Walther, 12 Okla. 20, 69 Pac. 953.

97. Herring-Hall-Marvin Co. *v.* Smith, 43 Ore. 315, 72 Pac. 704, 73 Pac. 340.

98. See *supra,* IV, B, 3, a, (II).

99. **N. Y.**—Marvin Safe Co. *v* Emanuel, 21 Abb. N. C. 181, 12 N. Y. St. 662, 14 N. Y. St. 681; Gray *v.* Booth, 64 App. Div. 231, 71 N. Y. Supp. 1015, 10 N. Y. Ann. Cas. 204; Ideal Cash Register Co. *v.* Zunino, 39 Misc. 311, 79 N. Y. Supp. 504. **N. C.**—National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100. **Tex.** Jaeggli *v.* Phears, 30 Tex. Civ. App. 212, 70 S. W. 330. **Ont.**—Tufts *v.* Poness, 32 Ont. 51.

1. See White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. A. R. 537. Also National Cash Register Co. *v.* Dehn, 139 Mich. 406, 102 N. W. 965.

[a] **Election of Remedies: Non-acceptance of Buyer.**—In the case of Ideal Cash Register Co. *v.* Zunino, 39 Misc. 311, 79 N. Y. Supp. 504, the court held that the three different remedies, recognized in case of the buyer's non-acceptance in a sale not conditional, namely, (1) that the seller may treat the goods as his own and sue for damages; (2) that the seller may treat the goods as the buyer's and sue him for the price; and (3) that the seller may resell the goods as the agent of the buyer and recover the difference between the proceeds of the sale and the contract price, applied equally to a sale where by the contract the title in the goods was not to pass until the buyer had paid the price. The court says: "It would be entirely inconsistent to contend that the plaintiff cannot maintain this action for the contract price, because by the terms of the contract the title to the property sold is to remain in it pending payment, while conceding, as we must, that it could maintain such an action were there no such clause in the contract."

2. American Soda Fountain Co. *v.* Gerrer's Bakery, 14 Okla. 258, 78 Pac. 115.

3. Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014.

4. Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014.

upon the refusal of the buyer to accept the goods, the seller, before he can treat the sale as absolute and bring an action for the price, must notify the buyer that he elects to do so and that he holds the goods subject to the buyer's order.[5]

5. Action for Damages. — Instead of rescinding the contract, the seller may treat the buyer's failure to pay as a breach of the contract, and may reclaim the goods and bring his action for damages.[6] In such a case, the measure of damages would be the loss the seller has suffered, usually the difference between the contract price and the market value of the goods at the time and place of default.[7] Likewise, where the conditional buyer refuses to accept the goods, the seller, at his election, has his action for the breach of the contract.[8]

6. Lien and Enforcement. — Generally the retaking of the goods constitutes an election which prevents a subsequent action for the price.[9] In some jurisdictions, however, a seller of property under a conditional sale may, upon the buyer's default, take and hold possession of the property until the price is paid, and may enforce his lien thereon.[10]

C. Remedies of the Buyer. — **1. Against the Seller.** — a. *In General.* — Except as affected by the contract or specially provided by statute the remedies of the buyer in a conditional sale would be similar to those available to any buyer.[11]

b. *Statutory Provisions.* — The buyer's remedies may be expressly affected by the local statute. For example, in some jurisdictions, the statute may require the seller, in case he takes back the goods, to refund all money paid by the buyer over and above a reasonable com-

5. Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384.

6. See Hayes *v.* Nashville, 80 Fed. 641, 26 C. C. A. 59.

7. Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; Burnham *v.* Roberts, 70 Ill. 19.

8. **U. S.**—Harkness *v.* Russell & Co., 118 U. S. 663, 7 Sup. Ct. 51, 30 L. ed. 285. **Ark.**—Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384, holding that it is the seller's only action where he fails to notify the buyer that he elects to treat the sale as absolute. **N. Y.**—National Cash Register Co. *v.* Schmidt, 48 App. Div. 472, 62 N. Y. Supp. 952, holding that the measure of damages is the difference between the contract price and the market value at the time and place of delivery, or, in absence of any evidence showing a difference therein, then nominal damages may be recovered.

9. See *supra,* IV, B, 3, e.

10. **Ark.**—Hollenberg Music Co. *v.* Barron, 100 Ark. 403, 140 S. W. 582, Ann. Cas. 1913C, 659, 36 L. R. A. (N. S.) 594. **Ia.**—Gigray *v.* Mumper, 141 Iowa 396, 118 N. W. 393. **Tex.**—Campbell Printing Press & Mfg. Co. *v.* Powell, 78 Tex. 53, 14 S. W. 245.

Enforcement of lien, see *supra,* II, B, 4, b.

11. See *supra,* III, and *infra* this section.

[a] **The Uniform Conditional Sales Act** does not prescribe the remedies of the buyer but leaves them, as in the case of all buyers, to the common law or to the Uniform Sales Act. Since, however, the rights of the parties in case of a breach of warranty in a conditional sale have been of some perplexity to the court. See for example **Minn.**—W. W. Kimball Co. *v.* Massey, 126 Minn. 461, 148 N. W. 307. **N. Y.** Cooper *v.* Payne, 186 N. Y. 334, 78 N. E. 1076. **Tenn.**—Blair *v.* A. Johnson & Sons, 111 Tenn. 111, 76 S. W. 912. § 2 of the Uniform Conditional Sales Act provides: "The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the property in the goods has passed to the buyer."

pensation for the use of the property.[12] In such case, the buyer may bring an action to recover the money paid, if not voluntarily refunded by the seller.[13] Other statutes make express provision for the buyer's right to redeem the property after it has been recovered by the seller.[14]

c. *Right To Return Goods.* — Unless the contract is in such form as to merely create a bailment so that the vendee is under no obligation to pay for the goods,[15] the buyer has no right to return the goods and thus avoid his liability for the price.[16]

d. *Recovery of Money Paid.* — In case the buyer has made default, and the seller has taken possession of the goods, it is the general rule that the buyer cannot recover any part of the purchase money paid, the decisions being based upon either the terms of the contract, express or implied, or upon the forfeiture of the money paid.[17] Some of the decisions, however, hold that the seller's reclamation of the goods operates as a failure of consideration, and that, as a matter of equity, the buyer may recover with proper allowance for reasonable compensation for the use of the goods, the money paid.[18] If the seller takes possession of the goods unwarrantedly, the buyer is entitled to a recovery of the price paid by him.[19] Moreover, the statute sometimes provides that the buyer may recover, upon the seller's retaking of the goods.[20]

e. *Recovery of Goods or Value.* — Where, in accord with the terms of the contract, the seller enters the premises of the buyer and repossesses himself of the goods, in case the buyer has made default, the buyer cannot bring replevin, trover, or trepass, and thereby recover

12. Mo.—McArthur *v.* St. Louis Piano Co., 85 Mo. App. 525. **Ohio.**—Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643. **Tenn.**—Cowan *v.* Singer Mfg. Co., 92 Tenn. 376, 21 S. W. 663.

See *supra*, IV. B. 2.

13. McArthur *v.* St. Louis Piano Co., 85 Mo. App. 525.

14. Such statutes exist in Maine, Massachusetts, Nebraska, New York, Pennsylvania, Vermont and Wisconsin. The period of redemption varies from fifteen to forty days.

[a] **Uniform Conditional Sales Act.** This act provides for the buyer's redemption of the goods within ten days after the retaking. Payment and performance of all other conditions are necessary prerequisites. Interest on the amount due, and expenses of the retaking, keeping, and storage must also be paid by the buyer. See § 18.

15. See Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448. See, also, Beach's Appeal, 58 Conn. 464, 20 Atl. 475, *citing* Loomis *v.* Bragg, 50 Conn. 228, 47 Am. Rep. 638; Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170.

16. Conn.—*In re* Beach's Appeal, 58 Conn. 464, 20 Atl. 475; Appleton *v.* Norwalk Library Corp., 53 Conn. 4, 22 Atl. 681. **Ga.**—Finlay *v.* Ludden & Bates South Music House, 105 Ga. 264, 31 S. E. 180. **Pa.**—Geist *v.* Stier, 134 Pa. 216, 19 Atl. 505.

17. See *supra*, IV, B, 3, c.

18. See *supra*, IV. B, 3, c.

19. New Home Sew. Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326.

[a] **Form of Action.**—The common count for money had and received is a sufficient declaration for the recovery of the money paid by the purchaser after the breach of the seller. Wood *v.* Kaufman, 135 Mich. 5, 97 N. W. 47.

20. Whitelaw Furniture Co. *v.* Boon, 102 Tenn. 719, 52 S. W. 155, where failure of the seller after reclaiming the property to advertise the same for sale, as required by state, is held to make him liable to the purchaser for the part of the price paid by him. See, also, *supra*, IV, C. 1, b.

the goods or their value, or damages for their taking.[21] If, however, the seizure of the goods by the seller was contrary to the terms of the contract,[22] the buyer may recover the goods by replevin,[23] or their value by trover and conversion.[24] Moreover, an action for assault will lie where the seller or his agent in retaking the goods resorts to force and personal violence.[25] Ordinarily, the measure of damages for conversion by the seller is the fair market value of the goods at the date of the conversion, diminished by the sum remaining unpaid on the contract price.[26] The value of the use of the property from the date of the conversion should not, however, be deducted.[27]

f. *Redemption.* — As previously stated, in some states the buyer is, by express statute, entitled to redeem the goods, within a certain fixed time, after their reclamation by the seller, analogous to the rights of a mortgagor.[28] In other states, even in the absence of such a statute, the remedy has been recognized as an equitable right.[29]

2. Against Third Persons. — The buyer, even before the transfer of title to him, may, under his right as bailee, bring trover against third persons who invade wrongfully his right of possession.[30]

V. AUCTION SALES. — A. REMEDIES OF THE SELLER. — **1. Rescission.** — The owner of the goods, in an auction sale, upon the failure of the buyer to perform has a right to rescind the contract. This rule applies, for example, where the vendor fails to take the goods at the time agreed,[31] or where the buyer fails to make a cash

21. **Ga.**—Wilmerding *v.* Rhodes-Hoverty Furn. Co., 122 Ga. 312, 50 S. E. 100. **Md.**—Walsh *v.* Taylor, 39 Md. 592. **Mass.**—Heath *v.* Randall, 4 Cush. 195. **Mich.**—Smith *v.* Lozo, 42 Mich. 6, 3 N. W. 227. **N. H.**—Proctor *v.* Tilton, 65 N. H. 3, 17 Atl. 638. **N. Y.** Palmer *v.* Kelly, 56 N. Y. 637; Dutton *v.* Gale Mfg. Co., 43 Hun 198, 4 N. Y. St. 410. **Pa.**—Summerson *v.* Hicks, 134 Pa. 566, 19 Atl. 808; North *v.* Williams, 120 Pa. 109, 13 Atl. 723, 6 Am. St. Rep. 695. **Vt.**—Mattnews *v.* Lucia, 55 Vt. 308; West *v.* Bolton, 4 Vt. 558. **Wash.** Quinn *v.* Parke & L. Mach. Co., 5 Wash. 276, 31 Pac. 866.

22. Van Wren *v.* Flynn, 34 La. Ann. 1158, where the seller, in absence of the buyer, entered the house of the buyer and carried away a set of furniture, the contract giving the seller the right of possession upon default, but not authorizing an entry into the buyer's house without his consent.

23. Wilson *v.* Lewis, 63 Neb. 617, 88 N. W. 690.

24. **Mass.**—Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556. **N. Y.**—Friedman *v.* Phillips, 84 App. Div. 179, 82 N. Y. Supp. 96. **Vt.**—Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94.

25. Drury *v.* Hervey, 126 Mass. 519.

26. **Ky.**—White Sewing Machine Co. *v.* Conner, 111 Ky. 827, 64 S. W. 841. **N. Y.**—Friedman *v.* Phillips, 84 App. Div. 179, 82 N. Y. Supp. 96. **Vt.**—Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94.

27. Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94.

28. See *supra*, IV, C, 1, b, and, also, the following cases: **Mass.**—Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556. **N. Y.**—Reach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283; Powers *v.* Burdick, 126 App. Div. 179, 110 N. Y. Supp. 883. **Vt.**—Smith *v.* Wood, 63 Vt. 534, 22 Atl. 575; Roberts *v.* Hunt, 61 Vt. 612, 17 Atl. 1006.

29. Liver *v.* Mills, 155 Cal. 459, 101 Pac. 299; Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124; Puffer & Sons Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682.

30. **Mass.**—Aldrich *v.* Hodges, 164 Mass. 570, 42 N. E. 107; Harrington *v.* King, 121 Mass. 269. **N. Y.**—Friedman *v.* Phillips, 84 App. Div. 179, 82 N. Y. Supp. 96. **Wash.**—Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480.

31. Higgins *v.* Delaware, L. & W. R. Co., 60 N. Y. 553.

payment in accord with the terms of the sale.[32]

2. Lien. — Until the price is paid the seller has the right of possession of the property and a lien thereon.[33]

3. Resale. — As in other sales, if the buyer fails to comply with the terms of the contract, the seller may, upon such notice as is required by law, resell the property,[34] and may maintain an action against the purchaser for any deficiency in price between the original sale and the resale.[35] The buyer is also responsible for the necessary expenses of the resale, and even if the reselling price is greater than the first price, the owner may recover such expenses if they are not covered by such increased price.[36]

4. Action for Price. — When the seller has tendered the goods and has otherwise fully performed his part of the contract, he may sue the buyer for the price.[37]

32. Broughton *v.* Silloway, 114 Mass. 71, 19 Am. Rep. 312, holding that where the auctioneer, without authority, received a check from the buyer on a bank in which he had no funds, the vendor is not bound thereby, and may rescind although he does not notify the buyer that he repudiates it.

33. Lucas *v.* Wallace, 42 Ill. App. 172; Jennings *v.* West, 40 Kan. 372, 19 Pac. 863.

34. Green *v.* Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

35. Green *v.* Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

[a] **In Louisiana,** (1) where an auction sale is made (a la folle encrere) the owner's remedy, under the code, is cumulative. He may sue for a specific compliance or damages, or resell at the first purchaser's risk. Municipality No. 2 *v.* Hennen, 14 La. 559; Stewart *v.* Paulding, 7 La. 506. (2) The owner cannot, however, hold the buyer to a deficiency in the prices where the property was bid in by the owner at the resale. Banks *v.* Hyde, 15 La. 391

36. Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.

37. Turner *v.* Langdon, 112 Mass. 265; Noah *v.* Pierce, 85 Mich. 70, 48 N. W. 277.

[a] **Seller Ready To Deliver.**—Although the goods have not been delivered, an action lies for the price if the plaintiff is ready to deliver. Turner *v.* Langdon, 112 Mass. 265; Clark *v.* Greeley, 62 N. H. 394.

[b] **Executory Contract.**—Where the terms of the sale are cash or an approved note, and no cash or note is given, and no actual delivery or tender of the goods is made, the contract is executory, and no action for the price can be maintained against the bidder. Mervine *v.* Arndt, 33 Pa. Super. 333.

[c] **Contract Executed When.**—Under a sale without conditions, title passes to the bidder when the property is knocked down to him. **Ill.**—Lucas *v.* Wallace, 42 Ill. App. 172. **N. H.** Jenness *v.* Wendell, 51 N. H. 63, 12 Am. Rep. 48. **R. I.**—Smith *v.* Hurley, 29 R. I. 489, 72 Atl. 705. *Compare* Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248.

[d] **Goods Destroyed.**—Where title passes at the sale, the buyer is liable for the price although the goods are destroyed before being removed by the purchaser. Jenness *v.* Wendell, 51 N. H. 63, 12 Am. Rep. 48.

[e] **Benefit of Terms Lost When.** In an action for the price of a wagon, where the buyer at the auction refused to settle for it, and to give a note according to the terms prescribed in the notice of the sale, the buyer is not then entitled to the benefit of such terms. Noah *v.* Pierce, 85 Mich. 70, 48 N. W. 277.

[f] **Cash Before Removal of Goods.** A buyer "for cash before removal of the goods" is liable in an action by the seller, unless he shows an offer to pay the price and remove the goods, or that the seller prevented it. Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.

[g] **Auctioneer Not Licensed.**—While the fact that the sale was conducted by an unlicensed auctioneer may subject the seller or the auctioneer to a penalty, yet it does not relieve the buyer from his obligation to pay the price. Van Praag & Co. *v.* Weinberg, 63 Misc. 324, 117 N. Y. Supp. 223.

5. Action for Damages. — For failure of the buyer to perform the contract, the seller may bring an action for damages.[38]

B. REMEDIES OF THE BUYER. — **1. Rescission.** — The buyer may rescind the sale if the auctioneer refuses to disclose the owner of the goods,[39] or because of puffing.[40]

2. Other Remedies. — The buyer has also certain remedies against the auctioneer in case of a failure of the sale or a breach of the contract.[41]

C. REMEDIES OF AND AGAINST AUCTIONEER. — **1. Auctioneer's Remedies.** — a. *Lien.* — An auctioneer has a lien for his commission on the goods,[42] and also upon the proceeds of the sale,[43] as long as they are in his possession.

b. *Action for Services.* — The auctioneer has an action against the employer for services in selling the goods.[44]

c. *Action for the Price.* — Ordinarily, an auctioneer of personal property may maintain in his own name an action against the buyer for the price.[45]

d. *Recovery of Goods.* — Where goods have been delivered to the buyer in a conditional sale, the auctioneer may maintain replevin against an officer who takes the goods from the buyer on execution.[46]

2. Remedies Against Auctioneer. — a. *Remedies of Seller.* — The seller may sue an auctioneer for the recovery of the proceeds of a

38. Ansley *v.* Green, 82 Ga. 181, 7 S. E. 921; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 539, 9 Am. Dec. 327.

39. Thomas *v.* Kerr, 66 Ky. 619, 96 Am. Dec. 262.

40. Minturn *v.* Main, 7 N. Y. 220, holding that as a condition precedent the buyer must return the property, otherwise he will be liable for the price.

41. See *infra*, V, C, 2, b.

42. **Ill.**—Elison *v.* Wulff, 26 Ill. App. 616. **La.**—Succession of Dowler, 29 La. Ann. 437. **Eng.**—Wolfe *v.* Horne, 46 L. J. Q. B. 534, 2 Q. B. D. 355, 36 L. T. N. S. 705, 25 W. R. 728; Williams *v.* Millington, 1 H. Bl. 81, 126 Eng. Reprint 49.

43. Lewis *v.* Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735; Harlow *v.* Sparr, 15 Mo. 184.

[a] **The auctioneer may appropriate** from the price the amount of his lawful compensation. Harlow *v.* Sparr, 15 Mo. 184.

44. See *infra*, this note.

[a] **The common counts** for work and labor may be used in such an action. Chit. Pl., Vol. II, p. 62, 16th ed.

[b] **Unregistered Auctioneer.**—Although an auctioneer has not paid his occupation tax or has not registered as required by law, he may recover his fee for sale of property. Davis *v.* Boyd Co., 143 Ga. 600, 85 S. E. 752.

45. **Ark.**—Beller *v.* Block, 19 Ark. 566. **Ill.**—Flanigan *v.* Crull, 53 Ill. 352, auctioneer having a lieu upon the goods for his charges. **Mass.**—Thompson *v.* Kelly, 101 Mass. 291, 296, 2 Am. Rep. 353; Tyler *v.* Freeman, 3 Cush. 261. **N. Y.**—Minturn *v.* Main, 7 N. Y. 220; Hulse *v.* Young, 16 Johns. 1. **S. C.**—Carter *v.* Bennett, Riley 287, 3 Hill 254. **Eng.**—Williams *v.* Millington, 1 H. Bl. 81, 126 Eng. Reprint 49.

[a] **Trustee of an Express Trust.**—Under the code, an auctioneer who sells goods in his own name for third parties may bring an action in his own name on the contract of sale, being a trustee of an express trust. Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.) 590.

[b] **Bad Plea.**—To a declaration for the price of a horse sold and delivered by plaintiff to defendant, defendant pleaded that plaintiff sold the horse as auctioneer for K, and that defendant had paid K before action brought. Held, on demurrer, a bad plea. Robinson *v.* Rutter, 4 El. & Bl. 954, 82 E. C. L. 953, 1 Jur. N. S. 823, 24 L. J. Q. B. 250, 3 W. R. 405, 119 Eng. Reprint 355.

46. Tyler *v.* Freeman, 2 Cush. (Mass.) 261.

sale,[47] and he may sue the auctioneer for the full price of the goods where the auctioneer delivered them without receiving the price from the purchaser.[48] The owner has also an action against the auctioneer for selling below the limit fixed,[49] also for selling on credit to an insolvent buyer without the owner's consent.[50]

b. *Remedies of Buyer.* — The buyer, in case the sale is not completed, if he be without fault, may maintain an action against the auctioneer to recover a deposit made on account of the sale.[51] The buyer may, also, sue the auctioneer for conversion where the title has passed, and there has been full performance by the buyer, and the auctioneer refuses to deliver the goods.[52] Generally, moreover, an auctioneer will be personally liable to a buyer, in the same way the owner would be liable, where the auctioneer does not disclose the name of his principal.[53] Where the auctioneer assumes the delivery of the goods, the buyer may sue him for non-delivery,[54] or may recover the purchase price paid where the goods are claimed by a superior title.[55]

c. *Remedies of Third Persons.* — An auctioneer who sells the goods of a third person is liable to such real owner in trover and conversion,[56] even though the auctioneer did not know they were the goods of another than his principal.[57] Likewise, when an auctioneer sells

47. Osgood *v.* Nichols, 5 Gray (Mass.) 420.

[a] **Cannot Dispute Principal's Title.**—In an action against an auctioneer for the amount of sales, he cannot dispute his principal's title. Hutchinson *v.* Gordon, 2 Har. (Del.) 179; Osgood *v.* Nichols, 5 Gray (Mass.) 420.

48. Brown *v.* Staton, 2 Chit. (Eng.) 353, 23 R. R. 750.

49. Lustgarten *v.* Hecht, 134 N. Y. Supp. 567 (holding that, in such a case, the auctioneer is not guilty of conversion, but is liable in a suit for damages); Hazul *v.* Dunham, 1 Hall (N. Y.) 720; Steele *v.* Ellmaker, 11 Serg. & R. (Pa.) 86, auctioneer liable to the seller for the difference between the limited price and the selling price.

50. See *infra*, this note.

[a] **See a form for such an action** in Earl of Ferrers *v.* Robins, 2 Cr. M. & R. (Eng.) 152, 5 Tyr. 705. *Compare* Townes *v.* Birchett, 12 Leigh (39 Va.) 173.

51. Merritt *v.* Archer, 163 App. Div. 648, 148 N. Y. Supp. 1008; Duncan *v.* Cafe, 2 Mees. & W. (Eng.) 244.

[a] **Auctioneer a Stakeholder.**—In such a case, the auctioneer is a stakeholder between the parties. Harrington *v.* Hoggart, 1 B. & Ad. 577, 9 L. J. K. B. O. S. 14, 20 E. C. L. 606, 109 Eng. Reprint 902. See also, Teaffe *v.* Simmons, 11 Allen (Mass.) 342.

52. Smith *v.* Hurley, 29 R. I. 489, 72 Atl. 705.

53. **Ill.**—Elison *v.* Wulff, 26 Ill. App. 616. **Ky.**—Thomas *v.* Kerr, 66 Ky. 619, 96 Am. Dec. 262. **Mo.**—Schell *v.* Stephens, 50 Mo. 375. **N. Y.**—Mills *v.* Hunt, 17 Wend. 333, 20 Wend. 431.

[a] **Disclosing Principal.**—As in case of other agents, however, an auctioneer who does disclose to the bidder the owner of the goods, is not liable, ordinarily, as a principal. Dugdale *v.* Lovering, L. R. 10 C. P. 196, 44 J. C. P. 197, 32 L. T. N. S. 155, 23 W. R. 391.

54. Elison *v.* Wulff, 26 Ill. App. 616.

55. Seemuller *v.* Fuchs, 64 Md. 217, 1 Atl. 120, 54 Am. Rep. 766.

56. **U. S.**—Morrow Shoe Mfg. Co. *v.* New Eng. Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417. **Md.**—Higgins *v.* Lodge, 68 Md. 229, 11 Atl. 846, 6 Am. St. Rep. 437 **Eng.**—Hardacre *v.* Stewart, 5 Esp. 103.

57. **Mass.**—Hills *v.* Snell, 104 Mass. 173, 6 Am. Rep. 216; Gilmore *v.* Newton, 9 Allen 171, 85 Am. Dec. 749; Coles *v.* Clark, 3 Cush. 399. **Mich.**—Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394. **N. Y.**—Hoffman *v.* Carow, 22 Wend. 285. **Vt.** Courtis *v.* Cane, 32 Vt. 232, 76 Am. Dec. 174.

Contra.—Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363 (see, however, 1 Cal.

goods that he knows were fraudulently obtained by his principal, he is liable to account to the persons from whom the goods were so obtained,[58] and where goods are fraudulently obtained by the seller and sent to the auctioneer for sale, the one from whom the goods were fraudulently obtained may maintain replevin against the auctioneer.[59]

VI. SALE OF GOOD WILL. — The remedies in case of a sale of good will are treated elsewhere in this work.[60]

429, 54 Am. Dec. 300, where on a former trial between the same parties, the court expressed a different opinion); Frizzell *v.* Rundle, 88 Tenn. 396, 12 S. W. 918, 17 Am. St. Rep. 908.

58. Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417.

59. Higgins *v.* Lodge, 68 Md. 229, 11 Atl. 846, 6 Am. St. Rep. 437.

60. See the title "**Restraint of Trade.**"

SALOONS. — See **Intoxicating Liquors.**

SALVAGE

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CROSS-REFERENCES:

Admiralty;
Maritime Liens;
Seamen;
Ships and Shipping.

For forms, see 9 STANDARD PROC. 18, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROCEEDINGS FOR RECOVERY OF SALVAGE. — A. NATURE AND FORM OF REMEDY. — Suits for salvage may be in rem against the property saved or its proceeds,[1] or in personam against the party at whose request and for whose benefit the salvage service was performed;[2] and the fact that such service may be performed under an express contract is not a bar to either action,[3] though having made a salvage contract the salvor cannot repudiate it merely because it is not advantageous to him.[4] When the services are voluntary and

1. The Sabine, 101 U. S. 384, 25 L. ed. 982; The Emblem, 2 Ware 68, 8 Fed. Cas. No. 4,434.

2. The Sabine, 101 U. S. 384, 25 L. ed. 982; Miller *v.* Kelly, 17 Fed. Cas. No, 9,577. See Admiralty Rule 19.

3. The Louisa Jane, 2 Lowell 295, 15 Fed. Cas. No. 8,532; The A. D. Patchin, 1 Blatchf. 414, 1 Fed. Cas. No. 87, 9 Fed. Cas. No. 5,170.

[a] In Rem.—Frame *v.* The Ella, 48 Fed. 569; The Williams, 29 Fed. Cas. No. 17,710.

4. Bondies *v.* Sherwood, 22 How. (U. S.) 214, 16 L. ed. 238.

the property saved is delivered to or taken by the owner, an action in personam will lie against him,[5] as well as against one who has a direct pecuniary interest in such property, one who has been directly benefited by the services performed;[6] but not when the benefit derived is merely incidental,[7] nor when the owner abandons the salved property.[8] Salvors cannot in the same libel proceed in rem against a vessel and in personam against the owners.[9]

B. JURISDICTION. — The jurisdiction of salvage cases has been treated elsewhere in this work.[10]

C. WHO MAY RECOVER SALVAGE. — As a general rule only those parties who have actually rendered a salvage service are entitled to, and may maintain an action for, salvage remuneration,[11] but there is an exception to this rule in favor of the owners[12] of vessels which

5. United States *v.* Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 987; Hudson *v.* Whitmire, 77 Fed. 846; Spaulding *v.* Alaska Commercial Co., 1 Alaska 497.

6. United States *v.* Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed 987; *affirming* 137 Fed. 455, 69 C. C. A. 603, and 108 Fed. 277; The Five Steel Barges, 59 L. J. Adm. (Eng.) 77, 6 Asp. M. C. 580, 15 P. D. 142, 63 L. T. N. S. 499, 39 W. R. 127.

7. United States *v.* Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 987; The Sabine, 101 U. S. 384, 25 L. ed. 982.

8. The Emblem, 2 Ware 68, 8 Fed. Cas. No. 4,434.

9. The Sabine, 101 U. S. 384, 25 L. ed. 982.

10. See 1 STANDARD PROC. 402.

11. The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Mulgrave, 2 Hag. Adm. (Eng.) 77; The Vine, 2 Hag. Adm. (Eng.) 1.

[a] **Officers and Crew of Salved Vessel.**—It is the legal duty of the officers and seamen of a vessel in distress to do everything in their power to save it, and they cannot become salvors of their own ship or cargo, unless they have been discharged or the voyage is terminated by the wreck of the vessel or its abandonment by all except the salvors. Gilbraith *v.* Stewart Transp. Co., 121 Fed. 540, 57 C. C. A. 602, 64 L. R. A. 193; The C. F. Bielman, 108 Fed. 878.

[b] **Pilots** assisting vessels in distress, beyond what their mere duty requires, are entitled to salvage compensation. Hobart *v.* Drogan, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Wisconsin, 32 Fed. 111, *affirming* 30 Fed. 846.

[c] **Passengers.**—(1) A passenger who assists in saving the property is entitled to a portion of the salvage. (Bond *v.* The Cora, 2 Wash. C. C. 80, 2 Pet. Adm. 373, 3 Fed. Cas. No. 1,621, *affirming* 2 Pet. Adm. 361, 3 Fed. Cas. No. 1,620), when (2) his services are extraordinary. Candee *v.* Sixty-Eight Bales Cotton, 48 Fed. 479; The Brabo, 33 Fed. 884.

[d] **Public Vessels and Servants.**—(1) The officers and crews of public vessels are entitled to salvage for their personal services in the same manner as other persons. The Mulhouse, 17 Fed. Cas. No. 9,910. (2) Public servants may recover salvage for assistance of great merit, rendered in the line of their regular duty, but in excess of the official requirements thereof. The Huntsville, 16 Fed. Cas. No. 6,916. (3) So the keeper of a lighthouse in the government service is entitled to salvage. The Ottawa, 1 Low. 274, 18 Fed. Cas. No. 10,617. (4) But when the salvor's act is merely the performance of a duty which they are employed to do, they are not entitled to salvage. Murphy *v.* The Suliote, 4 Woods 19, 5 Fed. 99.

12. **U. S.**—The Camanche, 8 Wall. 448, 19 L. ed. 397. **P. I.**—G. Urrutia & Co. *v.* Pasig Steamer and Lighter Co., 15 Phil. Isl. 521. **Eng.**—The Charlotte, 3 W. Rob. Adm. 68, 73.

[a] **Identity of Ownership.**—Where the peril which renders a salvage service necessary does not arise out of a breach of contract of carriage, the fact that the owners of the salvor vessel also own the salved ship does not preclude them from recovering salvage compensation from the cargo saved. Gilchrist Transp. Co. *v.* One Hundred

render assistance, whether individuals or corporations,[13] and such action may be on their own behalf and on behalf of the master, officers and crew.[14] An action in personam will lie by one salvor against a co-salvor to recover a proportionate share of the salvage compensation when the whole is received by the latter,[15] for example, when salvage is paid the owners of a salvor vessel they are accountable to the crew for their shares.[16]

D. PARTIES. — Who should be made parties to a libel for salvage is treated elsewhere in this work.[17]

E. PLEADING. — The general rules relating to pleading in admiralty cases are controlling in actions for salvage.[18]

The libel should contain a distinct claim for salvage,[19] and for any other matter incidental thereto, *e. g.*, the consumption of materials used on the job, for which recovery is sought.[20] The ownership of the vessel rendering the salvage service should be specifically alleged.[21]

A defense of contract to pay a fixed sum must be set out in the answer, with an averment of payment or tender,[22] and the defense of misconduct of the libelants must be specifically alleged.[23] That the services were rendered gratuitously may be pleaded in bar,[24] but not in mitigation of damages.[25]

F. TRIAL OR HEARING. — **1. In General.** — The court may properly consider any facts tending to show the cause of a wreck,[26] or the condition of the property,[27] but as a rule collateral issues between the parties will not be considered or determined,[28] unless they arise

Ten Thousand Bushels Wheat, 120 Fed. 432, 37 U. S. St. 242, 7 U. S. Comp. St., 1916, §7990.

13. The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Island City, 1 Black (U. S.) 121, 17 L. ed. 70.

14. The Flottbek, 118 Fed. 954, 55 C. C. A. 448; G. Urrutia & Co. *v.* Pasig Steamer and Lighter Co., 15 Phil. Isl. 521.

15. Conekin *v.* Lockwood, 231 Fed. 541; Waterbury *v.* Myrick, 1 Blatchf. & H. 34, 29 Fed. Cas. No. 17,253; The Centurion, 1 Ware 490, 5 Fed. Cas. No. 2,554.

16. Studley *v.* Baker, 2 Lowell 205, 23 Fed. Cas. No. 13,559; Roff *v.* Wass, 2 Sawy. 389, 20 Fed. Cas. Nos. 11,999, 12,000.

17. See 1 STANDARD PROC. 434.

As to intervention by salvors, see 1 STANDARD PROC. 434, 520.

18. See the title "**Admiralty.**"

[a] **Names of Parties Not Included in Libel.**—It is not essential that the names of the officers and crew should be stated in a libel by the owners. The Flottbek, 118 Fed. 954, 55 C. C. A. 448; *modifying* 112 Fed. 682. See generally 1 STANDARD PROC. 454.

[b] **Amendment of Answer.**—An answer which pleads matter in mitigation of damages which should have been pleaded in bar of recovery of salvage may be amended in the absence of injustice to the libelant. Commercial Pac. Cable Co. *v.* The Manchuria, 3 Hawaii U. S. Dist. Ct. 147.

19. The Adeline, 9 Cranch (U. S.) 244, 3 L. ed. 719.

20. Merritt & Chapman Derrick & Wrecking Co. *v.* Greene, 129 Fed. 969.

21. The Cherokee, 30 Fed. 640; Commercial Pac. Cable Co. *v.* The Manchuria, 3 Hawaii U. S. Dist. Ct 141.

22. The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397.

23. The Alexandra, 104 Fed. 904.

24. Commercial Pac. Cable Co. *v.* The Manchuria, 3 Hawaii U. S. Dist. Ct. 143.

25. Commercial Pac. Cable Co. *v.* The Manchuria, 3 Hawaii U. S. Dist. Ct. 143.

26. Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

27. The Mira A. Pratt, 31 Fed. 572.

28. The James Turpie, 113 Fed. 700.

out of the same occurrence.[29] On the discovery of fraud on the part of the libelants, such as the concealment of the names of some of the salvors, the court may dismiss the libel.[30]

2. **Value of Property and Amount of Compensation.** — Unless the parties agree upon the value of the property saved,[31] there must be an appraisal,[32] or sale.[33] Such value is usually estimated as of the time and place of salvage,[34] unless, by reason of the fault of the salvors, the property is not delivered to its owners, nor a libel filed, until after it has fallen in value, when the value at the time of filing the libel will control.[35] It is error to accept the amount of insurance on the property as against a positive valuation.[36] The determination of the amount of compensation is for the court.[37]

3. **Reference.** — All the issues of a salvage case may be referred to a commissioner to be heard and determined,[38] including that of distribution or apportionment of the amount awarded,[39] and when a reference is ordered the general rules relating to that subject control the proceeding.[40]

G. JUDGMENT. — 1. **In General.** — Before the amount of a salvage recovery is paid it is proper to direct an apportionment thereof,[41] *e. g.*, to owners, master and crew,[42] and where certain salvors are not before the court their shares should be paid into court and held subject to their order; in no event will such amount inure to the benefit of the claimants of the vessel.[43] So, too, where the libel is against a vessel and its cargo, the amount of salvage awarded should be apportioned and several judgments rendered.[44] Compensation for salvage services voluntarily rendered cannot exceed the value of the property saved.[45]

2. **Sale and Disposition of Surplus.** — The court, in its discretion, for the interest and advantage of the owners, may order a condemnation and sale of a salved vessel,[46] and, in case of a salved cargo, enough

29. The Flower City, 16 Fed. 866.

30. Hessian *v.* The Edward Howard, 1 Newb. 522, 12 Fed. Cas. No. 6,436.

31. The Henry R. Tilton, 214 Fed. 165; Johnson *v.* The El Dorado, 50 Fed. 951.

32. Cross *v.* The Dolphin, Bee 152, 6 Fed. Cas. No. 3,432.

33. Hayden *v.* The C. W. Cochrane, 3 Woods 304, 11 Fed. Cas. No. 6,258.

34. The Albion Lincoln, 1 Lowell 71, 1 Fed. Cas. No. 144.

35. The Albion Lincoln, 1 Low. 71, 1 Fed. Cas. No. 144.

36. Compagnie Commerciale de Transport a Vapeur Francaise *v.* Charente Steamship Co., 60 Fed. 921, 9 C. C. A. 292.

37. The Waterloo, 1 Blatchf. & H. 114, 29 Fed. Cas. No. 17,257; George *v.* The Arctic, Bee 232, 10 Fed. Cas. No. 5,330.

38. The Colonel Adams, 19 Fed. 795.

39. The Colonel Adams, 19 Fed. 795; The Arendal, 14 Fed. 580.

40. See the titles "**Admiralty**" and "**References.**"

41. Brooks *v.* The Adirondack, 2 Fed. 872.

[a] **Involves Discretion of Court.**— The distribution of a salvage award is a matter resting in the discretion of the court, and is governed largely by the peculiar circumstances of each individual case. Conekin *v.* Lockwood, 231 Fed. 541.

42. The Leipsic, 5 Fed. 108.

43. The Leipsic, 5 Fed. 108; Brooks *v.* The Adirondack, 2 Fed. 872; Montgomery *v.* The T. P. Leathers, 1 Newb. 421, 17 Fed. Cas. No. 9,736.

44. Stone *v.* The Jewell, 41 Fed. 103; The Colonel Adams, 19 Fed. 795.

45. The Sabine, 101 U. S. 384, 25 L. ed. 982.

46. Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120; The Kristrel, 14

thereof to meet the salvage award and costs.[47] But before making an order of sale the court should be satisfied that the application is made in good faith and that a sale would inure to the benefit of all parties interested.[48] The surplus proceeds of salved property is awarded to the owners thereof,[49] or the master, as their agent,[50] unless he is guilty of fraud, embezzlement, or other act inconsistent with his duty, or it appears to be to the interest of the owners to withhold such property from him;[51] but if abandoned by the owners it should be paid into the treasury of the United States,[52] and not, in the absence of a statute, to the salvors,[53] or treasury of the state.[54] But any disposition of such surplus can be made only by order of the court.[55]

3. Interest. — Interest on a salvage award may be allowed from the date of the service,[56] but not, upon a remand of the case, when it would change the amount of an award fixed by the appellate court.[57] Interest may be refused where the libelant's claim is exorbitant.[58]

4. Costs. — Costs in salvage cases are awarded in accordance with the general rules on that subject.[59] Thus the libelant, when awarded salvage, is generally entitled to costs,[60] but not for unnecessary acts,[61]

Fed. Cas. No. 7,935; The Isabel, 13 Fed. Cas. No. 7,098; Bennett *v.* The Tevere, 3 Fed. Cas. No. 1,325.

47. The Kristrel, 14 Fed. Cas. No. 7,935; Edwards *v.* Thirty-Five Boxes of Gold Dust, 8 Fed Cas. No. 4,299*a*.

48. Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120; The Lexington, 15 Fed. Cas. No. 8,536.

49. The Adventure, 8 Cranch (U. S.) 221, 1 Wheat. 128, 3 L. ed. 542.

50. The North America, 18 Fed. Cas. No 10,313; The Cerro Gordo, 5 Fed. Cas. No. 2,557.

51. The North America, 18 Fed. Cas. No. 10,313; The Montserat, 6 Adm. Rec. 83, 17 Fed. Cas No. 9,740; The Byron, 4 Fed. Cas. No. 2,275.

[a] **Property Withheld Temporarily.**—The surplus of salved property or proceeds, after the payment of salvage, may be withheld from the master temporarily, particularly when the court is uncertain about his honesty, to give the owners a chance to appear and file claims in their own behalf. The Osteonthe, 18 Fed. Cas. No. 10,608*a*.

52. Peabody *v.* Proceeds of Twenty-Eight Bags of Cotton, 19 Fed. Cas. No. 10,869.

53. Peabody *v.* Proceeds of Twenty-Eight Bags of Cotton, 19 Fed. Cas. No. 10,869.

54. Peabody *v.* Proceeds of Twenty-Eight Bags of Cotton, 19 Fed. Cas. No. 10,869.

55. The Byron, 4 Fed. Cas. No. 2,275.

56. The Haxby, 83 Fed. 715, 28 C. C. A. 33.

57. Brown *v.* Merritt Wrecking Organization, 83 Fed. 720, 28 C. C. A. 38.

58. Merritt & Chapman Derrick &. Wrecking Co. *v.* Cnubb, 113 Fed. 173, 51 C. C. A. 119.

59. See the titles "**Admiralty**" and "**Costs.**"

[a] **Apportionment.**—Costs should be borne by the respective claimants in proportion to the amounts awarded against them. The Rialto, 15 Fed. 124; The Leipsic, 5 Fed. 108.

[b] **Where the conduct of libelant is oppressive,** inequitable, and an abuse of the process of the court, cost, or part of them, will be awarded against him. The D. L. Co. No. XX, 205 Fed. 188.

60. The New Orleans, 23 Fed. 909; The Daniel Steinman, 19 Fed. 918; The Emily B. Souder, 15 Blatchf. 185, 8 Fed. Cas. No. 4,458; Edwards *v.* Thirty-Five Boxes of Gold Dust, 8 Fed. Cas. No. 4,299*a*; The Byron, 4 Fed. Cas. No. 2,275; James Clark Co. *v.* Ferryboat Columbia, 26 App. Cas. (D. C.) 85.

61. The Minnie Miller, 6 Ben. 117, 17 Fed. Cas. No. 9,638; The Henry Ewbank, 1 Sumn. 400, 11 Fed. Cas. No. 6,376.

[a] **The salvor's intention** in a case of unnecessary assistance will be considered, and where the court is satis-

as where two libels for salvage are filed when one is sufficient.[62] Nor is the libelant entitled to costs in the absence of notice or demand on the owner,[63] unless he is unknown,[64] or the circumstances of the case will not permit the delay incidental to a demand.[65] Likewise an excessive demand for security may bar the recovery of costs by the libelant,[66] but not where the parties agree on the amount, even though it is excessive.[67]

Exorbitant Claim. — An exorbitant claim for salvage service will generally bar the recovery of costs by the salvor,[68] but not when the claimants actively seek to prevent the recovery of compensation,[69] or make no offer whatever for the service.[70]

Effect of Tender. — Unless there is good ground to contend for a larger amount,[71] costs will be denied the libelants when the claimants have made a valid tender of a fair and liberal allowance as salvage.[72]

H. APPEAL. — The general rules on the appeal of salvage cases are the same as in other admiralty suits.[73] The amount of a salvage award rests in the court's discretion and will not be changed on appeal, unless there has been a palpable mistake or gross over-allowance by the court below.[74]

fied that his efforts were made with the intent, and hope of rendering assistance, the costs will be divided. The Brandow, 29 Fed. 878.

62. The Maryland, 16 Fed. Cas. No. 9,218.

63. The D. L. & W. No. 6 C, 53 Fed. 284; Jones *v.* Car Float No. Five, 50 Fed. 573; The Vanloo, 39 Fed. 570; The Rosedale, 20 Fed. 447; The Jack Jewett, 2 Ben. 463, 13 Fed. Cas. No. 7,122.

[a] **Claims not presented until trial** for special damage in rendering a salvage service, where full opportunity existed for doing so, will not justify an allowance of costs. The Benison, 36 Fed. 793.

64. The Henry R. Tilton, 214 Fed. 165.

65. The Alaska, 23 Fed. 597.

66. Jones *v.* Car Float No. Five, 50 Fed. 573; Murray *v.* The John Swan, 50 Fed. 447.

67. The Barge No. 127, 113 Fed. 529.

68. Bates *v.* The O. C. DeWitt, 59 Fed. 620; The O. M. Hitchcock, 25 Fed. 777; Commercial Pac. Cable Co. *v.* The Manchuria, 3 Hawaii U. S. Dist. Ct. 150.

69. Bates *v.* The O. C. DeWitt, 59 Fed. 620; The Straits of Gibraltar, 32 Fed. 297; Johnson *v.* The Industry, Hoff. Op. 488, 13 Fed. Cas. No. 7,391.

70. The Indiana, 22 Fed. 925; The Wexford, 6 Ben. 119, 29 Fed. Cas. No. 17,472.

71. The Marie, 39 Fed. 501.

72. Howard *v.* The Rose, 34 Fed. 928; The Rose, 31 Fed. 176; The Daniel Steinman, 19 Fed. 918; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586; Hessian *v.* The Edward Howard, 1 Newb. 522, 12 Fed. Cas. No. 6,436; The Arlington, 2 Ben. 511, 1 Fed. Cas. No. 534; James Clark Co. *v.* Ferryboat Columbia, 26 App. Cas. (D. C.) 85.

73. See the title "**Admiralty,**" and The Trefusis, 98 Fed. 314, 39 C. C. A. 96.

[a] **Objections to awards** for salvage services cannot be made for the first time on appeal. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70; The Flottbek, 118 Fed. 954, 55 C. C. A. 448.

74. The Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. ed. 751; The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328; Fountain *v.* Sawyer, 176 Fed. 92, 99 C. C. A. 612.

SANITATION. — See **Health.**

SATISFACTION. — See **Accord and Satisfaction; Judgments, Satisfaction of; Payment; Release.**

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SCHOOLS AND SCHOOL DISTRICTS

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. REMEDIES IN CONNECTION WITH CREATION AND DISSOLUTION OF SCHOOL DISTRICTS. —**Review of Action by Appeal.** Appeals to the courts from the action of officers relating to the creation or alteration of school districts are sometimes authorized by statute.[1] But in the absence of such statute, the court has no jurisdiction of an appeal.[2]

Review by Certiorari. — While in some states, certiorari is regarded as a proper remedy to review the action of a board in forming or altering school districts,[3] or the action of the officers to which an

1. **Conn.**—First School District *v.* Eighth School Dist., 78 Conn. 71, 61 Atl. 234. **Idaho.**—Gaiser *v.* Steele, 25 Idaho 412, 137 Pac. 889, disposition of appeal. **Mich.**—School Dist. No. 3 *v.* Green, 190 Mich. 371, 157 N. W. 266. **Minn.**—Bloomquist *v.* Washington County, 101 Minn. 163, 112 N. W. 203, to what court. **Miss.**—Hathorn *v.* Morgan, 107 Miss. 589, 65 So. 643, as to bill of exceptions. **Neb.**—State *ex rel.* Shull *v.* Clary, 25 Neb. 403, 41 N. W. 256.

[a] **Discretion of officers will not be disturbed unless abused.** School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482.

2. Cleal *v.* Higginbotham, 49 Okla. 362, 153 Pac. 64; Stephens *v.* Buie, 23 Tex. Civ. App. 491, 57 S. W. 312.

[a] **Decision of arbitrators to which appeal is taken** is not reviewable on appeal or error. School Dist. No. 14 *v.* Sims, 193 Mo. App. 480, 186 S. W. 4.

3. **Ill.**—School Directors of Union School Dist. No. 4 *v.* School Directors of New Union School Dist. No. 2, 135 Ill. 464, 28 N. E. 49; Potter *v.* Board of School Trustees, 10 Ill. App. 343. **Mich.** Silver *v.* Hamilton Tp. Board, 146 Mich. 393, 109 N. W. 664; Gentle *v.* School Inspector, 73 Mich. 40, 40 N. W. 928; Doxey *v.* School Inspectors, 67 Mich. 601, 35 N. W. 170. **Mo.**—School District No. 14 *v.* Sims, 193 Mo. App. 480, 186 S. W. 4; School District No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580. **Wis.**—State *ex rel.* Bidgood *v.* Clifton, 113 Wis. 107, 88 N. W. 1019.

[a] **Where existence of district** is questioned, quo warranto, not certiorari is appropriate. School District No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580.

[b] **Irregularities not affecting property rights or jurisdiction** of the board cannot be reviewed. Donough *v.* Dewey, 82 Mich. 309, 46 N. W. 782.

[c] **After new district has assumed its functions,** certiorari is not the proper remedy. Perrizo *v.* Kessler, 93 Mich. 280, 53 N. W. 391; Fractional School District *v.* Inspectors, 27 Mich. 3. See *infra*, this section.

[d] **Writ may run to supervisors instead of clerk.** State *ex rel.*. Bidgood *v.* Clifton, 113 Wis. 107, 88 N. W. 1019.

and finances, if there is no adequate legal remedy.[16]

C. INJUNCTION. — A taxpayer may maintain a suit to restrain illegal acts of the school officers in relation to school finances which tend to increase the burden of taxation.[17] But county commissioners cannot enjoin a county officer from paying school taxes to the district.[18]

D. ADJUSTING INDEBTEDNESS BETWEEN DISTRICTS. — It has been held that actions may be brought to determine and adjust the indebtedness on creation or alteration of school districts,[19] but under statute an apportionment is had by the county superintendent or by an auditor which right may be enforced by mandamus;[20] and an action cannot be brought by one district against the other until there has been such an apportionment.[21] Where there is no remedy by appeal from an adjustment, certiorari has been held to be the proper remedy to review the determination of the officers.[22] A suit will lie

39 N. H. 511. **N. J.**—State *ex rel.* Board of Education *v.* Sheridan, 45 N. J. L. 276. **Ore.**—See School Dist. No. 2 *v.* Lambert, 28 Ore. 209, 42 Pac. 221. **Pa.**—Com. *v.* Pittsburg, 209 Pa. 333, 58 Atl. 669, denying writ because requisition was ambiguous. But see Jefferson School Tp. *v.* School Town, 5 Ind. App. 586, 32 N. E. 807; State *ex rel.* Michener *v.* Board of Comrs., 5 Ind. App. 220, 32 N. E. 92, if money is applied to other purposes remedy is by action.

[f] **Signing Valid Bonds.**—Santa Ana School Dist. *v.* Talbert, 19 Cal. App. 104, 124 Pac. 872.

[g] **Taxpayer may intervene** in suit to compel levy of tax to pay bonds for the purpose of showing invalidity of bonds. Richards *v.* Lyon, 69 Iowa 612, 29 N. W. 630.

16. School Dist. No. 9 *v.* School Dist. No. 5, 118 Wis. 233, 95 N. W. 148.

17. Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506. See Baltimore *v.* Weatherby, 52 Md. 442. See also the title "**Municipal Corporations.**"

[a] **Illegal disposition of money of** school district. **Ark.**—Barton *v.* Hines, 123 Ark. 619, 185 S. W. 455. **Ill.**—Lindblad *v.* Board of Education, 221 Ill. 261, 77 N. E. 450; School Directors *v.* Wright, 43 Ill. App. 270; Martin *v.* Jamison, 39 Ill. App. 248. **Ia.**—Carthan *v.* Lang, 69 Iowa 384, 28 N. W. 650. **Okla.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336; Thompson *v.* Haskell, 24 Okla. 70, 102 Pac. 700. **Pa.**—Mason *v.* Hanover Tp. School Dist., 242 Pa. 359, 89 Atl. 552. **Tex.**—Barton *v.* Vickery (Tex. Civ. App.), 189 S. W. 1103.

[b] **Illegal Creation of Debt.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336; Thompson *v.* Haskell, 24 Okla. 70, 102 Pac. 700.

[c] **Illegal Issuance of Bonds.**—**Ark.** Schmutz *v.* Special School Dist., 78 Ark. 118, 95 S. W. 438. **Ia.**—Wilkinson *v.* Van Orman, 70 Iowa 230, 30 N. W. 495. **N. C.**—Ellis *v.* Trustees of Graded School, 156 N. C. 10, 72 S. E. 2. **Tex.**—Cleveland *v.* Gainer (Tex. Civ. App.), 184 S. W. 593.

[d] **Payment of Bonds.**—Holliday *v.* Hildebrandt, 97 Iowa 177, 66 N. W. 89.

18. School Dist. No. 21 *v.* Fremont, 15 Wyo. 73, 86 Pac. 24, where illegality of district was set up.

19. **Ia.**—Independent School Dist. *v.* Independent School Dist., 41 Iowa 321, suit for accounting. **Kan.**—School District No. 49 *v.* School District No. 70, 20 Kan. 76. **Pa.**—Appeal of School Dist. of Aleppe, 96 Pa. 76. See Chambersburg Borough School Dist. *v.* Hamilton Tp. School Dist., 228 Pa. 119, 77 Atl. 414.

But, see Dist. No. 6 *v.* Dist. No. 5, 18 Mo. App. 266.

20. **Ia.**—District Tp. of Franklin *v.* Wiggins, 110 Iowa 702, 80 N. W. 432. **Mich.**—Ramsey *v.* Everett Tp. Clerk, 52 Mich. 344, 17 N. W. 939. **Neb.** School Dists. Nos. 17 and 24 *v.* School Dists. Nos. 2 and 18, 17 Neb. 177, 22 N. W. 360.

See Independent School Dist. *v.* District Ct., 48 Iowa 182.

21. School Dists. Nos. 17 and 24 *v.* School Dists. Nos. 2 and 18, 17 Neb. 177, 22 N. W. 360.

22. Appeal of School Directors of Borough of Aliquippa, 172 Pa. 81, 33

to enforce an indebtedness due from one to other,[23] unless statute requires the apportioning officer to levy a tax therefor.[24] It seems that mandamus will lie to compel the treasurer to pay over the amount found due.[25]

E. Claims and Bonds. — Actions may be brought on claims and warrants[26] or bonds[27] of a school district, although statutes sometimes provide special remedies to enforce bonds.[28]

Mandamus To Enforce. — In regard to claims against schools and school districts, whether for teachers' salaries or otherwise, mandamus will lie in accordance with the general rules,[29] to compel the proper officers to take action on a claim where they refuse to do so,[30] to compel an appropriation of money to pay bonds,[31] to compel issuance of a warrant for claims or salaries,[32] if there are sufficient funds on hand

Atl. 236; Darby Borough School District's Appeal, 160 Pa. 79, 28 Atl. 636.

23. See People *ex rel.* Maltz *v.* Board of Education, 41 Mich. 547, 49 N. W. 920; Barre *v.* School Dist. No. 5, 69 Vt. 374, 37 Atl. 1111, suit by town to recover money from abolished district.

[a] **Action of Money Had and Received.—Ill.**—Trustees of Schools of Tp. 24 *v.* Trustees of Schools of Tp. 25, 81 Ill. 470. **Mich.**—School Dist. No. 9 *v.* School Dist. No. 5, 40 Mich. 551. **Wis.** School Dist. No. 9 *v.* School Dist. No. 5, 118 Wis. 233, 95 N. W. 148, action for share of credits.

[b] **Mandamus will not lie,** there being a remedy by action. School Dist. No. 9 *v.* School Dist. No. 5, 40 Mich. 551; School Dist. No. 9 *v.* School Dist. No. 5, 118 Wis. 233, 95 N. W. 148.

[c] **Bill in equity** lies to compel payment of amount found due on division. School Directors of Dist. No. 5 *v.* School Directors of Dist. No. 10, 73 Ill. 249; School Directors of Dist. No. 2 *v.* School Directors of Dist. No. Four, 16 Ill. App. 651.

[d] **The county treasurer** being custodian of funds is proper plaintiff in action for school fund due from a county on alteration of school districts. Trustees of Lytle School District *v.* Haas, 24 Tex. Civ. App. 433, 59 S. W. 830.

[e] **Other districts subsequently formed from one of the districts may join** with the latter as plaintiffs. School Dist. No. 9 *v.* School Dist. No. 6, 9 Neb. 331, 2 N. W. 712.

[f] **Territory unsuccessfully detached** from a district has no independent existence and cannot be compelled to pay its proportion of indebtedness by suit. Fordham School Tp. *v.* Darlington School Tp., 6 S. D. 489, 61 N. W. 1128.

24. School Dist. No. 94 *v.* Special School Dist. No. 33, 33 N. D. 353, 157 N. W. 287.

[a] **Mandamus** lies to enforce duty. School Dist. No. 94 *v.* Special School Dist. No. 33, 33 N. D. 353, 157 N. W. 287.

25. See School District No. 3 *v.* Riverside, 67 Mich. 404, 34 N. W. 886.

[a] **But an apportionment acquiesced in for a number of years** will not be disturbed by mandamus. School Dist. No. 3 *v.* Riverside, 67 Mich. 404, 34 N. W. 886.

26. Heal *v.* Jefferson Tp., 15 Ind. 431; Miller *v.* Jacobs, 70 Wis. 122, 35 N. W. 324.

27. Bonham *v.* Board of Education, 4 Dill. 156, 3 Fed. Cas. No. 1,629.

28. Bonham *v.* Board of Education, 4 Dill. 156, 3 Fed. Cas. No. 1,629, remedy is not exclusive.

29. **Mandamus as to claims generally,** see the title "**Municipal Corporations.**"

As to general rules relating to mandamus, see the title "**Mandamus.**"

30. **Ill.**—Cotton *v.* Reed, 20 Ill. 607. **Tex.**—Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686, approval of vouchers for salary. **W. Va.**—Poling *v.* Board of Education, 50 W. Va. 374, 40 S. E. 357.

31. State *ex rel.* Robertson *v.* Board of Education, 27 Ohio St. 96.

32. **Cal.**—Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Raisch *v.* Board of Education, 81 Cal. 542, 22 Pac. 890. **Minn.**—State *ex rel.* Clark *v.* Jack, 126 Minn. 367, 148 N. W. 306. See State *v.* Cooley, 58 Minn. 514, 60 N. W. 338. **Mont.**—Jay *v.* School Dist. No. 1, 24

and finances, if there is no adequate legal remedy.[16]

C. INJUNCTION. — A taxpayer may maintain a suit to restrain illegal acts of the school officers in relation to school finances which tend to increase the burden of taxation.[17] But county commissioners cannot enjoin a county officer from paying school taxes to the district.[18]

D. ADJUSTING INDEBTEDNESS BETWEEN DISTRICTS. — It has been held that actions may be brought to determine and adjust the indebtedness on creation or alteration of school districts,[19] but under statute an apportionment is had by the county superintendent or by an auditor which right may be enforced by mandamus;[20] and an action cannot be brought by one district against the other until there has been such an apportionment.[21] Where there is no remedy by appeal from an adjustment, certiorari has been held to be the proper remedy to review the determination of the officers.[22] A suit will lie

39 N. H. 511. **N. J.**—State *ex rel.* Board of Education *v.* Sheridan, 45 N. J. L. 276. **Ore.**—See School Dist. No. 2 *v.* Lambert, 28 Ore. 209, 42 Pac. 221. **Pa.**—Com. *v.* Pittsburg, 209 Pa. 333, 58 Atl. 669, denying writ because requisition was ambiguous. But see Jefferson School Tp. *v.* School Town, 5 Ind. App. 586, 32 N. E. 807; State *ex rel.* Michener *v.* Board of Comrs., 5 Ind. App. 220, 32 N. E. 92, if money is applied to other purposes remedy is by action.

[f] **Signing Valid Bonds.**—Santa Ana School Dist. *v.* Talbert, 19 Cal. App. 104, 124 Pac. 872.

[g] **Taxpayer may intervene** in suit to compel levy of tax to pay bonds for the purpose of showing invalidity of bonds. Richards *v.* Lyon, 69 Iowa 612, 29 N. W. 630.

16. School Dist. No. 9 *v.* School Dist. No. 5, 118 Wis. 233, 95 N. W. 148.

17. Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506. See Baltimore *v.* Weatherby, 52 Md. 442. See also the title "**Municipal Corporations.**"

[a] **Illegal disposition of money of** school district. **Ark.**—Barton *v.* Hines, 123 Ark. 619, 185 S. W. 455. **Ill.**—Lindblad *v.* Board of Education, 221 Ill. 261, 77 N. E. 450; School Directors *v.* Wright, 43 Ill. App. 270; Martin *v.* Jamison, 39 Ill. App. 248. **Ia.**—Carthan *v.* Lang, 69 Iowa 384, 28 N. W. 650. **Okla.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336; Thompson *v.* Haskell, 24 Okla. 70, 102 Pac. 700. **Pa.**—Mason *v.* Hanover Tp. School Dist., 242 Pa. 359, 89 Atl. 552. **Tex.**—Barton *v.* Vickery (Tex. Civ. App.), 189 S. W. 1103.

[b] **Illegal Creation of Debt.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336; Thompson *v.* Haskell, 24 Okla. 70, 102 Pac. 700.

[c] **Illegal Issuance of Bonds.**—**Ark.** Schmutz *v.* Special School Dist., 78 Ark. 118, 95 S. W. 438. **Ia.**—Wilkinson *v.* Van Orman, 70 Iowa 230, 30 N. W. 495. **N. C.**—Ellis *v.* Trustees of Graded School, 156 N. C. 10, 72 S. E. 2. **Tex.**—Cleveland *v.* Gainer (Tex. Civ. App.), 184 S. W. 593.

[d] **Payment of Bonds.**—Holliday *v.* Hildebrandt, 97 Iowa 177, 66 N. W. 89.

18. School Dist. No. 21 *v.* Fremont, 15 Wyo. 73, 86 Pac. 24, where illegality of district was set up.

19. Ia.—Independent School Dist. *v.* Independent School Dist., 41 Iowa 321, suit for accounting. **Kan.**—School District No. 49 *v.* School District No. 70, 20 Kan. 76. **Pa.**—Appeal of School Dist. of Aleppe, 96 Pa. 76. See Chambersburg Borough School Dist. *v.* Hamilton Tp. School Dist., 228 Pa. 119, 77 Atl. 414.

But, see Dist. No. 6 *v.* Dist. No. 5, 18 Mo. App. 266.

20. Ia.—District Tp. of Franklin *v.* Wiggins, 110 Iowa 702, 80 N. W. 432. **Mich.**—Ramsey *v.* Everett Tp. Clerk, 52 Mich. 344, 17 N. W. 939. **Neb.** School Dists. Nos. 17 and 24 *v.* School Dists. Nos. 2 and 18, 17 Neb. 177, 22 N. W. 360.

See Independent School Dist. *v.* District Ct., 48 Iowa 182.

21. School Dists. Nos. 17 and 24 *v.* School Dists. Nos. 2 and 18, 17 Neb. 177, 22 N. W. 360.

22. Appeal of School Directors of Borough of Aliquippa, 172 Pa. 81, 33

to enforce an indebtedness due from one to other,[23] unless statute requires the apportioning officer to levy a tax therefor.[24] It seems that mandamus will lie to compel the treasurer to pay over the amount found due.[25]

E. Claims and Bonds. — Actions may be brought on claims and warrants[26] or bonds[27] of a school district, although statutes sometimes provide special remedies to enforce bonds.[28]

Mandamus To Enforce. — In regard to claims against schools and school districts, whether for teachers' salaries or otherwise, mandamus will lie in accordance with the general rules,[29] to compel the proper officers to take action on a claim where they refuse to do so,[30] to compel an appropriation of money to pay bonds,[31] to compel issuance of a warrant for claims or salaries,[32] if there are sufficient funds on hand

Atl. 236; Darby Borough School District's Appeal, 160 Pa. 79, 28 Atl. 636.

23. See People *ex rel.* Maltz *v.* Board of Education, 41 Mich. 547, 49 N. W. 920; Barre *v.* School Dist. No. 5, 69 Vt. 374, 37 Atl. 1111, suit by town to recover money from abolished district.

[a] **Action of Money Had and Received.**—**Ill.**—Trustees of Schools of Tp. 24 *v.* Trustees of Schools of Tp. 25, 81 Ill. 470. **Mich.**—School Dist. No. 9 *v.* School Dist. No. 5, 40 Mich. 551. **Wis.** School Dist. No. 9 *v.* School Dist. No. 5, 118 Wis. 233, 95 N. W. 148, action for share of credits.

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[d] **The county treasurer** being custodian of funds is proper plaintiff in action for school fund due from a county on alteration of school districts. Trustees of Lytle School District *v.* Haas, 24 Tex. Civ. App. 433, 59 S. W. 830.

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31. State *ex rel.* Robertson *v.* Board of Education, 27 Ohio St. 96.

32. **Cal.**—Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Raisch *v.* Board of Education, 81 Cal. 542, 22 Pac. 890. **Minn.**—State *ex rel.* Clark *v.* Jack, 126 Minn. 367, 148 N. W. 306. See State *v.* Cooley, 58 Minn. 514, 60 N. W. 338. **Mont.**—Jay *v.* School Dist. No. 1, 24

to pay it,[33] to compel registration of a warrant,[34] as well as to compel the payment of a claim or warrant,[35] if there are sufficient funds on hand,[36] unless the party has another adequate remedy.[37] But the writ will not lie to control discretion as to allowance of a claim,[38] unless abused,[39] especially where the relator has a remedy at law.[40]

An injunction will issue in a proper case to restrain the payment of school warrants.[41]

IV. SCHOOL CONTRACTS. — A school district may sue for breach of its valid contracts,[42] and to recover money paid under an illegal and void contract.[43] School districts may be charged in actions ex contractu with non-performance of their contracts,[44] especially

Mont. 219, 231, 61 Pac. 250. **N. J.** Apgar *v.* School District No. 4, 34 N. J. L. 308. **N. Y.**—Dannat *v.* New York, 66 N. Y. 585. **Ohio.**—State *ex rel.* Ward *v.* Hubbard, 22 Ohio C. C. 252, 12 Ohio Cir. Dec. 87, directing issuance of warrant for full salary without deduction for teacher's fund under unconstitutional statute. **Wash.**—State *ex rel.* Brown *v.* McQuade, 36 Wash. 579, 79 Pac. 207.

But, see School Dist. No. 3 *v.* Bodenhamer, 43 Ark. 140, holding teacher must first obtain judgment.

[a] **Countersigning** of warrant may be compelled. State *ex rel.* Baas *v.* McKinnon, 68 Fla. 548, 67 So. 77.

[b] **Interest** should not be included in the direction for the issuance of the warrant. Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206.

33. Jay *v.* School Dist. No. 1, 24 Mont. 219, 231, 61 Pac. 250; State *ex rel.* Bryson *v.* Daneil, 52 S. C. 201, 29 S. E. 633.

34. Ryan *v.* Humphries, 50 Okla. 343, 150 Pac. 1106, L. R. A. 1915F, 1047; Hopley *v.* Benton, 38 Okla. 223, 132 Pac. 808.

35. **U. S.**—Whitaker & Ray Co. *v.* Roberts, 155 Fed. 882. **Ala.**—Somerville *v.* Wood, 115 Ala. 534, 22 So. 476. **Cal.**—Westerman *v.* Cleland, 12 Cal. App. 63, 106 Pac. 606. **Ill.**—Cotton *v.* Reed, 20 Ill. 607. **Mich.**—Martin *v.* Tripp, 51 Mich. 184, 16 N. W. 330. **Neb.**—State *ex rel.* Brandeis & Sons *v.* Melcher, 87 Neb. 359, 127 N. W. 241; Maher *v.* State *ex rel.* Allen, 32 Neb. 354, 49 N. W. 436, 441; State *ex rel.* Cook *v.* Bloom, 19 Neb. 562, 27 N. W. 638. **N. Y.**—Dannat *v.* New York, 66 N. Y. 585. **Ohio.**—Case *v.* Wresler, 4 Ohio St. 561. **Tex.**—Stephenson *v.* Camp (Tex. Civ. App.), 138 S. W. 816.

[a] **A teacher employed by a de facto board** may mandamus the treasurer to pay his salary warrant. Case *v.* Wresler, 4 Ohio St. 561.

36. People *ex rel.* Allen *v.* Frink, 32 Mich. 96.

37. Coffin *v.* Board of Education, 114 Mich. 342, 72 N. W. 156, mandamus to compel payment of salary on discharge of teacher.

38. Keefe Mfg. & Inv. Co. *v.* Board of Education, 33 Colo. 513, 81 Pac. 257.

39. Raisch *v.* Board of Education, 81 Cal. 542, 22 Pac. 890.

40. People *ex rel.* Harnett *v.* Inspectors of Common Schools, 44 How. Pr. (N. Y.) 322, where inspectors disallowed salary claim because relator's appointment was invalid.

[a] **The remedy by action against the officers** for neglect of duty, is not adequate. Raisch *v.* Board of Education, 81 Cal. 542, 22 Pac. 890.

[b] **The remedy by action against the board for breach of contract** is not adequate. Ross *v.* Board of Education, 18 Cal. App. 222, 122 Pac. 967; State *ex rel.* Brown *v.* McQuade, 36 Wash. 579, 79 Pac. 207.

41. Kellogg *v.* School District No. 10, 13 Okla. 285, 74 Pac. 110.

[a] **The holder of the warrant** is not a necessary party. Kellogg *v.* School Dist. No. 10, 13 Okla. 285, 74 Pac. 110.

42. Fluty *v.* School Dist., 49 Ark. 94, 4 S. W. 278, relief on theory contract is void not allowable.

43. **Ark.**—Fluty *v.* School Dist., 49 Ark. 94, 4 S. W. 278. **Fla.**—Board of Public Inst. *v.* Billings, 15 Fla. 686, action of money had and received. **Idaho.**—Independent School Dist. *ex rel.* Moore *v.* Collins, 15 Idaho 535, 98 Pac. 857, 128 Am. St. Rep. 76, that defendant was trustee when contract was made must be alleged.

44. **Cal.**—Morgan *v.* Board of Edu-

where the claim is unliquidated or there is a dispute as to the execution of the contract.[45] In a proper case relief may be had by mandamus,[46] or by injunction.[47]

Subcontractors. — Statutes sometimes provide what remedies subcontractors on school contracts shall have.[48]

V. ESTABLISHMENT AND MANAGEMENT OF SCHOOLS.

A. MANDAMUS. — Mandamus will lie to compel school officers to perform ministerial duties in regard to the establishment and maintenance of public schools unless there exists another adequate remedy.[49] But

cation, 136 Cal. 245, 68 Pac. 703. **Conn.** McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689. **Mich.**—Waterman-Waterbury Co. *v.* School Dist., 183 Mich. 168, 175, 150 N. W. 104. **Minn.**—Associated Schools *v.* School Dist. No. 83, 122 Minn. 254, 142 N. W. 325, 47 L. R. A. (N. S.) 200.

Actions by teachers, see *infra,* VII.

45. Waterman-Waterbury Co. *v.* School Dist., 183 Mich. 168, 150 N. W. 104.

46. Waterbury-Waterbury Co. *v.* School Dist., 183 Mich. 168, 175, 150 N. W. 104. See *supra,* III, E.

47. Eaton & Co. *v.* Royal, 36 Wash. 435, 78 Pac. 1093; Rand, McNally & Co. *v.* Royal, 36 Wash. 420, 78 Pac. 1103; Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

48. **Ind.**—Jeffries *v.* Myers, 9 Ind. App. 563, 37 N. E. 301, lien cannot be enforced. **Ia.**—Green Bay Lumb. Co. *v.* Independent School Dist., 125 Iowa 227, 101 N. W. 84, lien cannot be created. The subcontractor must file a claim. **Wis.**—Bank of Iron River *v.* Board of School Directors, 91 Wis. 596, 65 N. W. 368, he may sue the contractor and school district jointly.

49. Wharton *v.* School Directors, 42 Pa. 358.

[a] **Established Schools. — Ark.** — Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540, parents may sue. **Kan.** Young *v.* Regents of University of Kansas, 87 Kan. 239, 124 Pac. 150, Ann. Cas. 1913 D, 701, who is proper relator. **Mo.**—State *v.* Cartwright, 122 Mo. App. 257, 99 S. W. 48. **S. D.**—Swenehart *v.* Strathman, 12 S. D. 313, 81 N. W. 505. But *compare* State *ex rel.* Allen Co. Orphans' Home *v.* Schmetzer, 156 Ind. 528, 60 N. E. 269, remedy is by appeal.

[b] **Calling election to determine site** for school. State *ex rel.* Bean *v.* Lyons, 37 Mont. 354, 96 Pac. 922, taxpayer may sue.

[c] **Duty To Lease School Building.** Krull *v.* State, 59 Neb. 97, 80 N. W. 272.

[d] **Properly Dating Teacher's Certificate.**—Van Dorn *v.* Anderson, 219 Ill. 32, 76 N. E. 53.

[e] **Employment of teachers,** see Teeple *v.* State *ex rel.* Bower, 171 Ind. 268, 86 N. E. 49, as to complaint.

[f] Signing contract for employment of teacher. Davis *v.* Harrison, 140 Ky. 520, 131 S. W. 272.

[g] **Making Lists of Teachers Entitled to Promotion.**—Brooklyn Teachers' Assn. *v.* Board of Education, 176 N. Y. 564, 68 N. E. 1114.

[h] **Compelling Admission of Pupil to School.—Cal.**—Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029 (faculty members as parties); Foltz *v.* Hoge, 54 Cal. 28. **Ga.**—McCaskill *v.* Bower, 126 Ga. 341, 54 S. E. 942, injunction to restrain enforcement of illegal requirement is not proper remedy. **Ind.**—State *ex rel.* Stallard *v.* White, 82 Ind. 278, 42 Am. Rep. 496. **Mass.**—Nourse *v.* Merriam, 8 Cush. 11. **Mo.**—State *ex rel.* Biggs *v.* Penter, 96 Mo. App. 416, 70 S. W. 375. **Neb.**—Jackson *v.* State, 57 Neb. 183, 77 N. W. 662, 42 L. R. A. 792.

See 5 STANDARD PROC. 127, where denial is because of race or color.

[i] **Using Books Regularly Adopted.** Board of Trustees *v.* State *ex rel.* Eaton, 175 Ind. 147, 93 N. E. 851 (school book company is proper relator); State *ex rel.* Roberts *v.* School Directors of Springfield, 74 Mo. 21.

[j] **Cessation of Sectarian Instruction.**—Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760 (denying writ as there was no demand); State *ex rel.* Weiss *v.* District Board, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330. But see Curran *v.* White, 22 Pa. Co. Ct. 201, remedy is ineffectual.

[k] **Promotion of pupil** contrary to regulations will not be compelled. Board of Education *v.* State *ex rel.*

discretionary acts will not be compelled unless the exercise of discretion is abused.[50] Duties of a private school resting solely on contract cannot be enforced by mandamus;[51] they must be enforced by action or suit.[52]

B. INJUNCTION. — An injunction may issue to restrain wrongful acts relating to the establishment and maintenance of public schools,[53]

Wickham, 80 Ohio St. 133, 88 N. E. 412.

[l] **Signing Diploma.** — Hamlett *v.* Reid, 165 Ky. 613, 177 S. W. 440. *Compare* Niles *v.* Orange Training School, 63 N. J. L. 528, 42 Atl. 846.

[m] **Enforcing Final Order of State Superintendent.**—State *v.* Thomas, 152 Iowa 500, 132 N. W. 842. See Gilman *v.* Bassett, 33 Conn. 298.

[n] **Compelling Opening of School for Religious Meetings.**—Davis *v.* Boget, 50 Iowa 11.

[o] **Authority of board to make regulations** may be determined on mandamus. Kinzer *v.* Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496; State *ex rel.* Bowe *v.* Board of Education, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 282.

[p] **Mandamus to fill vacancies on the board of trustees** will not lie, as a special election can be called for that purpose. Johnson *v.* Mitchell, 120 Mich. 589, 79 N. W. 812.

[q] **Taxpayer cannot compel closing school house to prevent religious meetings where** his taxes were not increased. State *ex rel.* Gilbert *v.* Dilley, 95 Neb. 527, 145 N. W. 999, 50 L. R. A. (N. S.) 1182.

[r] **Supreme Court has original jurisdiction** of action to compel erection of buildings for state institute. State *ex rel.* Pierce *v.* Board of Trustees of Stout Institute, 158 Wis. 417, 149 N. W. 205.

[s] **The remedy by appeal to the county superintendent** does not preclude mandamus. Kinzer *v.* Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496. But see State *ex rel.* Allen Co. Orphans' Home *v.* Schmetzer, 156 Ind. 528, 60 N. E. 269.

50. **Ia.**—Kinzer *v.* Independent School Dist., 120 Iowa 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496. **Ky.**—Crawford *v.* Lewis, 170 Ky. 589, 186 S. W. 492. **Mo.**—State *ex rel.* Best *v.* Jones, 155 Mo. 570, 56 S. W. 307. **Okla.**—Molacek *v.* White, 31 Okla. 693, 122 Pac. 523.

[a] **Removal of School.**—Peters *v.* Warner, 81 Iowa 335, 46 N. W. 1001; Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135.

[b] **Holding term of school** where pupils are few. State *ex rel.* Bishop *v.* Morehouse, 38 Utah 234, 112 Pac. 169.

[c] **Discretion in Employment of Teacher.**—State *v.* Smith, 49 Neb. 755, 69 N. W. 114.

[d] **Discretion in Granting Teacher's Certificates.—Ia.**—Bailey *v.* Ewart, 52 Iowa 111, 2 N. W. 1009. **Ky.** Flynn *v.* Barnes, 156 Ky. 498, 161 S. W. 523 (contents of petition); Northington *v.* Sublette, 114 Ky. 72, 69 S. W. 1076. See Crawford *v.* Lewis, 170 Ky. 589, 186 S. W. 492, where certificate was refused because of moral unfitness. **Pa.**—Com. *v.* Jenks, 154 Pa. 368, 26 Atl. 371.

[e] **Transportation of Pupils.**—Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51.

[f] **Discretion in establishing text books** to be used. State *ex rel.* Ginn *v.* Wilson, 121 Wis. 523, 99 N. W. 336.

[g] **Recommending Students for Degree.**—People *ex rel.* O'Sullivan *v.* New York Law School, 68 Hun 118, 22 N. Y. Supp. 663, 52 N. Y. St. 14.

[h] **Changing Regulations Prescribed.**—State *ex rel.* School Dist. *v.* Rice, 32 S. C. 97, 10 S. E. 833.

[i] **Transfer of pupils** from one school to another may be compelled where arbitrarily refused. Cook *v.* Board of Directors of School Dist. No. 80, 266 Ill. 164, 107 N. E. 327.

51. State *ex rel.* Burg *v.* Milwaukee Medical College, 128 Wis. 7, 106 N. W. 116, 116 Am. St. Rep. 21, 3 L. R. A. (N. S.) 1115, duty to issue diploma. But see People *ex rel.* Cecil *v.* Bellevue Hospital Med. College, 60 Hun 107, 14 N. Y. Supp. 490, 38 N. Y. St. 418.

52. State *ex rel.* Burg. *v.* Milwaukee Medical College, 128 Wis. 7, 106 N. W. 116, 116 Am. St. Rep. 21, 3 L. R. A. (N. S.) 1115.

53. **Ill.**—School Directors of Union School Dist. *v.* School Directors of New Union School Dist., 135 Ill. 464, 28 N. E. 49. **Ind.**—State *v.* Earhart, 27 Ind.

unless the act is discretionary and there is no fraud or abuse of discretion.[54] If the act complained of would increase the burdens of taxation, the suit may be maintained by a taxpayer.[55] A school official may enjoin an unlawful interference with the exercise of his functions.[56]

C. PROHIBITION. — Where statute authorizes appeals to school officers, the courts will not interfere by prohibition proceedings.[57]

D. REMEDY WHERE STUDENT IS WRONGFULLY DISMISSED. — A pupil wrongfully expelled from school may maintain an action of trespass

119. **Pa.**—Wharton *v.* School Directors, 42 Pa. 358. **Wis.**—Dorner *v.* School Dist. No. 5, 137 Wis. 147, 118 N. W. 353, 19 L. R. A. (N. S.) 171.

[a] **Township may enjoin** persons unlawfully acting as officers. School Tp. of Franklin *v.* Wiggins, 122 Iowa 602, 98 N. W. 490.

[b] **Injunction at instance of book publisher** where district refuses to follow course of study, see Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

[c] **Taxpayer cannot intervene** in publisher's suit to prevent violation of contract as to course of study. Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

[d] **County superintendent may restrain directors from employing** a disqualified teacher. Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328, complaint held sufficient. But *compare* Perkins *v.* Wolf, 17 Iowa 228.

Separate schools fc different races. See 5 STANDARD PROC. 128.

54. Wharton *v.* School Directors, 42 Pa. 358; Cooney *v.* Gardner, 16 Pa. Co. Ct. 547; Spedden *v.* Board of Education, 74 W. Va. 181, 81 S. E. 724, 52 L. R. A. (N. S.) 163.

[a] **Discretion as to Location of School.**—Venable *v.* School Committee, 149 N. C. 120, 62 S. E. 902; Sarratt *v.* Cash, 103 S. C. 531, 88 S. E. 256.

55. Independent School Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174; Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506.

[a] **Illegal Establishment of School. N. D.**—Kretchmer *v.* School Board, 34 N. D. 403, 158 N. W. 993. **Okla.**—Kellogg *v.* School Dist. No. 10, 13 Okla. 285, 74 Pac. 110. **Pa.**—*In re* Witmer's Appeal, 1 Monag. 747, 15 Atl. 428. Tex. Barton *v.* Vickery (Tex. Civ. App.), 189 S. W. 1103. **Utah.**—Tooele Bldg. Assn. *v.* Tooele High School Dist No. 1, 43 Utah 362, 134 Pac. 894.

[b] **Enjoining and rescinding contract for purchase** of school land, Egaard *v.* Dahlke, 109 Wis. 366, 85 N. W. 369, complaint sufficient.

[c] **Acceptance of building** under fraudulent contract. Ford *v.* Collison, 128 Ark. 119, 193 S. W. 531.

[d] **Wrongful Removal of Schoolhouse.—Ill.**—Ruble *v.* School Dist. No. 5, 42 Ill. App. 483, director and taxpayer may join. **Ind.**—Willan *v.* Richardson, 51 Ind. App. 102, 98 N. E. 1094, county superintendent not necessary party. **Mo.**—Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506; Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867. **Neb.**—Lindeman *v.* Corson, 93 Neb. 548, 141 N. W. 153.

[e] **Abandonment of School.**—Greenlee *v.* Newton School Tp., 55 Ind. App. 630, 104 N. E. 610.

[f] **Restraining Employment of Teachers.**—O'Brien *v.* Moss, 131 Ind. 99, 30 N. E. 894.

[g] **Paying salaries** to teachers illegally employed. Lindblad *v.* Board of Education, 221 Ill. 261, 77 N. E. 450. See Perkins *v.* Wolf, 17 Iowa 228.

[h] **In a suit to restrain interference with school,** who has the legal right to teach cannot be determined. District Tp. *v.* Barrett, 47 Iowa 110.

[i] **Use of school for religious meetings** not enjoined. Townsend *v.* Hagan, 35 Iowa 194. See State *ex rel.* Gilbert *v.* Dilley, 95 Neb. 527, 145 N. W. 999, 50 L. R. A. (N. S.) 1182.

[j] **Enjoining Carrying Out Void Order Changing Text Books.**—Tanner *v.* Nelson, 25 Utah 226, 70 Pac. 984.

[k] **An allegation that school was built and supported by taxes** shows ownership by the district. Lindeman Corson, 93 Neb. 548, 141 N. W. 153.

56. Kimbrough *v.* Barnett, 93 Tex. 301, 55 S. W. 120, city superintendent.

57. School Dist. No. 13 *v.* County Superintendent, 36 Colo. 393, 85 Pac. 696.

on the case,[58] brought in his own name by next friend,[59] against the teacher and directors of the school district,[60] or under statute, against the city or town.[61] Or his reinstatement may be compelled by mandamus,[62] or mandatory injunction.[63]

VI. ACTIONS GENERALLY. — A. EFFECT OF RIGHT OF APPEAL. — Statutes providing for appeals to county superintendents or other officers from decisions of a district board, do not preclude resort to the courts to determine the authority of the board to act.[64]

B. JURISDICTION AND VENUE. — School districts are on the same plane as other corporations as to venue of actions in which they are parties.[65] A justice's court has jurisdiction of suits in which school districts are parties.[66]

C. CAPACITY TO SUE AND BE SUED. — Boards of education,[67] the

58. **Ala.**—Weaver *v.* Pepper, 167 Ala. 328, 52 So. 754, pleading of plaintiff held insufficient. **Ill.**—Stuckey *v.* Churchman, 2 Ill. App. 584. **Vt.**—Mack *v.* Kelsey, 61 Vt. 399, 17 Atl. 780, defendant cannot justify under general issue.

[a] **Action on contract** will not lie. Stuckey *v.* Churchman, 2 Ill. App. 584.

[b] **Malice or wantonness** must be alleged. McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.

59. Stephenson *v.* Hall, 14 Barb. (N. Y.) 222.

[a] **Parent** may not sue. **Ind.**—Boyd *v.* Blaisdell, 15 Ind. 73. **Me.**—Donahoe *v.* Richards, 38 Me. 376. **N. Y.**—Stephenson *v.* Hall, 14 Barb. 222. See Board of Education *v.* Purse, 101 Ga. 422, 443, 28 S. E. 896, 65 Am. St. Rep. 312, 41 L. R. A. 593. *Contra,* Roe *v.* Deming, 21 Ohio St. 666.

60. Roe *v.* Deming, 21 Ohio St. 666.

61. Bishop *v.* Rowley, 165 Mass. 460, 43 N. E. 191; Learock *v.* Putnam, 111 Mass. 499.

62. **Ga.**—McCaskill *v.* Bower, 126 Ga. 341, 54 S. E. 942; Board of Education *v.* Purse, 101 Ga. 442, 28 S. E. 896. **Md.**—Baltimore University *v.* Colton, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108. **Neb.**—State *ex rel.* Kelley *v.* Ferguson, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. (N. S.) 266; McNish *v.* State *ex rel.* Dimick, 74 Neb. 261, 104 N. W. 186. **Wis.**—State *ex rel.* Bowe *v.* Board of Education, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 282.

Compare Miller *v.* Clement, 205 Pa. 484, 55 Atl. 32, as to controlling judgment.

[a] **Parent may compel** reinstatement. Board of Education *v.* Purse, 101 Ga. 422, 443, 28 S. E. 896, 65 Am. St. Rep. 312, 41 L. R. A. 593; McNish *v.* State *ex rel.* Dimick, 74 Neb. 261, 104 N. W. 186, foster parent.

[b] **Remedy by appeal** to school officers must be exhausted. People *ex rel.* Ulrich *v.* Board of Education, 4 **N. Y.** Supp. 102.

63. **Cal.**—See Kramm *v.* Bogue, 127 Cal. 122, 59 Pac. 394. **Ill.**—Ashley *v.* Board of Education, 275 Ill. 274, 114 N. E. 20, all children affected by rule may join. **Ky.**—Cross *v.* Board of Trustees, 121 Ky. 469, 89 S. W. 506, contents of petition. **Neb.**—Mizner *v.* School Dist. No. 11, 2 Neb. (Unof.) 238, 96 N. W. 128.

But see McCaskill *v.* Bower, 126 Ga. 341, 54 S. E. 942; Board of Public Education *v.* Felder, 116 Ga. 788, 43 S. E. 56.

[a] **The parent** or one standing in *loco parentis* may sue. Mizner *v.* School Dist. No. 11, 2 Neb. (Unof.) 238, 96 N. W. 128.

64. Kinzer *v.* Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496; Rodgers *v.* Independent School Dist., 100 Iowa 317, 69 N. W. 544.

65. Crowell Ind. School Dist. *v.* First Nat. Bank (Tex. Civ. App.), 174 S. W. 878.

66. Cassville *v.* Morris, 14 Wis. 440.

67. **U. S.**—Atchison Board of Education *v.* De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. ed. 573. **Cal.**—Hancock *v.* Board of Education, 140 Cal. 554, 561, 74 Pac. 44. **Ky.**—Mock *v.* County Board of Education, 145 Ky. 715, 141 S. W. 38. **N. Y.**—Gunnison *v.* Board of Education, 176 N. Y. 11, 17, 68 N. E. 106; Reynolds *v.* Foster, 66 Misc. 133, 123 N. Y. Supp. 273.

trustees of school districts,[68] boards of directors,[69] school townships,[70] and school districts,[71] are generally constituted corporations with power to sue and be sued. But an unincorporated educational division,[72] or school community,[73] can neither sue nor be sued. County superintendents may maintain such actions as are necessary to fill the duties of their office.[74] An individual director cannot institute actions in behalf of a school district on his own motion, however.[75]

D. PARTIES. — Generally actions by and against school districts should be brought in their corporate names.[76] A taxpayer may maintain an action on its behalf in a proper case when its officers refuse to sue.[77] The school district is a proper but not a necessary party to a mandamus proceeding,[78] or an injunction suit[79] against its officers, but it is a necessary party in a suit questioning its organization.[80] And where the directors are improperly joined, they may be rejected

68. U. S.—Whitaker & Ray Co. *v.* Roberts, 155 Fed. 882. **Cal.**—Hancock *v.* Board of Education, 140 Cal. 554, 561, 74 Pac. 44. **Ky.**—Mingo *v.* Colored C. School Dist. No. A, 113 Ky. 475, 68 S. W. 483; Johnson *v.* Trustees Com. School Dist., 18 Ky. L. Rep. 887, 38 S. W. 861. **N. Y.**—Gunnison *v.* Board of Education, 176 N. Y. 11, 17, 68 N. E. 106. **Tex.**—Arrington *v.* Jones (Tex. Civ. App.), 191 S. W. 361.

Contra, Allen *v.* School District No. 1, 23 Mo. 418.

69. Botkin *v.* Osborne, 39 Ill. 101.

70. Harrison School Tp. *v.* McGregor, 96 Ind. 185.

71. Mass.—Fourth School Dist. *v.* Wood, 13 Mass. 193. **Minn.**—Gould *v.* Sub-Dist. No. 3, 7 Minn. 203. **N. Y.** Union Free School Dist. No. 1 *v.* Glen Park, 169 App. Div. 414, 96 N. Y. Supp. 428. **Tenn.**—Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592. **Tex.**—Vance *v.* Miller (Tex. Civ. App), 170 S. W. 838; Renshaw *v.* Arnett (Tex. Civ. App.), 158 S. W. 1197. **Wis.**—District No. 3 *v.* Macloon, 4 Wis. 79.

But see Wharton *v.* School Directors, 42 Pa. 358.

72. Runyan *v.* School Dist. No. 3, 12 Iowa 184; Drake *v.* Board of Trustees, 11 Iowa 54; Mock *v.* County Board of Education, 145 Ky. 715, 141 S. W. 38.

[a] **District may ratify pending suit** brought before it was organized. School Dist. No. 1 *v.* Richardson, 23 Pick. (Mass.) 62.

73. Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

74. Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328.

[a] **But he cannot be sued in tort for mistaken performance** of official duty involving the exercise of judgment. Gridley School Dist. *v.* Stout, 134 Cal. 592, 66 Pac. 785.

75. Independent School Dist. No. 6 *v.* Wirtner, 85 Iowa 387, 52 N. W. 243.

76. Jones *v.* Keating, 55 Md. 145; Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

[a] **In all suits in relation to school funds,** the board of education is the proper party by statute. Suits to recover teachers' wages are within statute. Gunnison *v.* Board of Education, 176 N. Y. 11, 68 N. E. 106.

[b] **A suit on a disputed claim** which the board of education refuses to allow should be brought against it, not the city. Gunnison *v.* Board of Education, 176 N. Y. 11, 68 N. E. 106; Dannat *v.* New York, 66 N. Y. 585.

[c] **Actions on school warrants** should not be brought against the town. Miller *v.* Jacobs, 70 Wis. 122, 35 N. W. 324, action on order of school drawn on town treasurer.

77. Independent School Dist. *ex rel.* Moore *v.* Collins, 15 Idaho 535, 98 Pac. 587, 128 Am. St. Rep. 76; Wilson *v.* School Directors, 81 Ill. 180. See Independent School Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174.

[a] **Patrons of school may sue** directors in equity for loss of school fund. Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

78. Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206. See Dannat *v.* New York, 66 N. Y. 585. See generally the title, "**Mandamus.**"

79. Holliday *v.* Hildebrandt, 97 Iowa 177, 66 N. W. 89.

80. Minear *v.* McVea (Tex. Civ. App.), 185 S. W. 1048.

as surplusage.[81] The state is a proper plaintiff in an action to enjoin building a school house.[82] Where several districts are formed from a district, a holder of obligations of the latter may join the several districts in an action in equity.[83]

E. PLEADING. — The pleadings in actions by and against school districts must conform to the general rules.[84] A complaint on an indebtedness must allege facts showing it to be within the authorization of the statute and to have been contracted in accordance with the same.[85] A taxpayer suing for an injunction must show that he is

81. Botkin *v.* Osborne, 39 Ill. 101.

82. State *v.* Earhart, 27 Ind. 119.

83. **U. S.**—Gamble *v.* Rural Ind. School Dist., 146 Fed. 113, 76 C. C. A. 539; Fairfield *v.* Rural Ind. School Dists., 111 Fed. 108. **Ia.**—White Oak *v.* Oskaloosa, 52 Iowa 73, 2 N. W. 965; Kennedy *v.* Derby Grange Ind. School Dist., 48 Iowa 189. See Knoxville Nat. Bank *v.* Independent Dist., 40 Iowa 612. **Ohio.**—See Crofton *v.* Board of Education, 26 Ohio St. 571. **Wis.**—Conway *v.* Joint Dist. No. 2, 150 Wis. 267, 136 N. W. 612; District No. 3 *v.* Macloon, 4 Wis. 79.

See Southhold Sav. Bank *v.* Board of Education, 33 Misc. 74, 89 N. Y. Supp. 714, not necessary to join city to which portion of district was annexed.

[a] **The original district cannot be sued** after the dissolution. Fairfield *v.* Rural Ind. School Dists., 111 Fed. 108.

[b] **The judgment may be rendered in such form** that it may be primarily satisfied out of the property of any one of the districts. White Oak *v.* Oskaloosa, 52 Iowa 73, 2 N. W. 965.

84. **Ind.**—Greenlee *v.* Newton School Tp., 55 Ind. App. 630, 104 N. E. 610 (complaint for cost of transporting pupils); Hornbeck *v.* State *ex rel.* Davidson, 33 Ind. App. 609, 71 N. E. 916 (complaint for accounting by treasurer); Silver, Burdett & Co. *v.* Indiana State Board (Ind. App.), 71 N. E. 667, complaint to enjoin letting of contract to furnish school books. **Neb.**—School Dist. No. 27 *v.* Holmes, 16 Neb. 486, 20 N. W. 721, denial of authority of agent. **N. Y.**—Katz *v.* Board of Education, 162 App. Div. 132, 147 N. Y. Supp. 327, injury from defective flooring.

[a] **That school district is a corporation** need not be alleged when all districts are so created by general law. School Dist. No. 4 *v.* Holmes, 53 Mo. App. 487.

[b] **The manner in which the district was formed** need not be set out at length. Fort Dodge City School Dist. *v.* District Tp., 15 Iowa 434.

[c] **Matters of defense** not to be pleaded. **Kan.**—State *v.* School Dist. No. 3, 34 Kan. 237, 8 Pac. 208. **Ky.** Trustees of Common School Dist. *v.* Thomas Kane & Co., 27 Ky. L. Rep. 983, 87 S. W. 321. **Okla.**—Board of Education *v.* Houilston, 51 Okla. 329, 151 Pac. 1035.

[d] **In pleading an appropriation,** that it was not expended need not be shown. Greenlee *v.* Newton School Tp., 55 Ind. App. 630, 104 N. E. 610.

[e] **Demand.**—Complaint on an order need not allege a demand. Rochford *v.* School Dist. No. 11, 17 S. D. 542, 97 N. W. 747. But see Pierson *v.* Independent School Dist., 106 Iowa 695, 77 N. W. 494; Fobes *v.* School Dist., 10 Wis. 117.

[f] **Existence of funds** from which to pay orders need not be alleged, if the order is not payable out a specific fund. Brown *v.* Fitcher, 91 Minn. 41, 97 N. W. 416; Brown *v.* Town Board, 77 Wis. 27, 45 N. W. 678.

85. **Ill.**—School Directors *v.* Taylor, 54 Ill. 289; School Directors *v.* Sippy, 54 Ill. 287. **Ind.**—Oppenheimer *v.* Greencastle, 164 Ind. 99, 72 N. E. 1100; Lebanon Nat. Bank *v.* Clinton School Tp., 24 Ind. App. 359, 56 N. E. 857. **Minn.**—School Dist. No. 7 *v.* Thompson, 5 Minn. 221.

[a] **Unless the order set out shows** such fact. Brown *v.* Fitcher, 91 Minn. 41, 97 N. W. 416.

[b] **Authority of trustee to contract** must be stated. Oppenheimer *v.* Greencastle, 164 Ind. 99, 72 N. E. 1100 (citing local cases); Lincoln School *v.* Union Trust Co., 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272; Peck-Smead Co. *v.* Sherman, 26 Tex. Civ. App. 208, 63 S. W. 340. But see Board of Education *v.* Houilston, 51 Okla. 329, 151 Pac. 1035.

[c] **Amount of consideration for**

a taxpayer,[86] and that he will sustain irreparable injury.[87] He is sometimes required to verify his pleading.[88]

Amendments of the complaint may be made if they do not change the cause of action.[89]

F. PROCESS. — Statute provides that jurisdiction of school districts may be obtained by service of process upon the clerk,[90] or on any officer thereof.[91]

G. APPEARANCE. — School directors are required to appear in all suits and actions brought by and against their district.[92]

H. JUDGMENTS. — A general judgment may be rendered against a school district.[93] A judgment against a school district may be enforced by mandamus,[94] or by suit in equity,[95] and sometimes by execution.[96]

I. REVIEW. — Appeals in actions by and against school districts

which bonds were issued need not be stated. State *v.* School Dist. No. 3, 34 Kan. 237, 244, 8 Pac. 208, petition held sufficient.

[d] **In an action on an order** (1) it must be alleged that officers signing order were proper officers of school board. Miller *v.* Jacobs, 70 Wis. 122, 35 N. W. 324. (2) If warrant is for supplies, that they were necessary and suitable for school purposes must be alleged. Oppenheimer *v.* Greencastle, 164 Ind. 99, 72 N. E. 1100; Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520. But see Buffalo School Furn. Co. *v.* School Dists. Nos. 4, 30, and 40, 7 Kan. App. 796, 54 Pac. 115. (3) Where officers are joined, their promise to pay the warrant must be alleged. Oppenheimer *v.* Greencastle, 164 Ind. 99, 72 N. E. 1100.

86. Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506.

[a] **A showing that plaintiff is a resident** is not of itself sufficient. Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506.

87. Williams *v.* School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506.

88. See 13 STANDARD PROC. 39.

[a] **A verification by the taxpayer joined with a director** is sufficient. Ruble *v.* School Dist. No. 5, 42 Ill. App. 483.

89. Hancock *v.* Board of Education, 140 Cal. 554, 562, 74 Pac. 44. See generally the titles "**Amendments and Jeofails;**" "**New Cause of Action or Defense.**"

90. Dow *v.* School Dist. No. 12, 46 Vt. 108; Downs *v.* Board of Directors, 4 Wash. 309, 30 Pac. 147.

[a] **Service on a director is insufficient.** Downs *v.* Board of Directors, 4 Wash. 309, 30 Pac. 147.

91. Kennedy *v.* Independent School Dist., 48 Iowa 189.

92. School District No. 44 *v.* Rural Special School District No. 10, 128 Ark. 383, 194 S. W. 241; Independent School Dist. *v.* Wirtner, 85 Iowa 387, 52 N. W. 243.

[a] **Formal meeting of board authorizing appearance** of a school district is not necessary. Thompson *v.* School Dist. No. 4, 71 Mo. 495.

93. School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155, even though unenforceable by execution.

94. **U. S.**—Whitaker & Ray Co. *v.* Roberts, 155 Fed. 882. **Ia.**—Chase *v.* Morrison, 40 Iowa 620. **N. Y.**—People *ex rel.* Wallace *v.* Abbott, 45 Hun 293, 13 Civ. Proc. 101, 10 N. Y. St. 399. **Ohio.**—State *ex rel.* O'Hara *v.* Board of Education, 7 Ohio Dec. Reprint 326. **Tex.**—Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120.

But see O'Donnell *v.* School Dist., 133 Pa. 162, 19 Atl. 358, the statute gives a special form of execution.

95. Kenyon *v.* Clarke, 2 R. I. 67.

96. **Ill.**—Rogers *v.* People *ex rel.* Brewer, 68 Ill. 154, 158, special execution. **Pa.**—O'Donnell *v.* School Dist., 133 Pa. 162, 19 Atl. 358. **R. I.**—Kenyon *v.* Clarke, 2 R. I. 67.

But see Allen *v.* School District No. 1, 23 Mo. 418. *Contra*, School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

[a] **Execution Against Member of School District.**—McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689; Kenyon *v.* Clarke, 2 R. I. 67.

are governed by the general rules regulating appeals generally.[97]

VII. ACTIONS BY TEACHERS. — **Remedies Generally.** — A teacher may bring an action to recover his compensation,[98] or he may resort to mandamus,[99] or an action of damages[1] against the officer personally, in a proper case. But equity cannot compel the allowance and payment of money due.[2] A teacher who has been wrongfully discharged may sue at law for the recovery of his salary,[3] or for damages for a breach of the contract,[4] or he may compel his reinstatement by mandamus in a proper case.[5] But a wrongful discharge of a teacher

97. See the titles "**Appeals;**" "**Writ of Error;**" and the titles dealing with particular phases of appellate procedure.

[a] **School directors may appeal without having first appeared** in the county court, and asking to be made parties. School District No. 44 *v.* Rural Special School Dist. No. 10, 128 Ark. 383, 194 S. W. 241.

[b] **Secretary** may execute appeal bond. School Dist. No. 8 *v.* Erskin, 1 Colo. 367.

98. **Cal.**—Roussin *v.* Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123, findings held supported by evidence. **Ga.**—Wheeler *v.* Board of Public Education, 12 Ga. App. 152, 76 S. E. 1035. **Minn.**—Martin *v.* Elwood, 35 Minn. 309, 29 N. W. 135.

[a] **Even though mandamus** would lie. Martin *v.* Elwood, 35 Minn. 309, 29 N. W. 135.

[b] **Recovery on an account** may be had. School Town of Rochester *v.* Shaw, 100 Ind. 268; Cashen *v.* School Dist. No. 12, 50 Vt. 30.

[c] **Attorney's fees** not recovered. School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

99. See *supra*, III, E.

1. **Mo.**—McCutchen *v.* Windsor, 55 Mo. 149. **Ohio.**—Gregory *v.* Small, 39 Ohio St. 346. **Pa.**—Philadelphia *v.* Johnson, 47 Pa. 382. See Burton *v.* Fulton, 49 Pa. 151. **Tenn.**—See Meadows *v.* Nesbit, 12 Lea 486. **Wis.**—Edson *v.* Hayden, 18 Wis. 627, where treasurer with money on hand refuses to pay teacher's wages.

2. Cotton *v.* Reed, 20 Ill. 607, remedy is by mandamus.

3. **Ind.**—Henry School Tp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393. **Mo.**—McCutchen *v.* Windsor, 55 Mo. 149. **Okla.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336; School Dist. No. 13 *v.* Ward, 40 Okla. 97, 136 Pac. 588. **Pa.**—Ryan *v.* Reddington, 240 Pa. 350, 87 Atl. 285. **Tex.**—Jones *v.* Dodd (Tex. Civ. App.), 192 S. W. 1134.

[a] **Separate actions for each installment** as it comes due may be brought. Ryan *v.* Reddington, 240 Pa. 350, 87 Atl. 285.

4. **Ind.**—Oil School *v.* Marting, 27 Ind. App. 525, 61 N. E. 740. **Ky.** Mock *v.* County Board of Education, 145 Ky. 715, 141 S. W. 38. **Mo.**—McCutchen *v.* Windsor, 55 Mo. 149. **Ohio.** Shuck *v.* Board of Education, 92 Ohio St. 55, 110 N. E. 533, "at common law, a teacher who had been dismissed was without redress." **Okla.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336. **Pa.**—Ryan *v.* Reddington, 240 Pa. 350, 87 Atl. 285. **W. Va.**—Robinson *v.* Board of Education, 70 W. Va. 66, 73 S. E. 337.

5. **Cal.**—Kennedy *v.* Board of Education, 82 Cal. 483, 22 Pac. 1042; Taylor *v.* Marshall, 12 Cal. App. 549, 107 Pac. 1012. See Stockton *v.* Board of Education, 145 Cal. 246, 78 Pac. 730. **Conn.**—Gilman *v.* Bassett, 33 Conn. 298. **Ore.**—Richards *v.* District School Board, 78 Ore. 621, 153 Pac. 482, Ann. Cas. 1917 D, 266, L. R. A. 1916 C, 789. **Tex.**—Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

See Zantzinger *v.* Manning, 123 Md. 169, 90 Atl. 839; Jordan *v.* Board of Education, 14 Misc. 119, 35 N. Y. Supp. 247, denying writ as relator's right was not clear.

[a] **But a discretion as to removal of teachers** will not be controlled. **D. C.**—United States *ex rel.* Nalle *v.* Hoover, 31 App. Cas. 311. **N. Y.** People *ex rel.* Peixotto *v.* Board of Education, 212 N. Y. 463, 106 N. E. 307. **Tex.**—Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

[b] **The fact that another teacher was installed** does not preclude relief. Kennedy *v.* Board of Education, 82 Cal. 483, 22 Pac. 1042.

will not be enjoined.[6] Where no appeal is provided for, certiorari lies.[7]

Conditions Precedent. — Any conditions precedent to the bringing of a suit for teacher's wages must be complied with before suit brought.[8]

Parties. — Several teachers who are wrongfully dismissed cannot maintain a joint action therefor.[9] And in an action for damages the board and a trustee liable for a personal tort cannot be joined as defendants.[10]

Pleading. — In an action for compensation of a teacher, the plaintiff's pleading must allege possession of a certificate of qualification,[11] and presentation thereof to the directors,[12] a hiring of the plaintiff in the manner prescribed by law,[13] a compliance with statutory re-

6. **Ill.**—Chatham *v.* Davis, 183 Ill. App. 506, revocation of certificate. **Ind.** Schwier *v.* Zitike, 136 Ind. 210, 36 N. E. 30. **Okla.**—Greer *v.* Austin, 40 Okla. 113, 136 Pac. 590, 51 L. R. A. (N. S.) 336. **Pa.**—Ryan *v.* Reddington, 240 Pa. 350, 87 Atl. 285.

7. **Ill.**—Chatham *v.* Davis, 183 Ill. App. 506, where superintendent revoked certificate. **Md.**—Riggs *v.* Green, 118 Md. 218, 84 Atl. 343, if the procedure before the board is irregular or illegal. **N. Y.**—Jordan *v.* Board of Education, 14 Misc. 119, 35 N. Y. Supp. 247, denying writ because of laches.

8. See *infra*, this note.

[a] **A teacher must appeal** (1) to the superintendent before resort to the courts to enforce claims for salaries. **Ia.**—Jackson *v.* Independent School Dist., 110 Iowa 313, 81 N. W. 596. **N. J.**—Draper *v.* Comrs. of Public Instruction, 66 N. J. L. 54, 48 Atl. 556. **Tex.** Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120 (where teacher was dismissed); Boyles *v.* Potter County (Tex. Civ. App.), 177 S. W. 210 (where approval of voucher was refused); Adkins *v.* Heard (Tex. Civ. App.), 163 S. W. 127. *Compare* Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506, mandamus may be resorted to where an appeal would not be adequate. **Wash.**—Van Dyke *v.* School Dist. No. 77, 43 Wash. 235, 86 Pac. 402. *Compare* Burkhead *v.* Independent School Dist., 107 Iowa 29, 77 N. W. 491 (holding a teacher discharged without a hearing because of illegality of the contract need not appeal); Robinson *v.* Board of Education, 70 W. Va. 66, 73 S. E. 337. (2) But a judgment rendered without such appeal, although erroneous, is not void. Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120.

[b] **But a teacher wrongfully discharged** need not present his demand for allowance before bringing suit. Taylor *v.* School Dist. No. 1, 15 Ariz. 262, 138 Pac. 13; Oil School *v.* Marting, 27 Ind. App. 525, 61 N. E. 740.

[c] **Mandamus to compel reinstatement** is not a condition precedent to a suit for wages where a teacher retired on a pension was not reduced in rank or removed. Moore *v.* Board of Education, 121 App. Div. 862, 106 N. Y. Supp. 983.

9. Ryan *v.* Reddington, 240 Pa. 350, 87 Atl. 285.

10. Mock *v.* County Board of Education, 145 Ky. 715, 141 S. W. 38.

11. **Ill.**—Casey *v.* Baldridge, 15 Ill. 65. **Ind.**—Jackson School Tp. *v.* Farlow, 75 Ind. 118. **Kan.**—Hamrick *v.* Board of Education, 28 Kan. 385. **Me.** See Dore *v.* Billings, 26 Me. 56. **Minn.** Ryan *v.* School Dist. No. 13, 27 Minn. 433, 8 N. W. 146.

Compare Ellis *v.* Sharp, 42 Hun 179, 4 N. Y. St. 687. *Contra*, Dogan *v.* School Dist. No. 3, 35 Vt. 520.

[a] **A general allegation that plaintiff was legally qualified** to teach is insufficient. Casey *v.* Baldridge, 15 Ill. 65. See Jackson School Tp. *v.* Farlow, 75 Ind. 118.

[b] **Amendment** to supply omission permissible. Ryan *v.* School Dist. No. 13, 27 Minn. 433, 8 N. W. 146.

12. Botkin *v.* Osborne, 39 Ill. 101; Casey *v.* Baldridge, 15 Ill. 65.

13. Ryan *v.* School Dist. No. 13, 27 Minn. 433, 8 N. W. 146.

[a] **That school district and the teacher entered into an agreement** in writing is sufficient. Ryan *v.* School Dist. No. 13, 27 Minn. 433, 8 N. W. 146.

[b] **Employment by the school town** is sufficient without alleging employ-

quirements,[14] and a breach of the contract.[15] That there are sufficient funds on hand with which to pay the claim need not be alleged,[16] unless it is sought to hold the officer personally liable for failure to pay the claim when he has money on hand.[17]

Plea or Answer. — The general rules relating to pleas and answers generally apply to this proceeding.[18]

Questions of Law and Fact. — Questions of fact are for the jury in accordance with the general rules.[19]

Judgment. — Judgment must be rendered and enforced in accordance with the general rules.[20]

VIII. ACTIONS ON BONDS OF DEFAULTING OFFICERS. Actions on the bonds of defaulting school officers should be brought in the name of the obligee of the bond,[21] and may be brought in the name of the school district,[22] school trustee,[23] or in the name of the

ment by trustees. School Town of Rochester *v.* Shaw, 100 Ind. 268.

[c] **Filing copy of contract** with pleading is required by statute. Owen School Tp. *v.* Hay, 107 Ind. 351, 8 N. E. 220.

14. Owen School Tp. *v.* Hay, 107 Ind. 351, 8 N. E. 220, as to making report of school.

15. Botkin *v.* Osborne, 39 Ill. 101 (as to form of allegation); Ellis *v.* Sharp, 42 Hun 179, 4 N. Y. St. 687.

16. Gay *v.* Bankston, 100 Ala. 280, 13 So. 939; Harrison School Tp. *v.* McGregor, 96 Ind. 185; Harmony School Tp. *v.* Moore, 80 Ind. 276; Rutherford School Tp. *v.* Craney, 51 Ind. App. 236, 99 N. E. 485. But see Boyles *v.* Potter County (Tex. Civ App.), 177 S. W. 210.

17. Edson *v.* Hayden, 18 Wis. 627.

[a] **Amendment** to supply allegation allowed. Edson *v.* Hayden, 18 Wis. 627.

18. See 11 STANDARD PROC. 1010, also the titles "**Answers;**" "**Confession and Avoidance;**" "**Denials;**" "**Pleas;**" and titles dealing with particular pleas and defenses.

[a] **Breach of duty by plaintiff** must be set up in the answer. Ellis *v.* Sharp, 42 Hun 179, 4 N. Y. St. 687.

[b] **Answer setting up discharge** of teacher must set up facts authorizing dismissal. Crawfordsville *v.* Hays, 42 Ind. 200, 210.

[c] **An answer setting up lack of funds,** must show the funds were paid out according to law. Gay *v.* Bankston, 100 Ala. 280, 13 So. 939. See, also, Rutherford School Tp. *v.* Craney, 51 Ind. App. 236, 99 N. E. 485.

[d] **Striking Immaterial Allegation.** School Dist. No. 25 *v.* Stone, 14 Colo. App. 211, 59 Pac. 885.

19. See the title "**Province of Court and Jury.**"

[a] **Existence of grounds for removal.** McCutchen *v.* Windsor, 55 Mo. 149; School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954. See Shuck *v.* Board of Education, 92 Ohio St. 55, 110 N. E. 533.

[b] **Acceptance of Substitute's Services.**—Southern Indust. Inst. *v.* Hellier, 142 Ala. 686, 39 So. 163.

20. See the titles "**Judgments;**" "**Judgments and Decrees, Enforcement Of.**"

[a] **Rendition of judgment, where there are no funds on hand,** is not permissible where the lack of funds is the only reason for refusing to pay the claim. Jay *v.* School Dist. No. 1, 24 Mont. 219, 61 Pac. 250.

[b] **Judgment must be enforced** by statute by taking out a special execution which may be enforced by attachment or mandamus. Rogers *v.* People *ex rel.* Brewer, 68 Ill. 154.

21. Fuller *v.* Fullerton, 14 Barb. (N. Y.) 59; School Directors *v.* Coe, 44 Wis. 103; Cassville *v.* Morris, 14 Wis. 440.

[a] **Where, on change of districts,** the statute confers on town school directors all powers of school district boards, the former may sue on a bond running to the latter. School Directors of Sigel *v.* Coe, 40 Wis. 103.

22. School Dist. No. 9 *v.* Brand, 71 Kan. 728, 81 Pac. 473; Armstrong *v.* Durland, 11 Kan. 15; Board of School Directors *v.* Kuhnke, 155 Wis. 343, 144 N. W. 987; Joint School Dist. No. 1 *v.* Lyford, 27 Wis. 506.

23. Bedwell *v.* Jones, 9 Lea (Tenn.) 168.

county[24] or state,[25] in accordance with the general rules.[26]

IX. CONTESTING TITLE TO OFFICE. — Quo warranto is the proper remedy to try the title to office of a school officer,[27] not injunction.[28]

X. CRIMES OF SCHOOL OFFICIALS. — An indictment or information against school officials should charge the offense in accordance with the general rules.[29]

XI. CRIMES AGAINST COMPULSORY EDUCATION LAWS. An information or complaint for violation of the compulsory education laws should charge the offense in accordance with the rules elsewhere treated.[30]

24. Madison Co. *v.* Tullis, 69 Iowa 720, 27 N. W. 487, as trustee of express trust.

25. Nichols *v.* State *ex rel.* Clark, 65 Ind. 512 (on relation of county superintendent); State *ex rel.* Salt Creek Civil Tp. *v.* Stevens (Ind. App.), 114 N. E. 873 (action on relation of trustee); State *v.* Bonner, 5 Mo. App. 13.

26. County Comrs. of Green County *v.* Smith, 4 Ill. 227 (allegations of breach); Kintner *v.* State, 3 Ind. 86, sustaining demurrer where one breach is sufficiently assigned. See the title "**Parties,**" and also 11 STANDARD PROC. 957, *et seg.*

[a] **Sureties on different bonds** may be joined. Holeran *v.* School Dist. No. 17, 10 Neb. 406, 6 N. W. 472.

[b] **School children are not necessary parties** to suit on bond for failure to account for school tax. Anderson *v.* Hays, 99 Tenn. 542, 42 S. W. 266.

[c] **A demand** is not a prerequisite to the maintenance of the suit where the officer conceals himself or removes from the county. Jenks *v.* School Dist. No. 38, 18 Kan. 356.

[d] **Recovery as to school and township money** in one action. Inglis *v.* State, 61 Ind. 212.

27. Dalby *v.* Hancock, 125 N. C. 325, 34 S. E. 516.

28. Schmohl *v.* Williams, 215 Ill. 63, 74 N. E. 75; Appeal of Gilroy, 100 Pa. 5. See the title "**Officers.**"

29. **Ind.**—Lathrop *v.* State, 6 Blackf. 502 (failure to report money received); Duty *v.* State, 9 Ind. App. 595, 36 N. E. 655, illegal creation of debt. **Ia.** State *v.* Stiles, 40 Iowa 148, misconduct in issuing school orders. **Mass.**—Com. *v.* Sheffield, 11 Cush. 178, neglecting to maintain high school. **N. H.**—State *v.* Demerritt, 64 N. H. 313, 9 Atl. 99 (failure to record warrant of meeting); State *v.* Corbett, 64 N. H. 311, 9 Atl. 629, failure to give warrant of school meeting. **Pa.**—Com. *v.* Swan, 19 Pa. Dist. 624, issuing employment certificate to pupil unable to read. **S. C.** State *v.* Elliott, 94 S. C. 35, 77 S. E. 728, fraudulent building of school on land of director. **Tenn.**—State *v.* Keeton, 9 Baxt. 559, making contract with director. See the title "**Indictment and Information.**"

30. State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234, negativing exceptions.

See the title "**Indictment and Information.**"

[a] **The name of the child** and its age and relationship to the defendant should be stated. Odam *v.* State (Tex. Crim.), 194 S. W. 829.

SCILICET

By the Editorial Staff.

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II. THE OFFICE AND EFFECT, 358

CROSS-REFERENCES:

Indictment and Information.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION. — Scilicet, and the synonymous term videlicet, mean to-wit, that is to say, namely.[1]

II. THE OFFICE AND EFFECT of a scilicet is to particularize what is too general in a preceding sentence, and render clear, and of certain application, what might seem otherwise doubtful or obscure.[2] If contrary to its premises it is void;[3] therefore it must neither increase nor diminish the preceding matter, nor change its meaning,[4]

1. See Bouv. L. Dict. and also cases cited in the notes following.

As synonymous with "innuendo" in action of libel and slander, see 18 STANDARD PROC. 906.

Use of in indictment and information, see 12 STANDARD PROC. 326. Effect of repugnant non-traversable matter under a scilicet in an indictment, see 12 STANDARD PROC. 342.

Intoxicating Liquors.—Use of scilicet in restricting kind of illicit liquor sold, see 14 STANDARD PROC. 390; in stating amount of liquor illegally sold, see 14 STANDARD PROC. 402, *n.*

2. **Ky.**—Cotton *v.* Ward, 3 Mon. 304. **Minn.**—Buck *v.* Lewis, 9 Minn. 314. **Miss.**—Sullivan *v.* State, 67 Miss. 346, 7 So. 275. **N. Y.**—Gleason *v.* McVickar, 7 Cow. 42. **Pa.**—Haak *v.* Breidenbach, 6 Binn. 12. **Vt.**—Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639. **Va.**—Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962. **Eng.**—Dakin's Case, 2 Wms. Saund. 290, 85 Eng. Reprint 1077, note (1).

[a] **Nature.**—"It is not a substantive clause of itself, and therefore you can neither begin a sentence with it, nor make a sentence of it by itself; but it is (as I may say) clausula ancillaris, a kind of handmaid to another clause, and to deliver her mind, not her own. And therefore it is a kind of interpreter; her natural and proper use is to particularize that that is before general; or distribute that that is in gross, or to explain that that is doubtful and obscure." Stukeley *v.* Butler, 1 Hob. 168, 80 Eng. Reprint 316.

3. **Ky.** — Cotton *v.* Ward, 3 Mon. 304. **Pa.**—Haak *v.* Breidenbach, 6 Binn. 12. **Eng.**—Dakin's Case, 2 Wms. Saund. 290, 85 Eng. Reprint 1077; Cutler *v.* Southern, 1 Wms. Saund. 116, 85 Eng. Reprint 125; Skinner *v.* Andrews, 1 Wms. Saund. 169, 85 Eng. Reprint 170; Stukeley *v.* Butler, 1 Hob. 168, 80 Eng. Reprint 316.

4. Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639; Skinner *v.* Andrews, 1 Wms. Saund. 169, 85 Eng. Reprint 170; Stukeley *v.* Butler, 1 Hob. 168, 80 Eng. Reprint 316.

but it may be used to restrict when the former words are general, narrowing their application to a particular case.[5] It cannot be used to introduce that which follows.[6]

In pleading, aside from its use to explain, limit, or make certain,[7] the scilicet is used to avoid making a positive averment of an immaterial matter which, if stated positively, must be strictly proved, such as the precise day on which a thing occurred, or place, name, manner, number, or amount.[8] But when the matter alleged is material and traversable, and must be stated with exactness and certainty, the statement of such matter under a scilicet will not avoid the consequences of a variance.[9] So, when an averment is material, the addition of a scilicet does not render it immaterial,[10] but the want of a scilicet will, in some cases, make an averment material that would not otherwise be so.[11] When a scilicet contains that which is material and necessary to be alleged, it is considered a direct and positive averment or affirmation and may therefore be traversed and issue

5. **Ala.**—Kilgore & Son *v.* Shannon & Co., 6 Ala. App. 537, 60 So. 520. **Conn.** Mallett *v.* Stevenson, 26 Conn. 428. **Mass.**—Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420. **Miss.**—Sullivan *v.* State, 67 Miss. 346, 7 So. 275. **Vt.** Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639. **Eng.** Stukeley *v.* Butler, 1 Hob. 168, 80 Eng. Reprint 316.

6. Gilligan *v.* Com., 99 Va. 816, 830, 37 S. E. 962.

7. Com. *v.* Quinlan, 153 Mass. 483, 27 N. E. 8; Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

[a] "**The precise and legal use** of a videlicet in every species of pleading is to enable the pleader to isolate, to distinguish, and to fix with certainty, that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects." Com. *v.* Hart, 4 Gray (Mass.) 465, 64 Am. Dec. 83.

8. **U. S.**—St. Charles *v.* Stookey, 154 Fed. 772, 85 C. C. A. 494. **Ala.**—Central Lumb. & Timber Co. *v.* McClure Lumb. Co., 180 Ala. 606, 61 So. 821; Birmingham Ry. L. & P. Co. *v.* Mosely, 164 Ala. 111, 51 So. 424; Pharr *v.* Bachelor, 3 Ala. 237; Kilgore & Son *v.* Shannon & Co., 6 Ala. App. 537, 60 So. 520. **Ill.**—Brown *v.* Berry, 47 Ill. 175; Prescott *v.* Guyler, 32 Ill. 312; Columbian Three Color Co. *v.* Aetna Life Ins. Co., 183 Ill. App. 384; Rose *v.* Mutual Life Ins. Co., 144 Ill. App. 434; Chicago Terminal Trans. Co. *v.* Young, 118 Ill. App. 226. **Mass.**—Thompson *v.* Crooker, 9 Pick. 59; Paine *v.* Fox, 16 Mass. 129. **Mich.**—Lothrop *v.* Southworth, 5 Mich. 436. **Minn.**—State *v.* Heck, 23 Minn. 549. **Miss.**—Sullivan *v.* State, 67 Miss. 346, 7 So. 275. **Va.** Taylor's Admr. *v.* Bank of Alexandria, 5 Leigh (32 Va.) 471.

[a] **An immaterial allegation cannot be made material** by being averred under a videlicet. Schiller *v.* Madden, 190 Ill. App. 624.

9. **Fla.**—Dawkins *v.* Smithwick, 4 Fla. 158. **N. Y.**—Gleason *v.* McVickar, 7 Cow. 42; Vail *v.* Lewis, 4 Johns. 450, 4 Am. Dec. 300. **Vt.**—Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639; Derragon *v.* Rutland, 53 Vt. 123, 3 Atl. 332; Ladue *v.* Ladue, 16 Vt. 189.

[a] **Improper Use.**—When it is material that a certain time be alleged, it is improper to allege a date under a videlicet. Steele-Wedeles Co. *v.* Shoodoc Pond Pkg. Co., 153 Ill. App. 576.

10. Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670.

11. **Miss.**—See Sullivan *v.* State, 67 Miss. 346, 7 So. 275, note. **N. Y.**—Jansen *v.* Ostrander, 1 Cow. 670. **Eng.** Dakin's Case, 2 Wms. Saund. 290, 85 Eng. Reprint 1077, note (1).

[a] **Stating Time or Amount.**—"Where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a videlicet; if he does not, he will be bound to prove the exact sum or day laid, it being a settled distinction that where anything which is not material is laid under a videlicet, the party is not concluded by it; but he is, where

taken upon it,[12] but not when the allegation is immaterial.[13] The general rule in relation to allegations under a scilicet, seems to be that if they be impossible, or contrary, or repugnant to the preceding matter, they must be rejected as surplusage;[14] but where they are used to explain what goes before them, and are consistent with the preceding matter, they are material and traversable.[15] But, however inconsistent an averment laid under a scilicet is with a subsequent allegation, it cannot be regarded for that reason alone as surplusage.[16]

there is no videlicet.'' Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670, 676.

12. **Mass.**—Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420. **N. Y.** Gleason *v.* McVickar, 7 Cow. 42; Jansen *v.* Ostrander, 1 Cow. 670. **Vt.** Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639. **Eng.** Skinner *v.* Andrews, 1 Wms. Saund. 169, 85 Eng. Reprint 170.

13. Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; Gleason *v.* McVickar, 7 Cow. (N. Y.) 42.

14. **Miss.**—Sullivan *v.* State, 67 Miss. 346, 7 So. 275. **N. Y.**—Gleason *v.* McVickar, 7 Cow. 42. **Pa.**—Haak *v.* Breidenbach, 6 Binn. 12. **Eng.**—Bishop of Lincoln *v.* Wolferstan, 1 W. Black. 490, 495, 3 Burr. 1504, 96 Eng. Reprint 284.

15. **Ala.**—Birmingham Ry. L. & P. Co. *v.* Moseley, 164 Ala. 111, 51 So. 424. **Mass.**—Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420. **Miss.**—Sullivan *v.* State, 67 Miss. 346, 7 So. 275. **N. Y.** Gleason *v.* McVickar, 7 Cow. 42. **Eng.** Dakin's Case, 2 Wms. Saund. 290, 85 Eng. Reprint 1077, note (1).

16. The King *v.* Stevens, 5 East 244, 102 Eng. Reprint 1063.

SCIRE FACIAS

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CROSS-REFERENCES:

Judgments and Decrees, Revivor.
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For forms, see 9 STANDARD PROC. 1112.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION, NATURE AND BASIS OF WRIT. — A scire facias is a judicial writ founded on some matter of record, as a suit, judgment, or recognizance, on which it lies either to enforce execution or for some other purpose.[1]

Though in strictness a scire facias is a judicial writ,[2] yet in a certain degree it is in the nature of an original writ and is therefore

1. Malsberger *v.* Parsons, 1 Boyce (Del.) 254, 75 Atl. 698.

[a] **For other definitions** see **U. S.** Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487; Pullman Palace Car Co. *v.* Washburn, 66 Fed. 790. **Ill.**—Strauss *v.* Merchants' Loan & Trust Co., 119 Ill. App. 588. **Ia.**—Vredenburgh *v.* Snyder, 6 Iowa 39. **Me.**—Pillsbury *v.* Smyth, 25 Me. 427. **Md.**—Bowie *v.* Neale, 41 Md. 124. **N. J.**—Boylan *v.* Anderson, 3 N. J. L. 529. **Tenn.**—Gregory *v.* Chadwell, 3 Coldw. 390; State *v.* Scott, 2 Swan 332. **Can.**—Gwatkin *v.* Harrison, 36 U. C. Q. B. 478.

[b] **Scire facias is a judicial writ,** (1) founded on some matter or proceeding of record, a regular and judicial statement of which is to further and accomplish the end and intent of that record, by insuring its proper operation in behalf of the parties legally interested therein. Pillsbury *v.* Smyth, 25 Me. 427. (2) Scire facias is a judicial writ at common law to revive judgments, or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered. Eagan *v.* Chicago G. W. Ry. Co., 163 Fed. 344.

2. U. S.—Owens *v.* Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. ed. 837; Egan *v.* Chicago G. W. Ry. Co., 163 Fed. 344; Pullman Palace Car Co. *v.* Washburn, 66 Fed. 790. **Del.**—Malsberger *v.* Parsons, 1 Boyce 254, 75 Atl. 698. **Ill.**—Challenor *v.* Niles, 78 Ill. 78. **Mass.**—McGee *v.* Barber, 14 Pick. 212. **Mo.**—Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111.

[a] "**Originally** a scire facias was a judicial writ; and it is so still, in its principal characteristics. It is so far a judicial writ, that it takes up a cause in which other proceedings have been had; it issues upon some existing record; and it must issue from the court in which such proceedings have been had, and where such record remains." McGee *v.* Barber, 14 Pick. (Mass.) 212.

[b] **A Writ of Execution.**—A scire

called an action.[3] Thus it is said to be an action because the defendant may appear and plead,[4] or becomes converted into an action by such appearance and plea.[5] The writ, however, must be based upon some matter of record,[6] and the cases in which it is employed are divided into two classes according to the nature of that record—when founded upon a judicial record the writ is merely a continuance of

facias "is not an original, but a judicial writ—a writ of execution." Shea *v.* Starr, 76 N. H. 538, 85 Atl. 788.

3. **Del.**—Malsberger *v.* Parsons, 1 Boyce 254, 75 Atl. 698. **N. Y.**—Murphy *v.* Cochran, 1 Hill 339. **Tenn.** State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; Gregory *v.* Chadwell, 3 Coldw. 390.

4. **U. S.**—Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491. **Ark.**—Hubbard *v.* Bolls, 7 Ark. 442. **Conn.** Smyth *v.* Ripley, 33 Conn. 306. **Ga.** Heath *v.* Bates, 70 Ga. 633. **Ill.**—Gibbons *v.* Goodrich, 3 Ill. App. 590. **Md.** Wright *v.* Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806; Kirkland *v.* Krebs, 34 Md. 93. **Mass.**—Com. *v.* Stebbins, 4 Gray 25. **Miss.**—Pollard *v.* Eckford, 50 Miss. 631. **Mo.**—Walsh *v.* Bosse, 16 Mo. App. 231; Simpson *v.* Watson, 15 Mo. App. 425. **N. H.**—State *v.* Kinne, 39 N. H. 129. **N. J.**—Castner *v.* Styer, 23 N. J. L. 236. **N. Y.**—Thurston *v.* King, 1 Abb. Pr. 126. **Vt.**—State *v.* Dwyer, 70 Vt. 96, 39 Atl. 629. **Eng.**—Grey *v.* Jones, 2 Wils. K. B. 251, 95 Eng. Reprint 794. **Can.**—Gwatkin *v.* Harrison, 36 U. C. Q. B. 478.

[a] **Writ and Action Distinguished.** Scire facias is a judicial writ issuing out of the court where the record is. But because the defendant may plead thereto, it is called an action. For some purposes at common law, it was in the nature of an original action, as to repeal letters patent or to recover upon a recognizance. But when the purpose is to revive a judgment against an executor or administrator, so as to charge the personal representative with the duty of payment, and have the right to execution against the decedent's effects, it is but the continuation of the former suit, and not an original proceeding. In one sense for all purposes it is in the nature of an action, because the defendant may plead to it. Pollard *v.* Eckford, 50 Miss. 631.

5. Collins *v.* McBlair, 29 App. Cas. (D. C.) 354.

[a] **Effect of Defendant's Appearance and Plea.**—Scire facias to renew a former judgment is a judicial writ, which may, however, be converted into an action by appearance and plea thereto by the defendant. It is not the equivalent of an action upon the judgment. As a judicial writ its function is to continue the effect and have execution of a former judgment. If the defendant appears and enters a plea setting up such matters as may be commonly pleaded in bar of a former judgment, the proceeding under the writ then becomes converted into an action. If not so converted into an action by the appearance and plea of the defendant, it remains a judicial writ, merely, the life of which is ended and its force spent after a year and a day from the date of issuance. Collins *v.* McBlair, 29 App. Cas. (D. C.) 354.

6. **U. S.**—Winder *v.* Calwell, 14 How. 434, 14 L. ed. 487; Egan *v.* Chicago G. W. Ry. Co., 163 Fed. 344; Bentley *v.* Sevier, Hempst. 249, 30 Fed. Cas. No. 18,233. **Ala.**—Lloyd *v.* State, Minor 34. **Fla.**—State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72; Brown *v.* Harley, 2 Fla. 159. **Ill.**—Challenor *v.* Niles, 78 Ill. 78; Chestnut *v.* Chestnut, 77 Ill. 346. **Mass.**—Com. *v.* Stebbins, 4 Gray 25; Sigourney *v.* Stockwell, 4 Metc. 518. **N. J.**—Police Comrs. *v.* Pritchard, 36 N. J. L. 101; Condit *v.* Gregory, 21 N. J. L. 429. **Tenn.**—State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; Frierson *v.* Harris' Heirs, 5 Coldw. 146, 94 Am. Dec. 220; Martin *v.* Gorden, 4 Hayw. 173. **Vt.**—Walsh *v.* Haswell, 11 Vt. 85.

[a] **Void Record.**—If the record is void the writ is necessarily void. State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563.

[b] **An assessment** of a privilege tax on persons for selling intoxicating liquors may be the basis of a scire facias. State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563.

a former action,[7] but when based upon a nonjudicial record it partakes of the nature of an original writ and is the commencement and foundation of the action.[8]

II. OBJECT AND USE OF WRIT. — A. In General. — The ordinary purpose of a scire facias is to continue or enforce the record upon which it is based.[9] In jurisdictions where it is used it is employed to revive judgments,[10] to vacate an entry of satisfaction of judgment,[11] to revive actions on the death of a party,[12] to enforce a penalty for violating an injunction,[13] to enforce mechanics' liens,[14] to foreclose mortgages,[15] to enforce the dissolution of a corporation for forfeiture,[16] to repeal letters patent at common law,[17] to cancel land grants improperly made or forfeited,[18] to proceed against a garnishee against whom a conditional judgment has been rendered,[19] or who defaults in the payment of the fund held by him.[20]

B. To Enforce Judgments. — **1. In General.** — A writ of scire facias is not employed, as a rule, to enforce a judgment,[21] but it is properly used, in those jurisdictions where it still obtains, to enforce the payment of alimony,[22] or judgments at law for sums of money in instalments.[23] Generally, however, with respect to the enforce-

7. **U. S.**—Lafayette *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360. **Conn.**—Sherwood *v.* Stevenson, 25 Conn. 431. **Del.** Malsberger *v.* Parsons, 1 Boyce 254, 75 Atl. 698; Van Vranken *v.* Roberts, 7 Del. Ch. 16, 29 Atl. 1044. **Fla.**—Brown *v.* Harley, 2 Fla. 159. **Ga.**—Heath *v.* Bates, 70 Ga. 633. **Me.**—Adams *v.* Rowe, 11 Me. 89, 25 Am. Dec. 266; Todd *v.* Darling, 11 Me. 34. **Miss.** Breckenridge's Admr. *v.* Mellon's Admr., 1 How. 273. **Mo.**—State *v.* Hoeffner, 124 Mo. 488, 28 S. W. 1; Coomes *v.* Moore, 57 Mo. 338; Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111. **N. C.**—McDowell *v.* Asbury, 66 N. C. 444; Binford *v.* Alston, 15 N. C. 351. **Ohio.**—Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462. **Tenn.**—State *v.* Scott, 2 Swan 332. **Vt.**—Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489; Gibson *v.* Davis, 22 Vt. 374. **Eng.**—Wright's Exrs. *v.* Nutt, 1 T. R. 388, 99 Eng. Reprint 1154.

8. **Del.**—Malsberger *v.* Parsons, 1 Boyce 254, 75 Atl. 698. **Ga.**—Calhoun *v.* Cawley, 104 Ga. 335, 30 S. E. 773. **Me.**—Potter *v.* Titcomb, 13 Me. 36. **Md.**—Bish *v.* Williar, 59 Md. 382. **N. J.**—Greenway *v.* Dare, 6 N. J. L. 305. **N. C.**—McDowell *v.* Asbury, 66 N. C. 444. **Ohio.**—Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462. **Tenn.**—State *v.* Scott, 2 Swan 332. **Vt.**—State Treasurer *v.* Foster, 7 Vt. 52.

[a] **"When founded upon a recognizance** the proceeding is an original, when based upon a judgment, or issued for the purpose of bringing in new parties, the proceeding is not a new suit, but the continuation of an existing one." Shea *v.* Starr, 76 N. H. 538, 85 Atl. 788.

9. Callahan *v.* Fahey, 10 Pa. Co. Ct. 488.

10. See 16 Standard Proc. 512.

To revive a justice's judgment, see 18 Standard Proc. 146, 149.

11. See 16 Standard Proc. 592.

12. See the title **"Revivor."**

13. See 13 Standard Proc. 310.

14. See 19 Standard Proc. 616.

15. See 19 Standard Proc. 909.

16. See 5 Standard Proc. 575.

To enforce forfeiture of a bank's charter, see 4 Standard Proc. 46.

17. Reg. *v.* Eastern Archipelago Co., 1 E. & B. 310, 17 Jur. 491, 22 L. J. Q. B. 196, 72 E. C. L. 310, 18 Eng. L. & Eq. 167, 118 Eng. Reprint 452; Reg. *v.* Pattee, 5 Ont. Pr. 292.

18. Calhoun *v.* Cawley, 104 Ga. 335, 30 S. E. 773; Walker *v.* Wells, 17 Ga. 547, 63 Am. Dec. 252.

19. See 10 Standard Proc. 572.

20. See 10 Standard Proc. 577.

21. See Jones *v.* Dilworth, 63 Pa. 447; McCann *v.* Farley, 26 Pa. 173.

22. See 7 Standard Proc. 836.

23. Outen *v.* Mitchels, 1 Bibb (Ky.) 360; Collins *v.* Collins, 2 Burr. 820, 97

ment of a judgment, it has been used for the purpose of obtaining a new execution when satisfaction had not been received through the original writ of execution.[24] But this method of obtaining a new execution is not now in general use.[25]

2. **Against Administrators and Executors Individually.** — The enforcement of judgments against administrators and executors individually by scire facias is treated elsewhere in this work.[26]

3. **Against New Parties.** — The writ is also used to extend a judgment to include persons originally liable, such as joint debtors, but who were not made parties to the record;[27] and parties who have subsequently become chargeable, such as purchasers, heirs, and devisees.[28]

4. **Judgment of Justice Court Transferred or Affirmed.**[29] — The writ may be issued to secure an execution for enforcing a judgment transferred from a justice court to a court of record,[30] or a judgment affirmed by a court of record on appeal from a justice court,[31] and the rules relating to the requisites and validity of a writ based on a judgment transferred from a justice court to a court of record are the same as those which govern writs of scire facias generally.[32]

C. To Enforce Bond for Costs. — A scire facias has been employed to enforce the payment of a bond for costs,[33] and this has been designated the proper method, in the absence of a statutory

Eng. Reprint 579. But see Chambers *v.* Harger, 18 Pa. 15.

24. **Conn.**—Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Ensworth *v.* Davenport, 9 Conn. 390. **Ky.**—Scott *v.* Maupin, 1 Hard. 122. **Me.**—Prescott *v.* Prescott, 65 Me. 478; Soule *v.* Buck, 55 Me. 30; Steward *v.* Allen, 5 Greenl. 103. **Mass.**—Flagg *v.* Dryden, 7 Pick. 52; Kendrick *v.* Wentworth, 14 Mass. 57. **N. H.**—Green *v.* Bailey, 3 N. H. 33. **Vt.**—Baxter *v.* Tucker, 1 D. Chip. 353.

See also 15 Standard Proc. 785.

25. See 15 Standard Proc. 778.

26. See 8 Standard Proc. 773.

27. Cleveland *v.* Skinner, 56 Ill. 500; Conwell *v.* Thompson, 50 Ill. 329; Ladd *v.* Edwards, 1 Ill. 182; Clinton Bank *v.* Hart, 5 Ohio St. 33.

28. **U. S.**—Ramsey *v.* Hanlon, 33 Fed. 425. **Ga.**—Bryant *v.* Owen, 1 Ga. 355. **Ill.**—Colson *v.* Leitch, 110 Ill. 504; Firebaugh *v.* Hall, 63 Ill. 81; Ryder *v.* Glover, 4 Ill. 547. **Md.** Hanson *v.* Barnes' Lessee, 3 Gill & J. 359, 22 Am. Dec. 322. **Miss.**—Smith *v.* Winston, 2 How. 601. **N. C.**—White *v.* Stanton, 48 N. C. 41; Falconer *v.* Jones, 14 N. C. 334. **Ohio.**—McVickar *v.* Ludeow's Heirs, 2 Ohio 246. **Pa.**—Colwell *v.* Rockwell, 100 Pa. 133; Moore *v.* Skelton, 14 Pa. 359; Benner *v.* Phillips, 9 Watts & S. 13. **Tenn.**—Moore *v.* Webb, 6 Heisk. 301; Hillman *v.* Hickerson, 3 Head 375.

29. **Scire facias as remedy to enforce judgment rendered by justice of the peace,** see 18 Standard Proc. 129.

30. **D. C.**—Green *v.* Mann, 19 App. Cas. 243. **Ind.**—Miller *v.* Shearer, 6 Ind. 50; Oungst *v.* Dils, 4 Ind. 545; Polson *v.* Simpson, 1 Ind. 492. **Ia.** Haggarty *v.* Burr, 22 Iowa 219. **Ore.** Glaze *v.* Lewis, 12 Ore. 347, 7 Pac. 354. **Pa.**—Rice *v.* Kitzelman, 1 Chest. Co. Rep. 173.

See also 15 Standard Proc. 785.

31. Ridley *v.* McKinley Mut. Ben. Society, 45 Pa. Super. 511.

32. **Del.**—Hill *v.* Brown, 4 Harr. 519. **Ind.**—Orput *v.* Hardy, 6 Blackf. 456; Roller *v.* Custer, 6 Blackf. 433; Codding *v.* Moore, 5 Blackf. 601. **Pa.** Huffsmith *v.* Levering, 3 Whart. 110.

See *infra*, VI, A.

[a] **Jurisdiction** of the justice, the want of which is not apparent from an inspection of the record, cannot be questioned in a proceeding of scire facias. Com. Bank *v.* Dunn, 4 Blackf. (Ind.) 513.

33. Searcy *v.* Whitesides, 5 Hayw. (Tenn.) 120.

remedy, to enforce the liability of an indorser on a writ for costs.[34]

D. Use of Writ Discontinued. — Generally, but not universally, the use of the writ of scire facias has been discontinued in the code states.[35]

III. ISSUANCE OF WRIT. — Scire facias may be resorted to only in that court having the record upon which it is founded.[36] It may be issued from any court of record,[37] including the state supreme courts,[38] and federal courts,[39] and in some jurisdictions by a justice of the peace.[40] The writ is issued by the clerk upon application, without the previous leave or order of the court,[41] except where the statute or rule provides otherwise,[42] as in case of the revival of a judgment after the lapse of a specified time, in some states.[43] In amicable actions the writ is sometimes dispensed with,[44] but in such[45]

34. **Me.**—Merrill *v.* Walker, 24 Me. 237; How *v.* Godman, 4 Greenl. 79; Reid *v.* Blaney, 2 Greenl. 128. **Mass.** McGee *v.* Barber, 14 Pick. 212. **Ohio.**—Newsom's Admr. *v.* Ran, 18 Ohio 240; Noble *v.* Markley, Wright 177.

35. See the statutes and the following: **Cal.**—Humiston *v.* Smith, 21 Cal. 129, Code of Civil Procedure, § 802. **Mont.**—United States *v.* Ensign, 2 Mont. 396. **Nev.**—Kapp *v.* Seventh Judicial Dist. Court, 32 Nev. 264, 107 Pac. 95, Ann. Cas. 1912D, 177. **N. Y.** Alden *v.* Clark, 11 How. Pr. 209; Cameron *v.* Young, 6 How. Pr. 372. **Ore.** State *v.* Shively, 10 Ore. 267.

36. **U. S.**—Egan *v.* Chicago G. W. Ry. Co., 163 Fed. 344; Pullman Palace Car Co. *v.* Washburn, 66 Fed. 790. **Conn.** Jarvis *v.* Rathburn, Kirby 220. **D. C.** Green *v.* Mann, 19 App. Cas. 243. **Ga.** Walker *v.* Wells, 17 Ga. 547, 63 Am. Dec. 252. **Ill.**—Challenor *v.* Niles, 78 Ill. 78. **Ia.**—Carnes *v.* Crandall, 4 Iowa 151, 10 Iowa 377. **Me.**—State *v.* Brown, 41 Me. 535; State *v.* Smith, 2 Greenl. 62. **Mass.**—Gray *v.* Thrasher, 104 Mass. 373; Osgood *v.* Thurston, 23 Pick. 110; McGee *v.* Barber, 14 Pick. 212. **Miss.** Pollard *v.* Eckford, 50 Miss. 631. **Mo.** Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111. **N. H.** State *v.* Kinne, 39 N. H. 129; Parsons *v.* Pearson, 1 N. H. 336. **N. J.**—Boylan *v.* Anderson, 3 N. J. L. 529. **N. C.** Turner *v.* White, 49 N. C. 116. **Tex.** Garner *v.* Smith, 40 Tex. 505; General Bonding & Casualty Ins. Co. *v.* State, 73 Tex. Crim. 649, 165 S. W. 615. **Vt.** Gibson *v.* Davis, 22 Vt. 374; Walsh *v.* Haswell, 11 Vt. 85. But see Gilson *v.* Gay, 10 Vt. 326, as to issuance from another justice or the county court in instances.

[a] **On Judgment of Justice Filed in Higher Court.**—Upon filing a transcript of the record of a case before a justice of the peace in a higher court, the judgment is placed upon the footing of a judgment of such court, and that court, and not the justice of the peace, is the proper court to issue a scire facias to revive the judgment. Green *v.* Mann, 19 App. Cas. (D. C.) 243.

37. Shumway *v.* Sargeant, 27 Vt. 440.

38. Shumway *v.* Sargeant, 27 Vt. 440.

39. 36 U. S. Stat. at L. 1162; U. S. Rev. St. § 716; 2 U. S. Comb. St. 1916, § 1239; Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337; Pullman Palace Car Co. *v.* Washburn, 66 Fed. 790.

40. See 18 Standard Proc. 129.

41. **D. C.**—Simpson *v.* Minnix, 30 App. Cas. 582. **Md.**—Booth *v.* United States, 11 Gill & J. 373. **Mo.**—Goddard *v.* Delaney, 181 Mo. 564, 80 S. W. 886, discussing the English practice. **Pa.**—See Perry *v.* Davis, 26 Pa. Co. Ct. 72, and 16 Standard Proc. 513.

42. See Simpson *v.* Minnix, 30 App. Cas. (D. C.) 582; Goddard *v.* Delaney, 181 Mo. 564, 80 S. W. 886.

[a] **In Tennessee** the issuance of the writ is a judicial act which requires an order of court. State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; Frierson *v.* Harris' Heirs, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

43. See 16 Standard Proc. 513.

44. Gelston *v.* Donnon, 44 Pa. Super. 280. See 16 Standard Proc. 514, note 71 [b].

45. Gelston *v.* Donnon, 44 Pa. Super. 280.

cases it is considered as having been issued and may be filed at any time.

IV. SERVICE AND RETURN. — A. In General. — Under modern statutes a scire facias is served in the same way that a summons is served,[46] and formal defects in such service, as in other cases, are waived by a general appearance.[47]

B. Who May Serve. — The rules relating to service of process generally, apply to who may serve a writ of scire facias.[48]

C. Place of Service. — The writ, as a general rule, may run to any county in the state, and therefore may be served wherever the defendant resides or is found.[49]

D. Procedure on Failure To Serve. — On a return of nihil to the writ an alias scire facias may be had,[50] and two returns nihil are equivalent to service.[51]

E. Return. — 1. **In General.** — The general rules relating to the return of process apply to the return of a writ of scire facias.[52] The

46. See the statutes and the following cases: **U. S.**—Bentley *v.* Sevier, Hempst. 249, 30 Fed. Cas. No. 18,233. **Ark.**—Hanly *v.* Adams, 15 Ark. 232. **Fla.**—McCallum *v.* Culpepper, 41 Fla. 107, 26 So. 187. **Ga.**—Atwood *v.* Hirsch Bros., 123 Ga. 734, 51 S. E. 742. **N. Y.** Feeter *v.* McCombs, 1 Wend. 19. **Pa.** Philadelphia *v.* Cooper, 212 Pa. 306, 61 Atl. 926; Buchanan *v.* Specht, 1 Phila. 252; Perry *v.* Davis, 26 Pa. Co. Ct. 72; Crawford *v.* Shoe, 14 Pa. Co. Ct. 419.

See also the title "**Service of Process and Papers.**"

47. Fisher *v.* Battaile, 31 Miss. 471; Andrews *v.* Buckbee, 77 Mo. 428.

48. See generally the title "**Service of Process and Papers.**"

[a] **By the sheriff of the county** (1) to whom the writ is directed. Grimke *v.* Mayrant, 2 Brev. (S. C.) 202. (2) Where the writ is directed to a sheriff of one county, but is served by the sheriff of another county, the service is void. Kennedy *v.* People, 15 Ill. 418.

[b] **By a Constable.**—The writ of scire facias may properly be served by a constable who is the only available officer in the county. Gay *v.* State, 20 Tex. 504.

[c] **By a Deputy.**—Service may be made by a deputy, or a special deputy under a statute providing for verification of the return by affidavit. Coursen *v.* Hixon, 78 Ill. 339.

49. **Ill.**—Challenor *v.* Niles, 78 Ill. 78. **Mo.**—Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111. **Tex.**—Dyches *v.* State, 24 Tex. 266.

50. Grimke *v.* Mayrant, 2 Brev. (S. C.) 202.

51. **U. S.**—Kirk *v.* United States, 137 Fed. 753, 70 C. C. A. 187. **Ill.** Choate *v.* People, 19 Ill. 63. **Ind.** Kearns *v.* State, 3 Blackf. 334. **Md.** Weaver *v.* Boggs, 38 Md. 255. **Miss.** Saffold *v.* State, 60 Miss. 928. **Mo.** State *v.* Culp, 39 Mo. 530. **N. Y.**—Cummings *v.* Eden, 1 Cow. 70. **N. C.**—Woodfork *v.* Bromfield, 5 N. C. 187. **Ohio.** Cowden *v.* Stevenson, Wright 116. **Pa.** Taylor *v.* Young, 71 Pa. 81; Gelston *v.* Donnon, 44 Pa. Super. 280; Mulherin *v.* Roach, 39 Pa. Super. 316. **Eng.**—Bromley *v.* Littleton, Yelv. 112, 80 Eng. Reprint 76; Ratcliffe's Case, 2 Dyer 172*a*, 73 Eng. Reprint 377; Barret *v.* Cleydon, 2 Dyer 168*a*, 73 Eng. Reprint 368.

52. See the title "**Returns.**"

[a] **Returned to Court Whence Issued.**—A writ of scire facias, when served, or when service is not possible, is returned by the officer to the court which issues it. Grimke *v.* Mayrant, 2 Brev. (S. C.) 202.

[b] **Amendment.**—The officer may amend his return to a writ of scire facias, at any time in the proceeding, within the discretion of the court. See **U. S.**—Mandeville *v.* McDonald, 3 Cranch C. C. 631, 16 Fed. Cas. No. 9,013. **N. H.**—Dennison *v.* Willson, 16 N. H. 496. **Va.**—Lee *v.* Chilton, 5 Munf. (19 Va.) 407.

[c] **Verification.**—When required by statute, the return should be verified. Dennison *v.* Willson, 16 N. H. 496; Henry *v.* Henry, 1 How. Pr. (N. Y.) 167.

[d] **Vacating.**—Where the return of a scire facias is defective, the rem-

time for making the return is generally fixed by statute,[53] being in some states the return-day of the next regular term of court.[54] In such jurisdictions it should not be returned before that day,[55] and when service is not made the writ should be held for the required period, irrespective of return-day.[56]

2. **Form and Sufficiency.** — The contents of such return are generally the same as the return of a summons.[57] When service is made the return must show a valid service,[58] the writ being returned scire feci;[59] if service cannot be made it is returned nihil, or nihil habet.[60]

V. PARTIES. — In accordance with the general rules relating to the joinder of parties,[61] a writ of scire facias should run against all the parties jointly liable on the obligation which is to be enforced.[62] It cannot be issued against one of two joint debtors, in the absence of statutory authority, unless the liability of one has terminated.[63] The writ may, as a general rule, run against several defendants who are liable severally on the same obligation providing a several judgment is prayed for,[64] but it has been held to the contrary that a joint scire facias will not lie on a several liability,[65] especially when the

edy of the defendant is a motion to quash the return, not a plea in abatement or motion to quash the writ. Mandeville *v.* McDonald, 3 Cranch C. C. 631, 16 Fed. Cas. No. 9,013.

53. See the statutes.

54. **Ind.**—Jebo *v.* Ewing, 5 Blackf. 563. **Ky.** — Hackett *v.* Ford, 4 Mon. 88. **Md.**—Bridges *v.* Adams, 32 Md. 577.

55. Jebo *v.* Ewing, 5 Blackf. (Ind.) 563; Young *v.* Colby, 1 Wright (Ohio) 85.

56. See the statutes and the following cases: **Ky.**—Patrick *v.* Newel, 1 Bibb 323. **Ohio.**—Young *v.* Colby, 1 Wright 85. **Va.**—Green *v.* Thompson, 1 Pat. & H. 427.

57. Davis *v.* Patty, 42 Miss. 509; Perry *v.* Davis, 26 Pa. Co. Ct. 72; Crawford *v.* Shoe, 14 Pa. Co. Ct. 419. See generally the title "**Returns.**"

58. **Miss.**—Thomas *v.* State, 62 Miss. 184; Davis *v.* Patty, 42 Miss. 509. **Pa.** Philadelphia *v.* Newkumet, 11 Pa. Co. Ct. 504. **Tenn.**—Simmons *v.* Wood's Lessee, 6 Yerg. 518. **Tex.**—Middleton *v.* State, 11 Tex. 255.

[a] **Statute Followed Strictly.**— Where the statute provides the manner of service and return, the statute should be strictly followed and the return made to show that the service was made exactly as provided, the words of the statute being followed to avoid error. Matthews *v.* Gordy, 2 Houst. (Del.) 573; Winans *v.* State, 25 **Tex.** Supp. 175.

59. Monges *v.* Marcus, 14 Pa. Dist. 367.

60. Monges *v.* Marcus, 14 Pa. Dist. 367.

61. See the title "**Parties.**"

62. **D. C.**—Roller *v.* Caruthers, 5 App. Cas. 368. **Mo.**—Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111. **Tex.**—Carson *v.* Moore, 23 Tex. 450.

63. Simpson *v.* Minnix, 30 App. Cas. (D. C.) 582.

64. **Ala.**—Howie *v.* State, 1 Ala. 113. **Ill.**—Farris *v.* People, 58 Ill. 26; Chumasero *v.* People, 18 Ill. 405; Sans *v.* People, 8 Ill. 327. **Ky.**—Madison *v.* Com., 2 A. K. Marsh. 131. See also Calloway's Heirs *v.* Eubank, 4 J. J. Marsh. 280. **Mass.**—Com. *v.* McNeill, 19 Pick. 127. **N. J.**—State *v.* Stout, 11 N. J. L. 124. **N. Y.**—People *v.* Corbet, 8 Wend. 520. **Tenn.**—State *v.* Frankgos, 114 Tenn. 76, 85 S. W. 79. **Va.** Caldwell *v.* Com., 14 Gratt. (55 Va.) 698; Gedney *v.* Com., 14 Gratt. (55 Va.) 318. **W. Va.**—State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

65. **Ind.**—Lockwood *v.* State, 7 Blackf. 417; Wellman *v.* State, 5 Blackf. 343; Thompson *v.* State, 4 Blackf. 188. **Md.**—Parrish *v.* State, 14 Md. 238. **Ohio.**—State *v.* Gardner, Tappan 252. **Tex.**—See Davidson *v.* State, 20 Tex. 649.

obligation is different.[66]

VI. PLEADING. — A. THE WRIT AS A DECLARATION. — A writ of scire facias is considered both a process and a declaration,[67] and in drawing it the general rules relating to the statement of a cause of action should be followed.[68] Thus essential facts should be averred;[69] but a writ stating in substance the record on which it is based,[70] or enough thereof to charge the defendant,[71] is sufficient, unless more than the record is necessary to comply with a statute.[72] On the other hand, the original record must support the writ.[73] When issued to enforce a judgment it is not necessary to allege nonpayment,[74] or to negative the assignment or transfer of the judgment.[75] In scire

66. Garland *v.* Ellis, 2 Leigh (29 Va.) 555.

67. **U. S.**—Browne *v.* Chavez, 181 U. S. 68, 21 Sup. Ct. 514, 45 L. ed. 752; Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337. **Ark.**—Calhoun *v.* Adams, 43 Ark. 238; Hanly *v.* Adams, 15 Ark. 232; Gray *v.* State, 5 Ark. 265. **D. C.**—Otterback *v.* Patch, 5 App. Cas. 69. **Ill.**—Compton *v.* People, 86 Ill. 176; Shadley *v.* People, 17 Ill. 252; Elevator Supply & Repair Co. *v.* Case, 185 Ill. App. 250. **Mich.**—McRoberts *v.* Lyon, 79 Mich. 25, 44 N. W. 160. **Miss.**—Tucker *v.* State, 55 Miss. 452. **Mo.**—State *v.* Baughman (Mo. App.), 74 S. W. 433. **Onio.**—McAlpin *v.* Graham, 1 Ohio Dec. (Reprint) 56. **Pa.** Rynd *v.* Bakewell, 87 Pa. 460; McKinney *v.* Mehaffey, 7 Watts & S. 276. **Tenn.**—State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; State *v.* Patterson, 7 Baxt. 246; State *v.* Johnson, 6 Baxt. 198. **Va.**—Gedney *v.* Commonwealth, 14 Gratt. (55 Va.) 318. **W. Va.**—State *v.* Tinovits, 72 W. Va. 531, 78 S. E. 664.

[a] **Bill in Chancery.**—A scire facias has been likened to a bill in chancery. State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563.

68. See the title "**Declaration and Complaint.**"

[a] **Conclusions of Law.** — A plea alleging merely that the plaintiff, a corporation, "was dissolved and ceased to have any existence as a corporation," is improper as being a conclusion of law. Brown *v.* Delafield & Baxter Cement Co., 1 App. Cas. (D. C.) 232.

[b] **Matters of Form.**—A writ of scire facias, like any other declaration, is not vitiated by errors as to matters of form. Andrews *v.* Buckbee, 77 Mo. 428; Davidson *v.* State, 20 Tex. 649.

[c] **Profert of the record** on which the scire facias is based should be made in the writ. Cowden *v.* Starr, Wright (Ohio) 115. But see the title "**Oyer and Profert.**"

69. See the following cases: **Ala.** State *v.* Moore, 19 Ala. 514; Toulmin *v.* Bennett, 3 Stew. & P. 220. **Ark.**—Gray *v.* State, 5 Ark. 265; Hicks *v.* State, 3 Ark. 313. **D. C.**—Lyon *v.* Ford, 9 Mackey 530. **Ill.**—Farris *v.* People, 58 Ill. 26; Conner *v.* People, 20 Ill. 381. **Md.**—Wright *v.* Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; Bowie *v.* Neale, 41 Md. 124; Washington & B. Turnpike Rd. *v.* State, 19 Md. 239. **Ohio.**—Wolf *v.* Pounsford, 4 Ohio 397; McVickar *v.* Ludlow's Heirs, 2 Ohio 246.

[a] **Omission of essential allegations is fatal.** Gray *v.* State, 5 Ark. 265; Davidson *v.* State, 20 Tex. 649.

[b] **Pleading Indictment Not Essential.**—In scire facias against a surety on a criminal recognizance, conditioned that the defendant appear, it need not be averred that an indictment was returned against the defendant. Snowden *v.* State, 8 Mo. 483.

70. **Ark.**—Gray *v.* State, 5 Ark. 265. **Md.**—Nesbit *v.* Manro, 11 Gill & J. 261; Boyle *v.* Robinson, 7 Harr. & J. 200. **Tenn.**—Gregory *v.* Chadwell, 3 Coldw. 390; Martin *v.* Gorden, 3 Hayw. 173. **Tex.**—Davidson *v.* State, 20 Tex. 649.

71. Gregory *v.* Chadwell, 3 Coldw. (Tenn.) 390; Martin *v.* Gorden, 3 Hayw. (Tenn.) 173; Horn *v.* State, 3 Tex. 190.

72. Walsh *v.* Haswell, 11 Vt. 85.

73. Callahan *v.* Fahey, 10 Pa. Co. Ct. 488.

74. Simpson *v.* Minnix, 30 App. Cas. (D. C.) 582; Starkweather *v.* West End Nat. Bank, 21 App. Cas. (D. C.) 281. Murphy *v.* Cochran, 1 Hill (N. Y.) 339.

75. Starkweather *v.* West End Nat. Bank, 21 App. Cas. (D. C.) 281.

facias on a bond for costs, the bond should be particularly described;[76] if on an indorsement of a writ for costs, such indorsement must be shown, or it must appear to have been made in accordance with the statute,[77] and that the principal is unable to and has failed to pay such costs.[78]

B. PLEA OR ANSWER.[79] — As a general rule the plea of the defendant is made to the writ,[80] but it has been held that when issued to bring in a new party the plea should go to the declaration on the original action.[81] Nul tiel record is a proper plea to deny the existence of the alleged record,[82] not nil debet,[83] or non est factum.[84] But non est factum has been held to be proper to a scire facias on a mortgage,[85] or mechanic's lien,[86] or bond for costs, when it is desired to put in issue the execution of the bond.[87]

C. REPLICATION. — At common law, in accordance with principles elsewhere treated,[88] when the plea of nul tiel record is entered, it is necessary to reply and reassert the record on which the scire facias is based.[89]

VII. DEMURRER. — A writ of scire facias may be tested by demurrer,[90] and in accordance with general rules elsewhere treated,[91] its validity may be questioned for stating insufficient facts to constitute a cause of action,[92] and for irregularities apparent on its face.[93]

76. Searcy *v.* Whitesides, 5 Hayw. (Tenn.) 120.

77. Farnum *v.* Bell, 3 N. H. 72. See also McGee *v.* Barber, 14 Pick. (Mass.) 212; Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117.

78. Ruggles *v.* Ives, 6 Mass. 494.

79. **Affidavits of defense** in certain actions by scire facias, see 1 STANDARD PROC. 666.

80. Winder *v.* Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487; Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337; Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111.

81. Lasman *v.* Harts, 112 Ill. App. 82.

82. **Ill.**—Slaten *v.* People, 21 Ill. 28. **Ind.**—Wilson *v.* State, 6 Blackf. 212. **Md.**—Bowie *v.* Neale, 41 Md. 124; Moore *v.* Garretson, 6 Md. 444. **Miss.** State *v.* Rhonimus, 47 Miss. 314; Fields *v.* State, 39 Miss. 509; Ditto *v.* State, 30 Miss. 126. **Mo.**—Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111. **Pa.**—Davis *v.* Norris, 8 Pa. 122; Donley *v.* Brownlee, 7 Pa. 109. **W. Va.**—State *v.* Tinovits, 72 W. Va. 531, 78 S. E. 664.

83. Elevator Supply & Repair Co. *v.* Case, 185 Ill. App. 250.

84. Camp *v.* Small, 44 Ill. 37; Carpenter *v.* Mooers, 26 Ill. 162; Elevator Supply & Repair Co. *v.* Case, 185 Ill. App. 250.

85. Malsberger *v.* Parsons, 1 Boyce (Del.) 254, 75 Atl. 698; Lancaster *v.* Smith, 67 Pa. 427.

86. Early *v.* Albertson, 2 W. N. C. (Pa.) 541.

87. Searcy *v.* Whitesides, 5 Hayw. (Tenn.) 120.

88. See the title "**Replication and Reply.**"

89. Payton *v.* Stuart, Peck (Tenn.) 156.

90. **U. S.**—Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337. **Tenn.** State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; Hayes *v.* Cartwright, 6 Lea 139. **Can.**—Randall *v.* Burton, 25 U. C. Q. B. 9.

91. See generally the title "**Demurrer.**"

92. **U. S.**—Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491. **Ark.**—Trapnall *v.* Terry, 27 Ark. 70. **Md.**—Bowie *v.* Neale, 41 Md. 124. **Mont.**—United States *v.* Ensign, 2 Mont. 396. **Va.** Garland *v.* Ellis, 2 Leigh (29 Va.) 555.

93. McFadden *v.* Fortier, 20 Ill. 509; Ross *v.* State, 6 Blackf. (Ind.) 315.

[a] **Nonjoinder or misjoinder of** parties, when apparent on the face of a scire facias, may be taken advantage of by demurrer. Bowie *v.* Neale, 41

VIII. AMENDMENT. — A writ of scire facias is amendable in the same manner as declarations in other cases.[94] It may be amended to conform to the record on which it is based,[95] or, in case of the death of a party and the survival of the action, by substituting the name of the decedent's representative.[96]

IX. TRIAL. — A. In General. — Subject to the general rules governing a jury trial, the defendant, in the federal courts, is entitled to a trial by jury on a scire facias based on a forfeited recognizance,[97] but as a rule a trial by jury in the state courts is not a matter of right,[98] and certainly this must be so when the only plea entered is nul tiel record.[99] Under the statutes of some jurisdictions, when the writ is for the purpose of bringing in a new party, there must be a trial de novo as to him.[1]

B. Issues, Proof and Variance. — In accordance with the general rule, pleadings and proof must correspond,[2] but a mere clerical error does not constitute a variance.[3] In certain jurisdictions, on a general denial, all material allegations of the scire facias must be proved.[4]

Md. 124; Parrish *v.* State, 14 Md. 238; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261.

94. **Ala.**—Lowry's Admr. *v.* Newsom, 51 Ala. 570. **D. C.**—Otterback *v.* Patch, 5 App. Cas. 69. **Ill.**—Peacock *v.* People, 83 Ill. 331. **Ind.**—Berry *v.* McDonald, 7 Blackf. 371. **Me.**—Marsh Bros. & Co. *v.* Bellefleur, 108 Me. 354, 81 Atl. 79. **N. Y.**—Jackson *v.* Tanner, 18 Wend. 526. **Pa.**—Worrilow *v.* Chester Land & Imp. Co., 19 Pa. Co. Ct. 269. **W. Va.**—State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

[a] **Amendment to change the cause of action** as stated in a scire facias is not permissible. Eckert *v.* Phillips, 4 Pa. Co. Ct. 514.

[b] **Time To Amend.**—The writ of scire facie may be amended by permission at any time according to the demands of justice and the exigencies of the case. So it may be amended after plea (**Md.**—Hazeldine's Admr. *v.* Walker's Exrs., 1 Harr. & J. 487. **N. J.**—Condit *v.* Gregory, 21 N. J. L. 429. **N. C.**—Williams *v.* Lee's Heirs, 4 N. C. 578, N. C. Term R. 146. **Pa.** Willard *v.* Norris, 2 Rawle 56. **S. C.** Smith *v.* Brisbane, 2 Bay 577, 1 Brev. 455) or (2) after appeal. Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49; State *v.* Cherry, 13 N. C. 550.

[c] **Amendment As of Course.**—The writ may be amended as of course either before or after service when the error to be corrected is a misrecital of the proceedings upon which it is based. McGee *v.* Barber, 14 Pick. (Mass.) 212.

[d] **Change of Parties.**—A writ of scire facias will not be permitted to be amended by substituting different parties as plaintiffs, since this would, in effect, be making a new writ. Willink *v.* Renwick, 22 Wend. (N. Y.) 608.

95. **Ky.**—Constantine's Admr. *v.* Major, 6 J. J. Marsh. 621; Thompson *v.* Dougherty's Heirs, 3 J. J. Marsh. 564. **Miss.**—Pounds *v.* State, 60 Miss. 925. **Pa.**—Maus *v.* Maus, 10 Watts 87; Schmidt *v.* Zeigler, 30 Pa. Super. 104. **S. C.**—Smith *v.* Brisbane, 2 Bay 557, 1 Brev. 455.

96. Challenor *v.* Niles, 78 Ill. 78.

97. Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337.

98. See 16 Standard Proc. 907.

99. **Ill.**—Reed *v.* Bank of Eau Claire, 136 Ill. App. 378. **Ind.**—Merkle *v.* Bolles, 6 Blackf. 288; White *v.* Elkin, 6 Blackf. 123. **Pa.**—Dimmick *v.* Leath, 5 Kulp 255; Jeremy *v.* Edwards, 2 Kulp 435.

1. Ryder *v.* Glover, 4 Ill. 547; Lasman *v.* Harts, 112 Ill. App. 82.

2. **Ark.**—Bolinger *v.* Fowler, 14 Ark. 27. **Ill.**—Farris *v.* People, 58 Ill. 26. **Miss.**—Smith *v.* State, 76 Miss. 728, 25 So. 491. **N. J.**—Earle *v.* Earle, 20 N. J. L. 347. **Pa.**—Hersch *v.* Groff, 2 Watts & S. 449. **Tex.**—Bailey *v.* State (Tex. Crim.), 22 S. W. 40.

See generally the title "**Variance and Failure of Proof.**"

3. Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337.

4. General Bonding & Casualty Ins. Co. *v.* State, 73 Tex. Crim. 649, 165 S.

On a plea of nul tiel record alone, only the record on which the writ is founded need be examined.[5] Oyer of the record is not demandable.[6]

C. Dismissal, Discontinuance and Nonsuit. — The general rules relating to the dismissal of an action apply to an action by scire facias.[7]

X. JUDGMENT. — A. In General. — When the writ is based on a judgment, a new judgment is not rendered, the proper entry being that the plaintiff have satisfaction of the judgment already secured.[8] When, however, a regular judgment is entered it should follow the record on which the scire facias is based, being several where the obligation is several, even though the writ be joint.[9] On a joint and several recognizance the judgment should run against those served;[10] judgment against all when some are not served is irregular,[11] unless in accordance with the provisions of a statute.[12]

A default judgment may be entered in favor of the plaintiff on a scire facias which has been twice returned nihil,[13] or, when served,

W. 615; Baker *v.* State, 21 Tex. App. 359, 17 S. W. 256; Goodin *v.* State, 14 Tex. App. 443.

5. Bergen *v.* Williams, 4 McLean 125, 3 Fed. Cas. No. 1,340.

6. Slaten *v.* People, 21 Ill. 28.

7. See the title "**Dismissal, Discontinuance and Nonsuit.**"

[a] **As to Parties Not Served.**—A formal discontinuance as to parties not served is unnecessary. State *v.* Hinson, 4 Ala. 671.

[b] **Suggestion of the death** of one defendant is equivalent to dismissal as to him. Davidson *v.* Alvord, 3 Ind. 1.

[c] **Dismissal for Delay.**—West's Exrs. *v.* Nixon's Exrs., 3 Grant Cas. (Pa.) 236. See Davis *v.* Jones, 12 Serg. & R. (Pa.) 60, two years delay not sufficient ground for discontinuance.

[d] **In case of a void writ** the remedy of the defendant is a motion to quash. West's Exrs. *v.* Nixon's Exrs., 3 Grant Cas. (Pa.) 236; Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933.

8. **Ill.**—Waterbury Nat. Bank *v.* Reed, 231 Ill. 246, 83 N. E. 188. **Ia.** Denegree *v.* Haun, 13 Iowa 240; Von Puhl *v.* Rucker, 6 Iowa 187. **Ky.**—Fowler *v.* Com., 4 Mon. 128; Davis *v.* Com., 4 Mon. 113. **Miss.**—Pollard *v.* Eckford, 50 Miss. 631. **Mo.**—Humphreys *v.* Lundy, 37 Mo. 320; Trimble *v.* Elkin, 88 Mo. App. 229. **N. J.**—Boylan *v.* Anderson, 3 N. J. L. 529. **Tenn.**—State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; Rogers *v.* Hollingsworth, 95 Tenn. 357, 32 S. W. 197; Payton *v.* Stuart, Peck 156. **Tex.**—Bullock *v.* Ballew, 9 Tex. 498; Camp *v.* Gainer, 8 Tex. 372. **Vt.**—Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489. **Va.**—Lavell *v.* McCurdy's Exrs., 77 Va. 763. **Wis.**—Ingraham *v.* Champion, 84 Wis. 235, 54 N. W. 398.

[a] **The judgment rendered** on a scire facias is nothing more than that execution issue. Boylan *v.* Anderson, 3 N. J. L. 529.

[b] **A judgment for the amount of the obligation, with damages,** on a scire facias based on a judgment, is erroneous and void. **Tenn.**—Payton *v.* Stuart, Peck 156. **Tex.**—Camp *v.* Gainer, 8 Tex. 372. **Va.**—Lavell *v.* McCurdy's Exrs., 77 Va. 763.

9. Fowler *v.* Com., 4 Mon. (Ky.) 128; Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131; Dean *v.* State, 2 Smed. & M. (Miss.) 200.

10. **Colo.**—People *v.* Mellor, 2 Colo. 705; Chase *v.* People, 2 Colo. 528. **Ill.** Stokes *v.* People, 63 Ill. 489; Wheeler *v.* People, 39 Ill. 430; Sans *v.* People, 8 Ill. 327. **Ind.**—Adair *v.* State, 1 Blackf. 200. **Ky.**—Fowler *v.* Com., 4 Mon. 128. **Miss.**—Saffold *v.* State, 60 Miss. 928. **Mo.**—State *v.* Woerner, 33 Mo. 216.

11. Breckenridge's Admr. *v.* Mellon's Admr., 1 How. (Miss.) 273.

12. Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16.

13. **Miss.**—Smith *v.* State, 76 Miss. 728, 25 So. 491. **N. J.**—Forest *v.* Price, 37 N. J. L. 177. **Pa.**—Mulherin *v.* Roach, 39 Pa. Super. 316; Monges *v.*

upon the defendant's failure to plead or demur.[14]

B. TIME OF ENTRY. — Statutes limiting the time of entry of certain judgments to particular terms do not as a rule apply to a judgment on a scire facias.[15] In the absence of a plea, judgment may be rendered at the return term of the writ, providing there is no statute to the contrary,[16] but not until the day following the last day of the period within which the defendant may plead.[17]

C. COSTS. — Costs in a proceeding by scire facias are not recoverable at common law,[18] but this rule has been changed by statute,[19] and under local statutes costs are generally awarded as in other civil actions.[20]

Attorney's Fee. — An attorney's fee is sometimes provided for.[21]

D. OPENING AND VACATING. — In accordance with the general rules relating to opening and vacating judgments,[22] when prompt application is made,[23] a judgment on a scire facias will be opened in furtherance of justice.[24]

E. CONCLUSIVENESS. — The doctrines of res judicata,[25] stare decisis,[26] and collateral attack[27] are fully applicable to judgments on writs of scire facias.

XI. APPEAL.[28] — An appeal from a decision on a writ of scire facias is governed by the general rules applicable to other cases.[29]

Marcus, 14 Pa. Dist. 367. See Green *v.* Plattsburg, 13 Pa. Co. Ct. 335

See *supra*, IV, D.

14. Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491.

15. Walker *v.* Massey, 10 Ala. 30.

16. **Mo.**—Unterrein *v.* McLane, 10 Mo. 343. **Ohio.**—Knight *v.* Bunker, 7 Ohio St. 77; Hill *v.* Kling, 4 Ohio 135. **Va.**—Williamson *v.* Crawford, 7 Gratt. (48 Va.) 202.

17. Davis *v.* Patty, 42 Miss. 509.

18. McCoy *v.* Loughery, 2 W. N. C. (Pa.) 521.

19. McCoy *v.* Loughery, 2 W. N. C. (Pa.) 521; Rex *v.* Miles, 7 T. R. 367, 101 Eng. Reprint 1024.

20. See the statutes and the following cases: **Ala.**—Hanson *v.* Jacks, 22 Ala. 549. **Mass.**—Richardson *v.* Wolcott, 10 Allen 439. **N. J.**—State *v.* Franke, 51 N. J. L. 410, 17 Atl. 1078. **N. Y.**—Hoyt *v.* Blain, 12 Wend. 188; Morton's Exrs. *v.* Croghan's Terre-Tenants, 20 Johns. 106. **Pa.**—Haskins *v.* Low, 17 Pa. 64.

See also the title "**Costs.**"

21. See *infra*, this note.

[a] **In the federal courts** an attorney fee of five dollars is allowed on a scire facias. U. S. Rev. St., § 824, 2 U. S. Comp. St., 1916, § 1378.

22. See generally 15 STANDARD PROC. 151, *et seq.*

23. Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16; Freemansburg Bldg. & L. Asso. *v.* Billig, 30 Pa. Super. 101.

24. Compher *v.* Anawalt, 2 Watts (Pa.) 490.

25. Scranton *v.* Koehler, 39 Pa. Super. 318. See generally the title "**Res Judicata.**"

26. Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 337. See generally the title "**Stare Decisis.**"

27. Collins *v.* McBlair, 29 App. Cas. (D. C.) 354. See the title "**Judgments.**"

28. **Appeal from a judgment of a justice of the peace,** see 18 STANDARD PROC. 183n.

29. See the title "**Appeals,**" and Wolf *v.* State (Tex. Crim.), 85 S. W. 17; Bringhurst *v.* State (Tex. Crim.), 37 S. W. 757.

[a] **Appealable Decisions.**—(1) An order overruling a demurrer is not appealable without permission. Starkweather *v.* West End Nat. Bank, 21 App. Cas. (D. C.) 281. (2) A decision on a question of fact, such as the existence of the record on a plea of nul tiel record, is not appealable. Simpson *v.* Simpson, 63 N. C. 534.

[b] **The validity of a writ of scire facias** may be questioned on appeal. State *ex rel.* Bonner *v.* Andrews, 131

Thus an appeal lies from a final decision, such as an award of execution,[30] on a bill of exceptions setting out the record, the ruling appealed from, and exception thereto.[31] The record on appeal in some jurisdictions should contain a copy of the writ in full.[32]

Tenn. 554, 175 S. W. 563; Hayes *v.* Cartwright, 6 Lea (Tenn.) 139.

[c] **The state cannot appeal** when the proceeding is of a criminal nature and the decision on the scire facias is adverse to it. State *v.* French (Tex. Crim.), 80 S. W. 1007. But see the title "**Review.**"

[d] **Objections and Exceptions.**—(1) When no exception is taken upon the denial of a demurrer to a plea in abatement to a scire facias, an assignment of error based on such action of the court will not be considered. Simpson *v.* Minnix, 30 App. Cas. (D. C.) 582. (2) An objection to the writ for the nonjoinder of a judgment debtor who is not an indispensable party cannot be made for the first time an appeal. Roller *v.* Caruthers, 5 App. Cas. (D. C.) 368. (3) "And so, in respect to the ruling on the trial of the plea of the Statute of Limitations, if there be no exception to such ruling, or no special verdict found, setting forth the facts upon which the ruling of the court is made, an appellate court cannot review the decision of the court below. Otterback *v.* Patch, 5 App. Cas. (D. C.) 69.

[e] **Presumptions on Appeal.**—On appeal from judgment in scire facias on an appeal bond in a justice court, in the absence of a bill of exceptions it will be presumed that the action of the court in striking defendant's pleas of nil debet and non est factum from the files and entering judgment was fully warranted. Elevator Supply & Repair Co. *v.* Case, 185 Ill. App. 250.

[f] **Assignment of Errors.**—The inquiry on appeal from a ruling on a demurrer to a writ of scire facias is limited to the errors specifically assigned. Lowry's Admr. *v.* Newsom, 51 Ala. 570.

30. **Conn.**—White *v.* Washington School Dist., 45 Conn. 59. **Mo.**—State *v.* Woerner, 33 Mo. 216. **N. C.**—Simpson *v.* Simpson, 63 N. C. 534; Trice *v.* Turrentine, 35 N. C. 212. **Vt.**—Gilson *v.* Gay, 10 Vt. 326.

31. **Ark.**—Bolinger *v.* Fowler, 14 Ark. 27; Hannah *v.* Carrington, 8 Ark. 117. **D. C.**—Otterback *v.* Patch, 5 App. Cas. 69. **Md.**—McKnew *v.* Duvall, 45 Md. 501.

32. Campbell *v.* People, 22 Ill. 234.

SEAMEN

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CROSS-REFERENCES:

Admiralty;
Maritime Liens;
Ministers, Ambassadors and Consuls;
Piracy;
Salvage;
Ships and Shipping;
Workmen's Compensation Act.

Definition of seaman, see 1 STANDARD PROC. 384.

Exemption of seaman's wages from attachment and execution, see 16 STANDARD PROC. 41.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ACTIONS TO RECOVER WAGES.[1] — A. JURISDICTION. — **1. In General.** — Seamen's wage contracts are within the admiralty jurisdiction,[2] and may be enforced by proceedings in rem,[3] as well as in personam.[4] But state courts have concurrent jurisdiction when the action is in personam.[5] The jurisdiction of admiralty is not necessarily defeated by previous attachment proceedings of a state court,[6] and conversely attachment proceedings in a state court are not defeated by seizure of a vessel under admiralty process.[7]

2. Jurisdiction of Consuls. — While the jurisdiction of foreign consuls, by treaty stipulations and statute, is generally exclusive in all cases between foreign seamen, or seaman and officers,[8] a court of admiralty will take jurisdiction of a suit for wages by a foreign seaman against a foreign vessel when the foreign consul consents thereto,[9] but will not proceed without such consent.[10] Even where no consul resides in the district, jurisdiction of admiralty will be denied,[11] though there is authority to the contrary.[12] It has been held that this rule does not bar an American seaman of a foreign vessel from bringing a libel for wages in a United States court of admiralty,[13] and that having acquired jurisdiction such court will adjudicate the claims of all foreign seamen joined in the same libel.[14]

B. JOINDER OF CAUSES. — Joinder of seamen's suits for wages is treated elsewhere in this work.[15] It is improper to join a cause of action for foreclosure of a mortgage on a vessel with one to enforce a lien for wages of a seaman against a vessel.[16]

C. PLEADING. — The general rules relating to admiralty pleading apply to suits for seamen's wages.[17] The contract and performance

1. **Wage contracts enforced according to the law of the flag,** see 1 STANDARD PROC. 382, note 29.

2. See 1 STANDARD PROC. 384.

3. The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. ed. 533; Sheppard *v.* Taylor, 5 Pet. (U. S.) 675, 8 L. ed. 269.

[a] **Canal-boats Not To Be Libeled for Wages.**—9 U. S. St. at L. 38; U. S. Rev. St., § 4251; 7 U. S. Comp. St., 1916, § 7996.

[b] **For wages accruing while a vessel is in the hands of a receiver appointed by a state court,** admiralty will take jurisdiction of a libel in rem. The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. ed. 533.

4. Sheppard *v.* Taylor, 5 Pet. (U. S.) 675, 8 L. ed. 269.

[a] **By a Master.**—Hammond *v.* Essex Fire & Marine Ins. Co., 4 Mason 196, 11 Fed. Cas. No. 6,001.

[b] **Extra Wages.**—(1) When extra wages are due a seaman he may recover them in admiralty in an action in rem. (The Saratoga, 2 Gall. 164, 21 Fed. Cas. No. 12,355), or (2) in personam against the master. Wells *v.* Meldrum, 1 Blatchf. & H. 342, 29 Fed. Cas. No. 17,402.

5. Calvin *v.* Huntley, 178 Mass. 29, 59 N. E. 435; Luther *v.* Fowler, 1 Grant Cas. (Pa.) 176. See 1 STANDARD PROC. 384, note 38, and 30 U. S. St. at L. 756; U. S. Rev. St. § 4547, as amended Dec. 21, 1898; 7 U. S. Comp. St., 1916, § 8336.

6. The Edith, 34 Fed. 927.

7. Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028.

8. See the title "**Ministers, Ambassadors, and Consuls.**"

9. Reynolds *v.* The Simoon, 20 Fed. Cas. No. 11,733.

10. Hay *v.* The Bloomer, 11 Fed. Cas. No. 6,255.

11. The Ester, 190 Fed. 216.

12. See the Amalia, 3 Fed. 652.

13. The Epsom, 227 Fed. 158.

14. The Epsom, 227 Fed. 158.

15. See 1 STANDARD PROC. 443.

16. Bruce *v.* Murray, 123 Fed. 366, 59 C. C. A. 494.

17. See the title "**Admiralty.**"

[a] **Technical rules of pleading not**

of the service should be stated in the libel.[18] The defense of desertion need not be anticipated by pleading an excuse or justification.[19]

New matter in accordance with general rules, should be specially pleaded.[20] Thus an unusual or special clause in the shipping articles,[21] a foreign statute,[22] or forfeiture of wages for misbehavior or other cause must be specially pleaded to be available as a defense.[23] Compliance with the statute relating to provisions must be pleaded when the claim of the libelant is for extra wages for short allowance.[24]

D. TRIAL. — As in other actions the pleading and proof must agree.[25]

Claims for wages by seamen who intervene in an action in rem against their vessel will be considered and determined irrespective of the merits of the original petition.[26]

E. COSTS.[27] — In accordance with the general rules relating to costs in admiralty cases,[28] their award is discretionary with the court,[29] but they are generally allowed the libelant when he prevails.[30] However, they will be denied the libelant if his action is unnecessary or unjust,[31] as where several libels for wages are filed when all might be joined in one.[32] When the complaint of seamen as to the provisions or unseaworthiness of a vessel is adjudged[33] to be without

favored. Pratt *v.* Thomas, 1 Ware 437, 19 Fed. Cas. No. 11,377.

[b] **Separate Paragraphs.**—The facts essential to the cause of action should be stated in distinct articles. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

[c] **Pleading Laches.**—Where it is not apparent from the complainant's own showing that he has slept too long on his rights before asserting his claim for wages, laches as a general rule must be pleaded to be available as a defense. The Samuel Little, 221 Fed. 308, 137 C. C. A. 136.

18. The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695; The Rockie E. Yates, 2 Hask. 430, 20 Fed. Cas. No. 11,980a; Pratt *v.* Thomas, 1 Ware 437, 19 Fed. Cas. No. 11,377; Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

19. Bibbins *v.* Brookfield, 2 Fed. Cas. No. 1,384.

20. White *v.* The Ranier, 45 Fed. 773; The Atlantic, Abb. Adm. 451, 2 Fed. Cas. No. 620.

21. Heard *v.* Rogers, 1 Spr. 556, 11 Fed. Cas. No. 6,298.

22. See The Alps, 19 Fed. 139.

23. The Pioneer, Deady 58, 19 Fed. Cas. No. 11,176; Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

[a] **The particular acts of misconduct relied on,** time and place, should be stated. Macomber *v.* Thompson, 1 Sumn. 384, 16 Fed. Cas. No. 8,919.

24. The Elizabeth Frith, 1 Blatchf. & H. 195, 8 Fed. Cas. No. 4,361, 2 Paine 291, 8 Fed. Cas. No. 4,353.

25. The Kendal, 56 Fed. 237; White *v.* The Ranier, 45 Fed. 773; The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695; Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583; The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

26. The Eva D. Rose, 151 Fed. 704, 153 Fed. 912.

27. **Seamen's exemption from filing stipulation for costs,** see 1 STANDARD PROC. 507; also Act of July 1, 1916, c. 209, § 1; 3 U. S. Comp. St., 1916, § 1630a.

28. See 1 STANDARD PROC. 574, *et seq.*

29. The Susan, 3 Ware 222, 23 Fed. Cas. No. 13,631.

30. The Grapeshot, 22 Fed. 123; Walsh *v.* Louisiana, 4 Fed. 751; The Cortes, 6 Ben. 288, 6 Fed. Cas. No. 3,258.

31. Johnson *v.* Blanchard, 7 Fed. 597; The Susan, 3 Ware 222, 23 Fed. Cas. No. 13,631; The Moslem, Olc. 374, 17 Fed. Cas. No. 9,876.

32. Reed *v.* Hussey, 1 Blatchf. & H. 525, 20 Fed. Cas. No. 11,646; The Cabot, 1 Abb. Adm. 150, 4 Fed. Cas. No. 2,277.

33. 30 U. S. St. at L. 757; U. S. Rev. St. § 4557; 7 U. S. Comp St., 1916, § 8346.

foundation, the costs of the master, owner or consignee may be deducted from their wages.

II. ACTIONS FOR SHARE OF EARNINGS. — When a seaman is entitled to a share of the proceeds or earnings of a voyage he may enforce his claim in admiralty either in rem against the vessel,[34] or in personam against the master, owner or shipper, according to the nature of his contract,[35] or proceed in a state court, when the action is personal.[36] But a court of admiralty will not entertain jurisdiction of a libel for an accounting of the proceeds of a voyage; the amount must be liquidated.[37]

When partnership is relied on as a defense, it is not proved by a contract to share in the profits of the voyage.[38]

III. ACTIONS FOR EXPENSE OF MEDICAL TREATMENT. A seaman's claim for the expense of medical treatment is a subject of admiralty jurisdiction,[39] the state courts having concurrent jurisdiction when the action is in personam.[40] A claim for medical treatment may be joined with or added by amendment to a claim for wages,[41] but not with a claim for personal injury.[42] Under a prayer for general relief in a suit by a seaman for damages a decree may be entered for expense of medical treatment,[43] but not for prospective expenses.[44]

IV. ACTIONS FOR PERSONAL INJURIES. — A. JURISDICTION. **1. In General.** — As in proceedings to recover wages, a share of the vessel's earnings, or the expense of medical treatment, so in an action for personal injury suffered by him a seaman may invoke the jurisdiction of admiralty, by proceedings either in rem[45] or in person-

34. The Hunter, 47 Fed. 744; The Crusader, 1 Ware (437) 488, 6 Fed. Cas. No. 3,456.

[a] **Whaling Vessels.**—A libel in rem in admiralty will not lie for a share of the earnings of a whaling vessel. Joy *v.* Allen, 2 Woodb. & M. 303, 13 Fed. Cas. No. 7,552.

[b] **In England** a seaman's claim for a share of the ship's earnings is not a subject of admiralty jurisdiction. See The Sydney Cove, 2 Dods. 11; The Riby Grove, 2 W. Rob. 52; The Mona, 1 W. Rob. 137.

35. Lovrein *v.* Thompson, 1 Spr. 355, 15 Fed. Cas. No. 8,557; Joy *v.* Allen, 2 Woodb. & M. 303, 13 Fed. Cas. No. 7,552; Duryee *v.* Elkins, 1 Abb. Adm. 529, 8 Fed. Cas. No. 4,197.

36. **U. S.**—Duryee *v.* Elkins, 1 Abb. Adm. 529, 8 Fed. Cas. No. 4,197; The Crusader, 1 Ware (437) 488, 6 Fed. Cas. No. 3,456. **Mass.**—Bishop *v.* Shepherd, 23 Pick. 492; Wait *v.* Gibbs, 7 Pick. 146. **Eng.**—Wilkinson *v.* Frasier, 4 Esp. (Eng. N. P.) 182.

37. The Fair Play, 1 Blatchf. & H. 136, 8 Fed. Cas. No. 4,615; Duryee *v.* Elkins, 1 Abb. Adm. 529, 8 Fed. Cas. No. 4,197.

38. The Crusader, 1 Ware (437) 488, 6 Fed. Cas. No. 3,456.

39. Brown *v.* The D. S. Cage, 1 Woods 401, 4 Fed. Cas. No. 2,002.

[a] **Lien for Injuries.**—A seaman injured in the service of a vessel has a lien on such ship for the damages he may sustain by reason of the neglect or misconduct of its officers while caring for him. The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52.

40. Moseley *v.* Scott, 3 Ohio Dec. (Reprint) 449; Sanders *v.* Stimson Mill Co., 32 Wash. 627, 73 Pac. 688, 34 Wash. 357, 75 Pac. 974.

41. The W. L. White, 25 Fed. 503.

42. Sanders *v.* Stimson Mill Co., 32 Wash. 627, 73 Pac. 688, 34 Wash. 357, 75 Pac. 974.

43. The Lizzie Frank, 31 Fed. 477.

44. The Lizzie Frank, 31 Fed. 477.

45. Rounds *v.* Cloverport Foundry & Mach. Co., 237 U. S. 303, 35 Sup. Ct. 596, 59 L. ed. 966; The Anaces, 93 Fed. 240, 34 C. C. A. 558; Weidman *v.* The

am,[46] jurisdiction in the latter being concurrent with state courts.[47]

2. Workmen's Compensation Acts. — When the action is brought in a state court, a seaman, or employe whose work is of a maritime character, may, by virtue of a recent act of congress, claim the right and remedies provided by the workmen's compensation law of such state,[48] though it was held under the clause of the judiciary act, "saving to suitors, in all cases, the right of a common-law remedy," that the state workmen's compensation act was not available to an injured seaman or stevedore or his surviving dependents if the case was one cognizable in admiralty.[49]

B. JOINDER OF CAUSES. — The general principles relating to the joinder of causes should be observed in actions by seamen.[50] Thus, in some jurisdictions, an action for personal injuries cannot be joined with a claim for medical treatment.[51]

C. PLEADING. — The general rules of admiralty pleading, or pleading in the state or common law courts, as the case may be, apply to personal injury actions by seamen.[52] To make available a defense under the law of a foreign vessel's flag, in an action in rem for personal injuries, such defense must be specially pleaded.[53]

D. COSTS.[54] — Costs, in the discretion of the court, may be allowed a libelant acting in good faith even though his cause of action fails.[55]

V. ACTIONS FOR WRONGFUL PUNISHMENT OR ASSAULT.

A. JURISDICTION. — When a seaman is entitled to redress for excessive or wrongful punishment by the ship's officers, he may recover in an action in rem in admiralty,[56] or he may proceed in either the

Nebraskan, 3 Hawaii U. S. Dist. Ct. 195.

46. Rounds *v.* Cloverport Foundry & Mach. Co., 237 U. S. 303, 35 Sup. Ct. 596, 59 L. ed. 966.

47. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264; Larson *v.* Alaska S. S. Co., 96 Wash. 665, 165 Pac. 880, L. R. A. 1917F, 671.

[a] **Unseaworthiness of Vessel.**—A seaman's claim for personal injury must be based on the vessel's unseaworthiness. Larson *v.* Alaska S. S. Co., 96 Wash. 665, 165 Pac. 880, L. R. A. 1917F, 671. See also Chelentis *v.* Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. ed. 1171.

[b] **Aider by Attachment.**—Such action in the state court may be aided by attachment. Rounds *v.* Cloverport Foundry & Mach. Co., 237 U. S. 303, 35 Sup. Ct. 596, 59 L. ed. 966; Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. ed. 447.

48. 40 U. S. St. at L. 395; Act of Oct. 6, 1917, c. 97; Veasey *v.* Peters, 142 La. 1012, 77 So. 948, giving the act retroactive effect.

49. Chelentis *v.* Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. ed. 1171; Southern Pac. Co. *v.* Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. ed 1086, Ann. Cas. 1917E, 900, L. R. A. 1918C, 451.

50. See the titles "**Admiralty**" and "**Joinder of Actions.**"

51. Sanders *v.* Stimson Mill Co., 34 Wash. 357, 75 Pac. 974. See also Lambert *v.* La Conner T. & T. Co., 37 Wash. 113, 79 Pac. 608.

52. See the titles "**Admiralty;**" "**Declaration and Complaint,**" and other titles dealing with pleading.

[a] **Particulars of Vessel's Unseaworthiness.**—Where a seaman is injured by the bursting of a boiler, in an action to recover damages the libel is sufficiently particular in alleging that the boilers were in "an unsafe, dangerous, and defective condition." Maritime Inv. Co. *v.* Hanos, 184 Fed. 596, 106 C. C. A. 576.

53. The Santa Clara, 206 Fed. 179.

54. See generally the title "**Admiralty.**"

55. The Wanderer, 20 Fed. 140.

56. The Lizzie Burrill, 115 Fed. 1015; The Marion Chilcott, 95 Fed. 688;

admiralty or state courts in a personal action against the owners, or officers, or both, according to the circumstances of the case.[57] For an assault the proceeding in admiralty may be in personam only,[58] but a seaman may maintain an action in rem for breach of the shipping articles in that he was not treated with proper kindness, but assaulted,[59] and also when he is subjected to continued abusive treatment by a subordinate officer.[60]

B. PLEADING. — A cause of action by a seaman for wrongful punishment or assault must be stated in accordance with the general rules of admiralty pleading.[61] Misconduct of the seaman, to be available as a defense, must be specially pleaded.[62]

C. TRIAL. — The duty of an officer to punish a seaman on command of the captain is a question for the court,[63] but the degree of punishment inflicted,[64] and the conditions on board the ship relied on under a plea of justification are for the jury to determine.[65]

D. COSTS. — While costs are generally awarded to the prevailing party,[66] this is not always an incident of recovery.[67]

The General Rucker, 35 Fed. 152; Roberts *v.* Skolfield, 3 Ware 184, 20 Fed. Cas. No. 11,917.

57. **U. S.**—Belyea *v.* Cook, 162 Fed. 180; Dorrell *v.* Schwerman, 111 Fed. 209; Forbes *v.* Parsons, Crabbe 283, 9 Fed. Cas. No. 4,929. **Mass.**—Samson *v.* Smith, 15 Mass. 365. **N. Y.**—Brown *v.* Howard, 14 Johns. 119. **Pa.**—Wedman *v.* Kendall, 14 W. N. C. 157; Flynn *v.* Corning, 2 W. N. C. 223. **S. C.** Fleming *v.* Ball, 1 Bay 3.

58. **U. S.**—The Sallie Ion, 153 Fed. 659; The Falls of Keltie, 114 Fed. 357; McGrath *v.* Candalero, Bee 64, 16 Fed. Cas. No. 8,810. **Haw.**—Weidman *v.* The Nebraskan, 3 Hawaii U. S. Dist. Ct. 195. **Wash. Ter.**—Smith *v.* The Challenger, 2 Wash. Ter. 447, 7 Pac. 851.

See Admiralty Rule 16.

[a] **Where a seaman is bitten by a dog** chained under a table in the cabin, his cause of action for the injury cannot be said to be based on an assault and battery. The Lord Derby, 17 Fed. 265.

59. The David Evans, 187 Fed. 775, 109 C. C. A. 623.

60. The Marion Chilcott, 95 Fed. 688.

61. See the title "**Admiralty.**"

[a] **Separate claims** must be separately stated. Pettingill *v.* Dinsmore, 2 Ware 212, 19 Fed. Cas. No. 11,045.

62. Pettingill *v.* Dinsmore, 2 Ware 212, 19 Fed. Cas. No. 11,045.

63. Frost *v.* Hammatt, 11 Pick. (Mass.) 70.

64. Frost *v.* Hammatt, 11 Pick. (Mass.) 70.

65. Buddington *v.* Smith, 13 Conn. 334, 33 Am. Dec. 407.

66. See the title "**Admiralty.**"

67. Peterson *v.* Watson, 1 Blatchf. & H. 487, 19 Fed. Cas. No. 11,037.

SEARCH AND SEIZURE

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For forms, see 9 STANDARD PROC. 1118, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. SEARCH WARRANT PROCEEDINGS. — A. NATURE AND OBJECT.[1] — A search warrant is an order issued by a court or magistrate in the name of the people, commanding a search for and seizure of certain designated property and the bringing of the same before the magistrate for further action.[2] The proceeding, in a limited form, existed at common law,[3] but its scope has been extended by constitutional[4] and statutory[5] provisions. In its nature, the proceeding is one in rem.[6] It is not a criminal prosecution,[7] nor does it bear any relation to civil process or civil actions,[8] but its proper function is to

1. **In reference to intoxicating liquors,** see 14 STANDARD PROC. 488.

2. **Ia.**—Haworth *v.* Newell, 102 Iowa 541, 71 N. W. 404. **N. Y.**—People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970. **Ore.** Smith *v.* McDuffee, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947. **Vt.**—Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

[a] **The function of such a warrant** is to cause a search to be made by an officer at a particular place for certain personal property and to secure the production thereof, if found, before the magistrate who issued the warrant. Boeger *v.* Langerberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

3. Com. *v.* Hinds, 145 Mass. 182, 13 N. E. 397; People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970.

[a] **It was first confined** to the discovery of stolen goods. State *ex rel.* Streit *v.* Justice Court, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156.

4. **U. S.**—United States *v.* Premises in Butte, 246 Fed. 185. **Cal.**—Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173. **Ga.** Owens *v.* Way, 141 Ga. 796, 82 S. E. 132, Ann. Cas. 1915C, 963. **Ill.**—Lippman *v.* People, 175 Ill. 101, 51 N. E. 872. **Ia.**—Krehbiel *v.* Henkle, 142 Iowa 677, 121 N. W. 378. **Me.**—Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70, 22 L. R. A. (N. S.) 819. **Mo.**—State *ex rel.* American Mfg. Co. *v.* Anderson, 270 Mo. 533, 194 S. W. 268, Ann. Cas. 1917E, 833. **Mont.**—State *ex rel.* Streit *v.* Justice Court, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156. **N. D.**—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82. **S. C.**—State *v.* Wimbush, 9 Rich. L. 309. **W. Va.**—State *v.* Emsweller, 78 W. Va. 214, 88 S. E. 787.

5. **Ala.**—Coleman *v.* State *ex rel.* Wild, 7 Ala. App. 424, 61 So. 20. **Cal.** Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173. **Colo.**—Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A 353. **Conn.** Lowrey *v.* Gridley, 30 Conn. 450. **Del.** Petit *v.* Colmery, 4 Penne. 266, 55 Atl. 344. **Ill.**—Early *v.* People, 117 Ill. App. 608. **Me.**—State *v.* Whalen, 85 Me. 469, 27 Atl. 348. **Mass.**—Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622. **Miss.**—Livelar Co. *v.* State, 98 Miss. 330, 53 So. 681. **Mont.**—State *ex rel.* Streit *v.* Justice Court, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156. **N. H.**—Hussey *v.* Davis, 58 N. H. 317. **N. Y.**—People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970. **Okla.**—Duncan *v.* State, 11 Okla. Crim. 217, 144 Pac. 629. **Pa.** Paye *v.* Bennett Piano Co., 21 Pa. Dist. 381. **R. I.**—State *v.* Hand Brewing Co., 32 R. I. 56, 78 Atl. 499. **S. D.**—Gamble *v.* Keyes, 35 S. D. 644, 153 N. W. 888. **Tex.**—Dupree *v.* State, 102 Tex. 455, 119 S. W. 301.

6. State *v.* Hand Brewing Co., 32 R. I. 56, 78 Atl. 499.

7. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622; Paye *v.* Bennett Piano Co., 21 Pa. Dist. 381.

[a] **A prosecution cannot be founded** on the search warrant but a new complaint must be filed against the suspected person even though he has been taken into custody under the warrant. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622. See also State *v.* Hand Brewing Co., 32 R. I. 56, 78 Atl. 499.

8. **Mass.**—Robinson *v.* Richardson, 13 Gray 454. **Pa.**—Paye *v.* Bennett Piano Co., 21 Pa. Dist. 381. **R. I.** State *v.* Hand Brewing Co., 32 R. I. 56, 78 Atl. 499.

[a] **The title to or possession** of the property taken cannot be determined. **Ala.**—Southern Hardware Co. *v.* Lester, 166 Ala. 86, 52 So. 328. **Cal.**—Modern Loan Co. *v.* Police Court, 12 Cal. App.

aid in the prosecution of a criminal offense by obtaining possession of personal property alleged to be unlawfully held or kept and which will later be used as evidence in the criminal case.[9]

B. THE WARRANT. — **1. Necessity for.** — Except as otherwise provided by statute,[10] an officer is not justified in making a search and seizure unless fortified with a warrant.[11]

2. Proceedings To Obtain. — a. *In General.* — A search warrant can be issued only in the manner prescribed by the law,[12] and the requirements of the statute in respect thereto must be strictly observed.[13]

b. *Application on Affidavit.* — The warrant issues on application supported by affidavit,[14] showing facts establishing probable cause for

582, 108 Pac. 56. **Mass.**—Robinson *v.* Richardson, 13 Gray 454. **N. Y.**—People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970.

9. **Minn.**—Cole *v.* Curtis, 16 Minn. 182. **N. Y.**—People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970. **Pa.**—Paye *v.* Bennett Piano Co., 21 Pa. Dist. 381.

See City of Bessemer *v.* Eidge, 162 Ala. 201, 50 So. 270.

[a] **But no prosecution need accompany** or follow the search warrant proceeding. Haworth *v.* Newell, 102 Iowa 541, 71 N. W. 404.

10. Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

[a] **Search for concealed weapons** without warrant. Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

11. **Ga.**—Pickett *v.* State, 99 Ga. 12, 25 S. E. 608, 59 Am. St. Rep. 226; Hughes *v.* State, 2 Ga. App. 29, 58 S. E. 390. **Ia.**—McClurg *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519. **N. Y.**—Devlin *v.* McAdoo, 49 Misc. 57, 96 N. Y. Supp. 425; People *v.* Glennon, 37 Misc. 1, 74 N. Y. Supp. 794, 10 N. Y. Ann. Cas. 365, 16 N. Y. Crim. 297. **Tex.**—Regan *v.* Harkey, 40 Tex. Civ. App. 16, 87 S. W. 1164.

[a] **No amount of suspicion or incriminating evidence** will justify a search of a residence without a warrant having been previously issued for that purpose. Fennemore *v.* Armstrong, 6 Boyce (Del.) 35, 96 Atl. 204; Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

12. **Ala.**—Coleman *v.* State *ex rel.* Wild, 7 Ala. App. 424, 61 So. 20. **N. Y.** People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970. **Okla.**—Duncan *v.* State, 11 Okla. Crim. 217, 144 Pac. 629.

13. Early *v.* People, 117 Ill. App. 608.

14. **Ala.**—City of Bessemer *v.* Eidge, 162 Ala. 201, 50 So. 270; Coleman *v.* State *ex rel.* Wild, 7 Ala. App. 424, 61 So. 20. **Cal.**—Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173. **Ga.**—Owens *v.* Way, 141 Ga. 796, 82 S. E. 132, Ann. Cas. 1915C, 963. **Ill.**—White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60. **Mass.**—Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622; Com. *v.* Dana, 2 Metc. 329. **Minn.**—Cole *v.* Curtis, 16 Minn. 182. **N. Y.**—People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970. **N. D.**—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82. **R. I.**—Humes *v.* Taber, 1 R. I. 464. **S. C.**—State *v.* Wimbush, 9 Rich. L. 309. **S. D.**—Gamble *v.* Keyes, 35 S. D. 644, 153 N. W. 888. **Tex.**—Dupree *v.* State, 102 Tex. 455, 119 S. W. 301. **W. Va.** State *v.* Emsweller, 78 W. Va. 214, 88 S. E. 787.

[a] **Where issued without such supporting** affidavit the warrant is wholly void. **Ala.**—Coleman *v.* State *ex rel.* Wild, 7 Ala. App. 424, 61 So. 20. **Mo.** Halsted *v.* Brice, 13 Mo. 171. **S. C.** State *v.* Wimbush, 9 Rich. L. 309.

[b] **An affidavit made after the search** and seizure cannot give any legal vitality to a prior warrant issued without affidavit. **Ala.**—Coleman *v.* State *ex rel.* Wild, 7 Ala. App. 424, 61 So. 20. **Ill.**—Early *v.* People, 117 Ill. App. 608. **Tex.**—Dupree *v.* State, 102 Tex. 455, 119 S. W. 301.

the search,[15] and describing with particularity the place to be searched and the things or person to be seized.[16] It is not necessary to directly charge a crime in the affidavit.[17]

c. *To Whom Application Made.* — The application for a search warrant may be made to a justice of the peace[18] or other magistrate[19] or court[20] authorized to issue warrants in criminal cases.

d. *Disposition of Application.* — The question of the existence of probable cause for the issuance of a search warrant is to be determined by the judge or justice to whom application therefor is made,[21] and such decision is conclusive so far as the validity of the search warrant and the proceedings thereunder are concerned,[22] although it does not prevent the institution of an action for damages against the party who made the affidavit.[23]

3. Form and Sufficiency of Warrant. — a. *In General.* — The warrant must show on its face that the statute has been complied with.[24] Some statutes expressly prescribe the form of a search warrant.[25] It should be directed to the officer[26] or private person[27] authorized to execute it and be made returnable to the proper tribunal,[28] and within a designated time.[29] Under some statutes the warrant must direct that not only the property but also the person in whose possession it was found be brought before the judge or justice who issued the search warrant,[30] and where under the statute a search

15. Lippman *v.* People, 175 Ill. 101, 51 N. E. 872.

[a] **An averment of affiant's belief** without a statement of facts upon which such belief is founded is insufficient. White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

16. **Ala.**—Thrash *v.* Bennett, 57 Ala. 156. **Cal.**—Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173. **Ga.**—Owens *v.* Way, 141 Ga. 796, 82 S. E. 132, Ann. Cas. 1915C, 963. **N. Y.**—People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970. **N. D.**—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82. **Pa.**—Paye *v.* Bennett Piano Co., 21 Pa. Dist. 381. **R. I.**—*In re* Horgan's Liquors, 16 R. I. 542, 18 Atl. 279. **S. D.**—Gamble *v.* Keyes, 35 S. D. 644, 153 N. W. 888.

17. Olson *v.* Haggerty, 69 Wash. 48, 124 Pac. 145.

18. Smith *v.* McDuffee, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947.

19. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622; O'Meara *v.* Merritt, 128 Mich. 249, 87 N. W. 197.

20. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622.

21. Toole *v.* State, 170 Ala. 41, 54 So. 195; Kniseley *v.* Ham, 39 Okla. 623, 136 Pac. 427, 49 L. R. A. (N. S.) 770.

22. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622.

23. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622.

As to civil actions founded upon a wrongful search generally, see *infra*, III.

24. Coleman *v.* State *ex rel.* Wild, 7 Ala. App. 424, 61 So. 20; State *v.* Whalen, 85 Me. 469, 27 Atl. 348.

[a] **Strict compliance** with the statute must appear. Early *v.* People, 117 Ill. App. 608.

25. Smith *v.* McDuffee, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947.

26. City of Bessemer *v.* Eidge, 162 Ala. 201, 50 So. 270.

27. Meek *v.* Pierce, 19 Wis. 300.

28. Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6.

[a] **The court which issued it is the** one to which return should be made. Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6.

29. Livelar Co. *v.* State, 98 Miss. 330, 53 So. 681.

[a] **Term Time.**—The warrant need not be made returnable in term time. Toole *v.* State, 170 Ala. 41, 54 So. 195.

30. White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

warrant should not contain a clause commanding the arrest of the person in whose possession the property is found an insertion of such clause does not affect the validity of the search warrant.[31] Under some statutes it is essential to the validity of a search warrant that it contain a command for the return of an inventory of the property taken thereunder.[32]

b. *Showing of Probable Cause.* — The statute may,[33] or may not,[34] require the warrant to show on its face that probable cause for its issuance had been previously ascertained.

c. *Description of Place.* — The premises to be searched should be described in the warrant[35] with sufficient particularity to enable the officer to locate the place.[36] It is generally not necessary to give the

31. Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

32. Hussey *v.* Davis, 58 N. H. 317.

33. State *v.* Whalen, 85 Me. 469, 27 Atl. 348.

34. Toole *v.* State, 170 Ala. 41, 54 So. 195; Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6.

35. Ala.—Toole *v.* State, 170 Ala. 41, 54 So. 195; City of Bessemer *v.* Eidge, 162 Ala. 201, 50 So. 270; Thrash *v.* Bennett, 57 Ala. 156. **Conn.**—Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200. **Ill.**—Langdon *v.* People, 133 Ill. 382, 24 N. E. 874. **Ind.**—Tuell *v.* Wrink, 6 Blackf. 249. **Ky.**—Weaver *v.* Fickle, 174 Ky. 432, 192 S. W. 515; Reed *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122. **La.**—Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554. **Me.**—State *v.* Fezzette, 103 Me. 467, 69 Atl. 1073; State *v.* Duane, 100 Me. 447, 62 Atl. 80. **Mass.**—Com. *v.* Certain Intox. Liquors, 13 Allen 52; Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151. **Mich.** Bullock *v.* Ward, 182 Mich. 443, 148 N. W. 651. **Minn.**—Ingraham *v.* Booton, 117 Minn. 105, 134 N. W. 505, Ann. Cas. 1913D, 212. **N. H.**—Metcalf *v.* Weed, 66 N. H. 176, 19 Atl. 1091. **N. D.** State *v.* McNulty, 7 N. D. 169, 73 N. W. 87. **Ore.**—Smith *v.* McDuffee, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947. **R. I.**—*In re* Horgan's Liquors, 16 R. I. 542, 18 Atl. 279. **W. Va.**—State *v.* Emsweller, 78 W. Va. 214, 88 S. E. 787; Byrnside *v.* Burdette, 15 W. Va. 702. **Wis.**—Ashley *v.* Peterson, 25 Wis. 621.

[a] **Only one place** should be described. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; State *v.* Duane, 100 Me. 447, 62 Atl. 80. But see Gray *v.* Davis, 27 Conn. 447.

[b] **If the place is sufficiently described in the complaint** and the same is expressly made a part of the warrant, the latter need not contain a particular description of the premises to be searched. State *v.* Erskine, 66 Me. 358; Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6.

36. Ark.—Bryan *v.* State, 99 Ark. 163, 137 S. W. 561, Ann. Cas. 1913A, 908. **Ia.**—State *v.* Moore, 125 Iowa 749, 101 N. W. 732. **Mass.**—Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6. **Minn.** McSherry *v.* Heimer, 132 Minn. 260, 156 N. W. 130. **N. D.**—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82.

[a] **Inaccuracies in the description** of the premises do not vitiate the warrant provided the description is such that the officer can with reasonable certainty locate them. **Me.**—State *v.* Robinson, 49 Me. 285. **Mass.**—Com. *v.* Certain Intox. Liquors, 122 Mass. 36; Downing *v.* Porter, 8 Gray 539. **Minn.** McSherry *v.* Heimer, 132 Minn. 260, 156 N. W. 130.

[b] **Warrant authorizing search of the dwelling house** of a designated person is sufficient. **Mass.**—Dwinnels *v.* Boynton, 3 Allen 310. **Vt.**—Lincoln *v.* Smith, 27 Vt. 328. **Wis.**—Meek *v.* Pierce, 19 Wis. 300.

[c] **Describing premises as the office** of a named person giving the street and number is sufficient although the office is occupied by another person. Com. *v.* Dana, 2 Metc. (Mass.) 329.

[d] **Where a building is partly occupied by another** person a description of the whole building as being subject to the search under a warrant is fatally defective. Com. *v.* Certain Intox. Liquors, 110 Mass. 499.

true legal description of the premises,[37] although there is authority to the contrary.[38]

d. *Description of Property To Be Seized.* — The personal property to be seized under the warrant must also be described therein with sufficient certainty.[39] Unless required by statute,[40] it is not necessary to state the name of the owner of the property.[41]

e. *Provision for Search of Individual.* — A search warrant may authorize the searching of an individual in a proper case.[42]

C. Execution of Warrant. — The warrant must be executed strictly in accordance with the statute and in obedience to the directions of the writ itself.[43] It should be done promptly,[44] and in the day time,[45] though it has been held that in the absence of an express statutory prohibition, a search warrant may be executed in the night-time.[46] In some jurisdictions an officer in the execution of a search warrant is authorized to break open the door of the premises to be searched,[47] if after notice of his authority and purpose[48] he is refused admittance.[49] A warrant authorizing the search of certain premises is to be construed strictly,[50] and under such warrant no other place can be searched.[51]

37. State *v.* Moore, 125 Iowa 749, 101 N. W. 732; McSherry *v.* Heimer, 132 Minn. 260, 156 N. W. 130.

38. State *v.* Bartlett, 47 Me. 388; Jones *v.* Fletcher, 41 Me. 254.

39. **Ala.**—City of Bessemer *v.* Eidge, 162 Ala. 201, 50 So. 270; Thrash *v.* Bennett, 57 Ala. 156. **Conn.**—Frisbie *v.* Butler, Kirby 213. **Ill.**—Lippman *v.* People, 175 Ill. 101, 51 N. E. 872. **Ky.** Reed *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122. **Mass.**—Stone *v.* Dana, 5 Metc. 98. **Mich.**—Hastings *v.* Haug, 85 Mich. 87, 48 N. W. 294. **Minn.**—Ingraham *v.* Booton, 117 Minn. 105, 134 N. W. 505, Ann. Cas. 1913D, 212. **N. Y.** Bell *v.* Clapp, 10 Johns. 263, 6 Am. Dec. 339. **N. D.**—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82. **R. I.**—*In re* Horgan's Liquors, 16 R. I. 542, 18 Atl. 279. **Vt.**—State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711. **W. Va.** Byrnside *v.* Burdett, 15 W. Va. 702. **Wis.**—Ashley *v.* Peterson, 25 Wis. 621.

[a] **Describing them as goods, wares and merchandise** without any specification of their character, quality or weight or other circumstance tending to distinguish them is wholly insufficient. Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151.

40. Com. *v.* Reed, 162 Mass. 215, 38 N. E. 364.

41. Gray *v.* Davis, 27 Conn. 447; Bell *v.* Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

42. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

43. White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60; Boston & M. R. Co. *v.* Small, 85 Me. 462, 27 Atl. 349, 35 Am. St. Rep. 379.

As to liability of officer executing a warrant, see *infra.* III, A.

44. State *v.* Guthrie, 90 Me. 448, 38 Atl. 368; Farmer *v.* Sellers, 89 S. C. 492, 72 S. E. 224.

45. Beaty *v.* Perkins, 6 Wend. (N. Y.) 382; Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

[a] **So Provided by Statute.**—Petit *v.* Colmery, 4 Penne. (Del.) 266, 55 Atl. 344.

46. **Conn.** — State *v.* Brennan's Liquors, 25 Conn. 278. **Me.**—State *v.* Bennett, 95 Me. 197, 49 Atl. 867. **Mass.** Com. *v.* Hinds, 145 Mass. 182, 13 N. E. 397.

47. Banks *v.* Farwell, 21 Pick. (Mass.) 156.

48. Phelps *v.* McAdoo, 47 Misc. 524, 94 N. Y. Supp. 265, 16 N. Y. Ann. Cas. 470, 19 N. Y. Crim. 126.

49. Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

50. Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

51. **Ky.**—Weaver *v.* Ficke, 174 Ky. 432, 192 S. W. 515. **La.**—Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554. **N. D.**—State *v.* McNulty, 7 N. D.

D. WAIVER OF IRREGULARITIES. — Voluntary consent to a search waives irregularities in the warrant[52] or in its execution.[53]

E. DISPOSITION OF PROPERTY SEIZED. — Property seized upon a search warrant is thereby brought into the custody and control of the court from which the process issued,[54] and to be further dealt with in accordance with the provisions and terms of the statute.[55] But the statute may permit the officer to leave the property in the custody of the person in whose possession it was found upon his giving sufficient surety to produce the same at the time of trial.[56] If upon the trial no probable cause is shown, the property is returned to the person in whose possession it was found,[57] but upon conviction of such person the property is returned to the one who upon the trial proved to be the owner thereof.[58]

F. REVIEW OF SEARCH WARRANT PROCEEDINGS. — Certiorari does not lie to review proceedings of a magistrate in issuing a search warrant for the seizure of property,[59] but there is authority to the contrary.[60]

II. PROCEEDINGS TO SEIZE FORFEITED PROPERTY. — It is a generally recognized principle of law that in the exercise of police power property of a certain character held or used to the detriment of the general public may be seized and destroyed,[61] and that such

169, 73 N. W. 87. **R. I.**—Humes *v.* Taber, 1 R. I. 464.

[a] **Variance in Name of Owner.**—Under a warrant authorizing to search the premises of one B. P. Tuell a search of the premises of Benjamin P. Tuell is illegal. Tuell *v.* Wrink, 6 Blackf. (Ind.) 249.

[b] **A warrant authorizing the search of a dwelling house** of a designated person does not empower the officer to search a building owned by the party named in the warrant but occupied by another person. Humes *v.* Taber, 1 R. I. 464.

52. Smith *v.* McDuffee, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947.

53. Smith *v.* McDuffee, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947.

54. **Cal.**—Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173. **Mass.**—Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622. **N. Y.**—Houghton *v.* Bachman, 47 Barb. 388.

[a] **Although no criminal prosecution** has been instituted against the person in whose possession the property was found the magistrate has jurisdiction over the property. Haworth *v.* Newell, 102 Iowa 541, 71 N. W. 404.

55. Guyton *v.* Neal, 48 Colo. 549, 111 Pac. 84; Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

56. Com. *v.* Thompson, 24 Pa. Co. Ct. 179.

57. Briggs *v.* Shepard Mfg. Co., 217 Mass. 446, 105 N. E. 622; People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970.

58. People *ex rel.* R. Simpson Co. *v.* Kempner, 208 N. Y. 16, 101 N. E. 794, Ann. Cas. 1914D, 169, 46 L. R. A. (N. S.) 970.

59. Farrow *v.* Springer, 57 N. J. L. 353, 31 Atl. 215.

[a] **A writ of certiorari** lies only to correct the errors of inferior courts or officers acting judicially in proceedings not according to the course of the common law. Search warrant proceedings are according to the course of the common law although the cause for the search and seizure is created by the statute. **Lynch *v.* Crosby, 134 Mass. 313.**

60. White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

61. **Cal.**—Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173. **Ill.**—Langdon *v.* People, 133 Ill. 382, 24 N. E. 874. **La.**—City of Shreveport *v.* Nejin, 140 La. 785, 73 So. 996. **Me.**—Gray *v.* Kimball, 42 Me. 299. **Mass.**—Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381

scizure when authorized by the law is not in conflict with the constitutional prohibition of unreasonable search and seizures.[62] But the exercise of such power conferred by the law must be properly guarded in order that abuses be prevented.[63] Where the seizure of certain property contained in a shop is ordered, a seizure of such property from the person named in the warrant is unauthorized,[64] but it has been held that under a warrant directing the seizure of certain personal property, if found in the possession of a person, such property when found in his store may be lawfully seized.[65]

III. REMEDIES FOR WRONGFUL SEARCHES AND SEIZURES. — A. FORM OF REMEDY. — One who is injured by the illegal issuance or execution of a warrant of search or seizure may sue the responsible party[66] in trespass[67] or case,[68] and an action for malicious

See also the title **"Penalties, Forfeitures and Fines."**

As to seizure of gambling instruments, see 10 STANDARD PROC. 330.

In reference to intoxicating liquors, see 14 STANDARD PROC. 488.

62. **U. S.**—Boyd *v.* United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746. **Ill.**—Glennon *v.* Britton, 155 Ill. 232, 40 N. E. 594; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874. **Mass.**—Com. *v.* Dana, 2 Metc. 329. **Wis.**—State *v.* Newman, 96 Wis. 258, 71 N. W. 438, municipal ordinance.

63. **Me.**—State *v.* Therrien, 86 Me. 425, 29 Atl. 1117; Gray *v.* Kimball, 42 Me. 299. **Mass.**—Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381. **N. H.**—State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398.

64. State *v.* Therrien, 86 Me. 425, 29 Atl. 1117.

65. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

66. [a] **One who without probable cause** institutes search warrant proceedings (1) is liable. **Del.**—Reed *v.* Legg, 2 Harr. 173. **Ind.**—Whitson *v.* May, 71 Ind. 269. **Ky.**—Weaver *v.* Ficke, 174 Ky. 432, 192 S. W. 515. **Minn.**—Olson *v.* Tvete, 46 Minn. 225, 48 N. W. 914. **Mo.**—Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693. **N. Y.**—Doane *v.* Anderson, 60 Hun 586, 15 N. Y. Supp. 459, 39 N. Y. St. 913. (2) Also where he acts maliciously in procuring the warrant. **Ala.**—Gulsby *v.* Louisville & N. R. Co., 167 Ala. 122, 52 So. 392. **Ia.** Krehbiel *v.* Henkle, 152 Iowa 604, 129 N. W. 945, 133 N. W. 145, Ann. Cas. 1913B, 1156. **Mo.**—Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

[b] **Against magistrate** acting without jurisdiction. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Farrow *v.* Springer, 57 N. J. L. 353, 31 Atl. 215. As to actions against judges generally, see 16 STANDARD PROC. 644.

[c] **Officer liable** where he acts without a warrant. (Fennemore *v.* Armstrong, 6 Boyce [Del.] 35, 96 Atl. 204; Regan *v.* Harkey, 40 Tex. Civ. App. 16, 87 S. W. 1164) or (2) under a warrant invalid on its face (Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398), but (3) not where it is regular (**Okla.**—Kniseley *v.* Ham, 39 Okla. 623, 136 Pac. 427, 49 L. R. A. (N. S.) 770. **Vt.**—Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663. **Wash.**—Olson *v.* Haggerty, 69 Wash. 48, 124 Pac. 145) unless (4) he executes it in an illegal manner. Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554; Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70, 22 L. R. A. (N. S.) 819.

[d] **Persons called upon by an officer** to aid him in executing a search warrant are not liable in damages although the warrant is invalid as it is not their duty to examine the warrant. Reed *v.* Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

67. **Conn.**—Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200. **Del.**—Reed *v.* Legg, 2 Harr. 173. **Ky.**—Weaver *v.* Ficke, 174 Ky. 432, 192 S. W. 515; Reed *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122. **N. Y.**—Doane *v.* Anderson, 60 Hun 586, 15 N. Y. Supp. 459, 39 N. Y. St. 913. **N. C.**—Gardner *v.* Neil, 4 N. C. 104. **Ohio.**—Simpson *v.* McCaffrey, 13 Ohio 508. **Tex.**—Reed *v.* Lucas, 42 Tex. 529.

68. Tuell *v.* Wrink, 6 Blackf. (Ind.)

prosecution may also be maintained where the proceedings were instituted through malice.[69]

An injunction to restrain the search warrant proceedings will issue in a proper case.[70]

B. PLEADING. — Where the action is brought to recover damages for malicious prosecution,[71] or punitive damages are sought to be recovered,[72] malice must be specifically pleaded. It has been held that in actions for malicious prosecution of a search warrant it is not necessary to allege actual pecuniary damage, but allegations of humiliation and disgrace caused by the search are sufficient to sustain a recovery of damages.[73] A plea in which it is averred that the entry was peaceably made discloses a sufficient justification under a valid warrant and it is not necessary to set forth the grounds upon which the warrant was applied for and issued.[74]

C. TRIAL. — The question of plaintiff's consent to the search is one of fact for the jury,[75] as is the question of the existence of probable cause for the issuance of a search warrant,[76] unless the facts are undisputed and but one inference can be drawn from them.[77] The existence of malice likewise is a question of fact to be determined by the jury,[78] and so is the question of the unreasonableness of the delay in the service of the search warrant in so far as it depends upon the particular facts of the case.[79]

249; Beaty *v.* Perkins, 6 Wend. (N. Y.) 382.

69. Olson *v.* Haggerty, 69 Wash. 48, 124 Pac. 145.

70. Owens *v.* Way, 141 Ga. 796, 82 S. E. 132, Ann. Cas. 1915C, 963; Paye *v.* Bennett Piano Co., 21 Pa. Dist. 381.

71. Gulsby *v.* Louisville & N. R. Co., 167 Ala. 122, 52 So. 392.

72. Wallace *v.* Williams, 59 Hun 628, 14 N. Y. Supp. 180, 37 N. Y. St. 812.

73. Olson *v.* Haggerty, 69 Wash. 48, 124 Pac. 145.

74. Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

75. McClurg *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519.

76. Krehbiel *v.* Henkle, 142 Iowa 677, 121 N. W. 378; Lane *v.* Pennsylvania R. Co., 78 N. J. L. 672, 76 Atl. 1016.

77. Krehbiel *v.* Henkle, 142 Iowa 677, 121 N. W. 378; Lane *v.* Pennsylvania R. Co., 78 N. J. L. 672, 76 Atl. 1016.

78. Fennemore *v.* Armstrong, 6 Boyce (Del.) 35, 96 Atl. 204.

79. Farmer *v.* Sellers, 89 S. C. 492, 72 S. E. 224.

[a] **Reasonable Time a Question for Court.**—But under a statute providing that the search warrant must be executed immediately the question as to what is a reasonable time within which the service of such a warrant can lawfully be made is a question of law for the court. State *v.* Guthrie, 90 Me. 448, 38 Atl. 368.

SEARCH WARRANTS. — See **Search and Seizure; Warrants.**

SECURITIES. — See **Marshaling Assets.**

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CROSS-REFERENCES:

Costs; Justification of Sureties; Paupers.

In admiralty, see 1 STANDARD PROC. 505.

For forms, see 9 STANDARD PROC. 1119, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. POWER TO ORDER. — A. SOURCE OF POWER. — **1. Common Law.** — Independently of statute, courts have power to require security for costs in the case of a non-resident plaintiff or a minor suing by next friend.[1]

2. Statutes. — The matter is now largely regulated by statutes conferring upon courts the power to exact security and designating the cases in which it may be required.[2] These statutes, which are to

1. **U. S.**—Karns *v.* Imlay Rapid Cyanide Process Co., 181 Fed. 751; Roy *v.* Louisville, N. O. & T. R. Co., 34 Fed. 276. **N. J.**—Binns *v.* Mount, 28 N. J. Eq. 24; Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249; State Bank *v.* Evans, 14 N. J. L. 298. **Ohio.**—*In re* Probate of Barr's Will, 11 Ohio Dec. (Reprint) 910. **Pa.**—Freeman Bros. *v.* Refowich, 20 Pa. Co. Ct. 15. **R. I.** Pratt *v.* Fenner, 8 R. I. 40.

See 10 STANDARD PROC. 770.

2. **Ala.**—Davis *v.* Brandon, 75 So. 908. **Ark.**—Palmer *v.* Hicks, 17 Ark. 505. **Del.**—Fidelity Mut. F. Ins. Co. *v.* Hart, 1 Penne. 447, 41 Atl. 974. **Idaho.** Kissler *v.* Budge, 24 Idaho 246, 133 Pac. 125. **Ill.**—Smith *v.* Robinson, 11 Ill. 119. **Ind.**—State *v.* Roche, 91 Ind. 406. **Ky.**—Murphey's Heirs *v.* Murphey, 7 B. Mon. 232. **Md.**—State *v.* Layman, 46 Md. 190. **Mass.**—Shute *v.* Bils, 198 Mass. 544, 84 N. E. 862. **Mich.**—Osowichi *v.* Ferrick, 106 Mich. 41, 63 N. W. 981. **Mont.**—Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339. **Neb.**—Moss *v.* Robertson, 56 Neb. 774, 77 N. W. 403. **N. J.**—Jones *v.* Knauss, 33 N. J. Eq. 188. **N. Y.**—Myers *v.* Stephens, 52 Misc. 632, 102 N. Y. Supp. 929. **N. C.** Moore *v.* Banner, 39 N. C. 293. **P. R.** Didricksen *v.* American R. Co., 6 Porto Rico Fed. 478. **R. I.**—Pratt *v.* Fenner, 8 R. I. 40. **Va.**—Evans *v.* Bradshaw, 10 Gratt. (51 Va.) 207. **W. Va.**—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

be liberally construed,[3] have been uniformly upheld as constitutional.[4]

B. DISCRETION OF COURT. — The defendant is in certain cases entitled as a matter of right to security for costs,[5] but ordinarily the matter rests in the court's discretion,[6] which will not be reviewed on appeal[7] unless a clear abuse thereof is shown.[8]

C. WHAT COURTS MAY EXERCISE. — **1. In General.** — The statute, as a rule, designates the courts in which security for costs may be required.[9]

3. U. S.—McClaskey *v.* Barr, 79 Fed. 408. **Ind.**—Cox *v.* Hunt, 1 Blackf. 146. **Mont.**—Marsh *v.* Kinna, 2 Mont. 547. **Neb.**—Moss *v.* Robertson, 56 Neb. 774, 77 N. W. 403. **Wash.**—State *v.* Superior Court, 17 Wash. 564, 50 Pac. 482.

4. Ark.—Williams *v.* Pindall, 35 Ark. 434. **Md.**—Holt *v.* Tennalytown & R. Ry. Co., 81 Md. 219, 31 Atl. 809. **Ohio.** *In re* Probate of Barr's Will, 11 Ohio Dec. (Reprint) 910. **Pa.**—Patton's Election, 228 Pa. 446, 77 Atl. 658. **W. Va.**—Nease *v.* Capehart, 15 W. Va. 299.

[a] **A requirement that non-resident plaintiffs** shall furnish security for costs has been held not to be in conflict with the constitution of the United States providing that the citizens of each state shall be entitled to all the privileges of citizens of the several states. Promutico *v.* Brooks Co., 42 Pa. Co. Ct. 490.

5. U. S.—Sutro *v.* Simpson, 4 McCrary 276, 14 Fed. 370. **Colo.**—Edgar Gold & S. Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113. **Ill.**—Smith *v.* Robinson, 11 Ill. 119; Hickman *v.* Haines, 10 Ill. 20. **Ky.**—Portsmouth F. & M. Works *v.* Iron Hills F. & Min. Co., 11 Bush 47. **Me.**—Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71. **Md.**—Mayer *v.* Tyson, 1 Bland 559. **N. H.**—Brackett *v.* Bartlett, 19 N. H. 129; Pettingill *v.* McGregor, 12 N. H. 179. **N. Y.**—Tuthill *v.* Forbes, 160 App. Div. 510, 145 N. Y. Supp. 660; Craig *v.* Du Cros, 63 Misc. 524, 117 N. Y. Supp. 384; Myers *v.* Stephens, 52 Misc. 632, 102 N. Y. Supp. 929. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **Utah.**—Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011.

[a] Where plaintiff is a non-resident the defendant is entitled to an order for security for costs as matter of right. Schmalz *v.* William Crow Const. Co., 146 App. Div. 623, 131 N. Y. Supp. 398.

6. Ark.—Perkins *v.* Reagan, 14 Ark. 47. **Cal.**—Stimson *v.* Carpenter, 78 Cal. 571, 21 Pac. 304. **Colo.**—Ward *v.* Wilms, 16 Colo. 86, 27 Pac. 247; Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78. **Ill.** Papineau *v.* Belgarde, 81 Ill. 61; Baltimore & O. S. W. Ry. Co. *v.* Keck, 84 Ill. App. 159; St. Louis, A. & T. H. R. R. Co. *v.* Reagan, 52 Ill. App. 488. **Ind.** Hughes *v.* Osborn, 42 Ind. 450. **Ia.** Funk *v.* Church, 132 Iowa 1, 109 N. W. 286. **Mich.**—Roff *v.* Miller, 189 Mich. 558, 155 N. W. 517; Gray *v.* Wilcox, 56 Mich. 58, 22 N. W. 109. **Minn.**—Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444. **Mo.**—Needles *v.* Burk, 98 Mo. 474, 11 S. W. 1008. **Neb.**—King *v.* Jackson, 25 Neb. 466, 41 N. W. 448. **N. H.**—Gale *v.* French, 16 N. H. 95. **N. M.**—Roswell *v.* Bateman, 20 N. M. 77, 146 Pac. 950, Ann. Cas. 1918D, 426, L. R. A. 1917D, 365. **N. Y.**—Schmalz *v.* William L. Crow Const. Co., 146 App. Div. 623, 131 N. Y. Supp. 398; McKeaggan *v.* Post, 117 App. Div. 129, 102 N. Y. Supp. 276; Bender *v.* Paulus, 109 App. Div. 148, 95 N. Y. Supp. 670; Barnes *v.* Seligman, 67 Hun 649, 22 N. Y. Supp. 45; Kimberly *v.* Goodrich, 22 How. Pr. 424. **N. C.**—Adams *v.* Reeves, 76 N. C. 412. **Ohio.**—Newsom's Admr. *v.* Ran, 18 Ohio 240. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **R. I.**—Northrup *v.* Peacedale Mfg. Co., 25 R. I. 503, 56 Atl. 685; Rosenfeld *v.* Swarts, 22 R. I. 315, 47 Atl. 690. **S. C.**—Tharin *v.* Seabrook, 6 S. C. 113. **Tenn.**—Sharp *v.* Miller, 3 Sneed 42. **Tex.**—Missouri Pac. Ry. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907. **Wis.** Colbeth *v.* Colbeth, 117 Wis. 90, 93 N. W. 829; Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900; Joint School Dist. No. 7 *v.* Kemen, 72 Wis. 179, 39 N. W. 131.

7. Goodenough *v.* Burton, 146 Mich. 50, 109 N. W. 52; State *v.* Cox, 46 N. C. 373.

8. Gifford *v.* Roberts, 125 Mich. 408, 84 N. W. 465; Whitsett *v.* Blumenthal, 63 Mo. 479.

9. Ia.—Smith *v.* Humphrey, 15 Iowa

2. Limited and Inferior Jurisdiction. — Unless authorized by statute,[10] costs cannot be exacted by courts of limited and inferior jurisdiction,[11] such as justices of the peace,[12] municipal courts[13] county courts,[14] and in some jurisdictions probate courts.[15]

3. Federal Courts. — There being no federal statute in reference to security for costs the federal courts will follow the state statutes on the subject,[16] although they are not binding upon them.[17]

4. Courts of Equity. — Security for costs, as a rule, may be required in equity as well as at law.[18]

II. IN WHAT PROCEEDINGS.[19] — A. INCIDENTAL AND SUPPLEMENTAL PROCEEDINGS. — The statutes generally require security for costs in original actions only and do not extend to incidental and supplemental proceedings.[20]

B. SUMMARY PROCEEDINGS. — In summary proceedings security for costs ordinarily is not required.[21]

C. ACTIONS FOR RECOVERY OF PROPERTY. — **1. In General.** — A statute providing for security for costs, as a rule, applies to actions for the recovery of property.[22]

2. Ejectment. — Under some statutes security for costs may be required in actions of ejectment,[23] even though the statute provides that such security is to be given at the time of issuance of process and no process under statute is issued in actions of ejectment.[24]

428. **Mass.**—Joannes *v.* Underwood, 6 Allen 240. **N. Y.**—Longrill *v.* Downey, 7 N. Y. Supp. 503, 27 N. Y. St. 51. **Tex.**—Pierce *v.* Pierce, 21 Tex. 469.

10. Dunn *v.* Sutliff, 1 Mich. 24; Stark *v.* Small, 72 Wis. 215, 39 N. W. 359.

11. **Ia.**—Smith *v.* Humphrey, 15 Iowa 428. **Mo.**—McCurdy *v.* Brown, 8 Mo. 549. **N. J.**—Kienzle *v.* Gardner, 73 N. J. L. 258, 63 Atl. 10. **N. Y.**—Mellen *v.* Hutchins, 8 Abb. N. C. 228; Westervelt *v.* Gregg, 1 Barb. Ch. 469.

12. McCurdy *v.* Brown, 8 Mo. 549; Osborne *v.* Everitt, 103 Pa. 421.

13. Mellen *v.* Hutchins, 58 How. Pr. (N. Y.) 349.

14. Pierce *v.* Pierce, 21 Tex. 469. *Contra,* United States *v.* United States F. & G. Co., 78 Vt. 445, 63 Atl. 581.

15. Westervelt *v.* Gregg, 1 Barb. Ch. (N. Y.) 469. See *infra,* II, I.

16. Silvas *v.* Arizona Copper Co., 220 Fed. 116, 136 C. C. A. 208.

17. Post *v.* Torres y Pacheco, 7 Porto Rico Fed. 180.

18. Moore *v.* Banner, 39 N. C. 293.

19. **In Admiralty** see 1 STANDARD PROC. 505.

20. **Ark.**—Johnson *v.* Hoskins, 12 Ark. 635. **Ia.**—Meyer *v.* Evans, 66 Iowa 179, 23 N. W. 386. **Kan.**—Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439. **N. Y.**—First Nat. Bank *v.* Yates, 21 Misc. 373, 47 N. Y. Supp. 484. **Ohio.** Roberts *v.* Price, 2 Ohio Dec. (Reprint) 681. **Pa.**—Firestone *v.* Christ, 2 Pa. Co. Ct. 413.

[a] **Proceedings To Vacate Judgment.**—Roberts *v.* Price, 2 Ohio Dec. (Reprint) 681; Firestone *v.* Christ, 2 Pa. Co. Ct. 413.

[b] **Proceedings to Revive Judgment.**—Johnson *v.* Hoskins, 12 Ark. 635.

[c] **But an application for rehearing** after final judgment is a new action within the meaning of a statute requiring security for costs. Garrett *v.* Terry, 33 Ala. 514.

21. Hasler *v.* Johnston, 59 How. Pr. (N. Y.) 432.

22. **Conn.**—Fleet *v.* Lockwood, 17 Conn. 233. **Ill.**—Farnsworth *v.* Agnew, 27 Ill. 42. **N. C.**—Wall *v.* Fairly, 66 N. C. 385. **Pa.**—Brace Bros. *v.* Evans, 6 Pa. Co. Ct. 19. **Wis.**—Stark *v.* Small, 72 Wis. 215, 39 N. W. 359.

[a] **A vendor** suing for the recovery of property sold under a contract of purchase may be compelled to give security for costs. Allen *v.* Taylor, 96 N. C. 37, 1 S. E. 462.

23. Farnsworth *v.* Agnew, 27 Ill. 42; Moyers *v.* Brown, 10 Humph. (Tenn.) 77.

24. Farnsworth *v.* Agnew, 27 Ill. 42.

3. Replevin. — In some jurisdictions security for costs need not be given in addition to a replevin bond,[25] although the costs of the action exceed the amount of the replevin bond.[26] But where defendant by furnishing a bond required by the statute regains possession of the property after plaintiff gives a replevin bond, the plaintiff may be required to give security for costs.[27] In other jurisdictions security for costs may be required in replevin actions.[28]

D. Partition. — Security for costs cannot be required in partition suits.[29]

E. Bastardy Proceedings. — In bastardy proceedings security for costs is not required.[30]

F. Assignment of Dower. — Under some statutes security for costs may,[31] while according to others it may not,[32] be required in proceedings to have dower assigned.

G. Libel, Slander and Malicious Prosecution. — Some statutes provide that in actions to recover damages for libel[33] or slander,[34] security for costs must be given,[35] although the omission to give such security as required by the statute does not deprive the court of jurisdiction.[36] And under some statutes a party suing for malicious prosecution must give security for costs.[37]

H. Election Contests. — It is provided by some statutes that the contestant in an election contest must furnish security for costs,[38] and in some jurisdictions it is held that the court cannot proceed with the contest unless such statute is complied with;[39] but in other jurisdictions the requirement of security for costs is deemed to be solely for the benefit of the contestee and does not affect the jurisdiction of the court.[40] Where the statute does not require security for costs in election contests,[41] or where under the statute neither

25. **Conn.**—Singer Mfg. Co. *v.* Rhodes, 54 Conn. 48, 5 Atl. 610. **Neb.**—Moore *v.* Herron, 17 Neb. 697, 24 N. W. 425. **N. Y.**—Vulcanite Portland Cement Co. *v.* Williams, 46 Misc. 405, 92 N. Y. Supp. 574; Rogers *v.* Hitchcock, 9 Wend. 462. **Vt.**—Stoddard *v.* Gilman, 22 Vt. 568.

26. Doty *v.* Brown, 1 How. Pr. (N. Y.) 245.

27. Gelch *v.* Barnaby, 7 Abb. Pr. (N. Y.) 19, 1 Bosw. 657.

28. Stark *v.* Small, 72 Wis. 215, 39 N. W. 359.

29. Brock *v.* Eastman, 27 Vt. 559.

30. Francis *v.* Com., 3 Bush (Ky.) 4; Woodman *v.* Jarvis, 12 Gray (Mass.) 190.

31. Murphey's Heirs *v.* Murphey, 7 B. Mon. (Ky.) 232.

32. Forrester *v.* Forrester's Admrs., 35 Ala. 594.

33. **Ala.**—McWhirter *v.* Frazier, 129 Pac. 179; Baker *v.* Palmer, 83 Ill. 568.

34. Stinson *v.* Carpenter, 78 Cal. 571, 21 Pac. 304.

35. See 18 Standard Proc. 892.

36. Stinson *v.* Carpenter, 78 Cal. 571, 21 Pac. 304; Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179; Baker *v.* Palmer, 83 Ill. 568. See 18 Standard Proc. 892.

37. Greer *v.* Whitfield, 4 Lea (Tenn.) 85.

38. **Ala.**—McWhirter *v.* Frazier, 129 Ala. 450, 29 So. 445; Davis *v.* Jones, 123 Ala. 647, 26 So. 321. **Ark.**—Mills *v.* Sanderson, 68 Ark. 130, 56 S. W. 779. **Colo.**—Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202. **Ia.**—Kelso *v.* Wright, 110 Iowa 560, 81 N. W. 805. **Kan.**—Balcom *v.* Peacock, 59 Kan. 136, 52 Pac. 76. **Minn.**—Nehring *v.* Haines, 79 Minn. 233, 72 N. W. 1061.

See 8 Standard Proc. 103.

39. Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017. See 8 Standard Proc. 103.

40. Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

41. McCormick *v.* Jester, 53 Tex. Civ. App. 306, 115 S. W. 278.

party to such contest is liable for costs[42] no security can be exacted.[43]

I. PROBATE PROCEEDINGS. — Unless required by statute,[44] the contestant of a will need not furnish security for costs.[45] In proceedings to compel the personal representative of an estate to make an allowance for costs,[46] or to allow a claim against the estate,[47] or to compel him to pay a debt of the estate,[48] no security for costs need be given.

J. ATTACHMENT. — Generally, the filing of an attachment bond does not relieve the plaintiff from the necessity of furnishing security for costs,[49] but in some jurisdictions it is held that security for costs cannot be required in addition to an attachment bond.[50]

K. ACTIONS FOR RECOVERY OF PENALTIES. — Some statutes provide that in actions instituted by private persons for the recovery of a penalty prescribed for the violation of a law, security for costs must be furnished by the plaintiff.[51] But in the absence of an express statute on the subject security for costs cannot be required in such actions.[52] And it has been held that a statute providing for a cost bond in proceedings on penal statutes is not applicable to city ordinances imposing penalties.[53]

L. QUO WARRANTO. — Under some statutes the relator in quo warranto proceedings must give security for costs.[54] But it has been held that where quo warranto proceedings are instituted by the attorney general for the purpose of ousting respondent from office and declaring a claimant entitled to such office, the latter party cannot be required to give security for costs.[55]

M. CRIMINAL PROSECUTIONS. — Pursuant to some statutes the complainant in a misdemeanor case must furnish security for costs.[56] But

42. Northampton Co. Contested Elections, 18 Pa. Co. Ct. 584.

43. See 8 STANDARD PROC. 103.

44. **Ala.**—Rainer *v.* McElroy, 20 Ala. 347. **Ky.**—Cape *v.* Cape, 136 Ky. 625, 124 S. W. 869. **La.**—Succession of Grover, 49 La. Ann. 1050, 22 So. 313. **Ohio.**—*In re* Probate of Robert Barr's Will, 11 Ohio Dec. (Reprint) 910.

[a] **After probate** under some statutes security for costs need be given by a contestant only where the contest is instituted after the will has been admitted to probate. Harrison *v.* Stanton, 146 Ind. 366, 45 N. E. 582; Burns *v.* Travis, 117 Ind. 44, 18 N. E. 45; Coffman *v.* Reeves, 62 Ind. 334.

45. Cash *v.* Lust, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576.

[a] **A will contest not an action** within terms of a statute providing security for costs in actions. *In re* Joseph's Estate, 118 Cal. 660, 50 Pac. 768.

46. *In re* Statler's Estate, 58 Wash. 199, 108 Pac. 433.

47. Wise *v.* Outtrim, 139 Iowa 192, 117 N. W. 264, 130 Am. St. Rep. 301.

48. Westervelt *v.* Gregg, 1 Barb. Ch. (N. Y.) 469.

49. Shepherd *v.* Spriggs, 29 Ala. 673; Hodges *v.* Porter, 20 Hun (N. Y.) 244; Woodward *v.* Stearns, 11 Abb. Pr. (N. S.) 445.

[a] **An attachment bond** is given only for the payment of costs as may be awarded to the defendant while a cost bond covers all costs which may accrue in the action either to the opposite party or to any of the officers of the court. Casey *v.* Horton, 36 Ill. 234.

50. House *v.* Bierne, 5 Smed. & M. (Miss.) 622.

51. Samuell *v.* Sherman, 170 Ill. 265, 48 N. E. 576; Edwards *v.* Brown, 67 Mo. 377.

52. Board of Com'rs of Excise *v.* McGrath, 27 Hun (N. Y.) 425.

53. Quincy *v.* Ballance, 30 Ill. 185.

54. West End *v.* State, 138 Ala. 295, 36 So. 423; State *v.* Cahaba, 30 Ala. 66.

55. Simonton *v.* State, 44 Fla. 289, 31 So. 821.

56. **Ark.**—Taylor *v.* State, 39 Ark. 291. **Mich.**—Hutchinson *v.* Board of Supvrs., 130 Mich. 62, 89 N. W. 561. **R.**

such security can only be required where it is expressly authorized by the statute,[57] and the requirement does not extend to prosecutions by indictment;[58] nor is it intended to limit the jurisdiction of courts,[59] hence the objection to the failure to give the security may be waived.[60]

III. PERSONS ENTITLED TO SECURITY. — Though, under some statutes security for costs may be required by plaintiff,[61] it is generally ordered only on application of defendant.[62] It has been held that a garnishee in attachment proceedings may demand security for costs.[63]

IV. PERSONS FROM WHOM REQUIRED. — A. Parties. — **1. In General.** — Security for costs can be exacted only of one who is in fact a party to the action.[64]

2. Plaintiff. — a. *In General.*[65] — Generally the security is to be furnished by the plaintiff who institutes the action.[66]

b. *State, County and Municipality.* — Security for costs cannot as a rule be required either of the state,[67] the county,[68] or the municipal-

I.—State *v.* Palmer, 15 R. I. 6, 22 Atl. 944, assault and battery.

57. State *v.* Bowling, 14 Mo. 508.

58. State *v.* Parker, 39 Ark. 174.

59. People *v.* Griswold, 64 Mich. 722, 31 N. W. 809.

60. Mann *v.* State, 37 Ark. 405; State *v.* McCarty, 4 R. I. 82.

61. Badger *v.* Taft, 58 Vt. 585, 3 Atl. 535.

62. Locke *v.* McFalls, 3 Sneed (Tenn.) 674.

[a] **Non-resident** defendant (1) may require security (Mills *v.* Nassau Bank, 123 App. Div. 514, 108 N. Y. Supp. 559; Craig *v.* Du Cros, 63 Misc. 524, 117 N. Y. Supp. 384; Muir *v.* Lewis, 25 Pa. Co. Ct. 656) and (2) the alleged failure on the part of the defendant to register as a foreign corporation does not deprive it of the right to require the plaintiff to give security for costs. Promutico *v.* Brooks Co., 42 Pa. Co. Ct. 490.

[b] **But a defaulting** defendant is not entitled to security. Naderhoff *v.* Geo. Benz & Sons, 25 N. D. 165, 141 N. W. 501, 47 L. R. A. (N. S.) 853.

[c] **Where there are several** defendants only one security can be exacted from the plaintiff for the benefit of all the defendants. Feitelson *v.* Moser, 173 App. Div. 93, 159 N. Y. Supp. 354.

63. Valley Nat. Bank *v.* Mylin, 18 Pa. Dist. 414.

64. International & G. N. Ry. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099.

65. **As affected by non-residence of plaintiff,** see *infra,* IV, C.

66. **Ala.**—Stein *v.* McGrath, 128 Ala. 175, 30 So. 792. **Ark.**—Palmer *v.* Hicks, 17 Ark. 505. **Del.**—Fidelity Mut. F. Ins. Co. *v.* Hart, 1 Penne. 447, 41 Atl. 974. **Idaho.**—Kissler *v.* Budge, 24 Idaho 246, 133 Pac. 125. **Ill.**—Smith *v.* Robinson, 11 Ill. 119. **Ind.**—State *v.* Roche, 91 Ind. 406. **Ia.**—Petty *v.* Hayden, 115 Iowa 212, 88 N. W. 339. **Ky.**—Dean *v.* Boyd, 9 Dana 169. **Md.**—State *v.* Layman, 46 Md. 190. **Mass.**—Shute *v.* Bills, 198 Mass. 544, 84 N. E. 862. **Mont.** Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339. **Neb.**—Moss *v.* Robertson, 56 Neb. 774, 77 N. W. 403. **N. H.**—Sanford *v.* Candia, 54 N. H. 419, 422. **N. J.**—Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249. **N. Y.**—Riley *v.* Ryan, 45 Misc. 151, 91 N. Y. Supp. 952. **Ohio.** Standard Pub. Co. *v.* Bartlett, 6 Ohio Dec. (Reprint) 965. **Pa.**—Jack *v.* McClure, 26 Pa. Co. Ct. 59. **S. D.**—Lawrence *v.* Hughes, 37 S. D. 134, 156 N. W. 904. **Tex.**—Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

67. **La.**—State *v.* Succession of Taylor, 33 La. Ann. 1270. **Miss.**—Albrecht *v.* State, 62 Miss. 516. **Tenn.**—Davis *v.* Hansard, 9 Humph. 173.

[a] **In action for the use of a person** beneficially interested who is chargeable with costs security may be required of the party in whose behalf the action is instituted, though brought in the name of the state. State *v.* Layman, 46 Md. 190.

68. People *v.* Coultas, 9 Ill. App. 39.

[a] **School districts** not within the

ity,[69] or of persons acting on their behalf.[70]

c. *Executors and Administrators.*[71] — Some statutes provide that in an action brought by or against an administrator in his representative capacity the court may, in its discretion, require the plaintiff to give security for costs.[72]

d. *Guardians.* — Under some statutes guardians are exempt from furnishing security for costs.[73] And a guardian ad litem is held to be a guardian within the meaning of such statute.[74] Otherwise, however, when coming within the terms of a general statute they may be required to furnish security.[75] And a next friend suing on behalf of a minor without previous appointment by the court may be required to give security.[76]

e. *Trustees in Bankruptcy.* — A trustee in bankruptcy ordinarily is not relieved from the requirement to give security for costs.[77]

3. Defendant. — The statute may empower the court to require defendant to furnish security for costs,[78] otherwise such security cannot be exacted,[79] not even where defendant seeks affirmative relief,[80]

statutes. Mitchell *v.* Board of Education, 137 Cal. 372, 70 Pac. 180.

69. Seneca Nation *v.* John, 27 Abb. N. C. (N. Y.) 253.

[a] **As to constitutionality of statute** see Memphis *v.* Fisher, 9 Baxt. (Tenn.) 239.

70. See *infra*, this note and Albrecht *v.* State, 62 Miss. 516.

[a] **A receiver of a national bank** need not give security under a federal statute relieving parties acting in behalf of the government from the necessity of giving security for costs. Pepper *v.* Fidelity & Cas. Co., 125 Fed. 822.

[b] **County commissioners** not included in statute exempting counties from duty of giving security. Stegman *v.* Abbe, 8 Kan. App. 860, 54 Pac. 917.

71. **As affected by residence of administrator**, see *infra*, IV, C, 1 and 3.

72. Tuthill *v.* Forbes, 160 App. Div. 510, 145 N. Y. Supp. 660; Hilgenberg *v.* Great Eastern C. & I. Co., 144 App. Div. 411, 129 N. Y. Supp. 240.

[a] **Security for costs will be required** where the action is shown not to have been brought in good faith. Pfeifer *v.* Supreme Lodge, 54 App. Div. 200, 66 N. Y. Supp. 604; Lewis *v.* Lewis, 13 Abb. N. C. 182.

73. Blumenthal *v.* Alexander, 176 App. Div. 184, 162 N. Y. Supp. 403; Green *v.* Harrison, 3 Sneed (Tenn.) 131.

74. Silvas *v.* Arizona Copper Co., 220 Fed. 116, 136 C. C. A. 208; Blumenthal *v.* Alexander, 176 App. Div. 184, 162 N. Y. Supp. 403.

75. See 10 STANDARD PROC. 770, 899.

Ward a non-resident but guardian a resident, see *infra*, IV, C, 3.

76. **Ill.**—Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7. **Ky.** Spicer *v.* Holbrook, 23 Ky. L. Rep. 1812, 66 S. W. 180. **N. Y.**—Fulton *v.* Rosevelt, 1 Paige 178, 19 Am. Dec. 409.

See 10 STANDARD PROC. 770.

77. Osborne *v.* Pennsylvania R. Co., 159 Fed. 301; Graham *v.* Aschenbach, 136 App. Div. 447, 120 N. Y. Supp. 882.

[a] **The statute is mandatory** (1) where the cause of action arose prior to the adjudication of insolvency (Joseph *v.* Raff, 75 App. Div. 447, 78 N. Y. Supp. 310; Joseph *v.* Makley, 73 App. Div. 156, 76 N. Y. Supp. 669), but (2) where the cause of action arose subsequent to the adjudication of insolvency the matter is discretionary with the court. Kronfeld *v.* Liebman, 78 App. Div. 437, 79 N. Y. Supp. 1083; Schreier *v.* Hogan, 70 App. Div. 2, 74 N. Y. Supp. 1051; Rielly *v.* Krause, 57 App. Div. 400, 408, 68 N. Y. Supp. 265, 9 N. Y. Ann. Cas. 377; Cole *v.* Manson, 42 Misc. 149, 85 N. Y. Supp. 1011.

78. Brace Bros. *v.* Evans, 6 Pa. Co. Ct. 19; Badger *v.* Taft, 58 Vt. 585, 3 Atl. 535.

79. Riley *v.* Ryan, 45 Misc. 151, 91 N. Y. Supp. 952; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

80. State *v.* Superior Court, 17 Wash. 564, 50 Pac. 482.

or files a cross-complaint.[81]

4. Intervenors and Parties Interpleaded. — In some jurisdictions,[82] but not in others,[83] an intervenor may be required to furnish security for costs. In the absence of an express statute in regard thereto a claimant in interpleader proceedings cannot be required to give security for costs as a condition to being allowed to prosecute his claim.[84]

B. As Affected by Insolvency. — While security for costs generally cannot be required upon the sole ground of plaintiff's apparent insolvency,[85] the court may in some jurisdictions require plaintiff to furnish security for costs where it appears that he is financially irresponsible,[86] particularly where the claim sued on is prosecuted by him for the benefit of a third party.[87] It has been held, however, that a receiver of an insolvent corporation who has no funds in his hands with which to pay the costs of an action cannot upon that ground alone be required to furnish security for costs unless there is a showing of bad faith or mismanagement.[88]

C. As Affected by Residence. — **1. In General.** — The court may in some jurisdictions require security for costs from a resident plaintiff.[89] Elsewhere this cannot be done,[90] even though the plaintiff be an alien.[91]

Non-residence of the plaintiff is quite generally recognized as a ground for requiring security for costs,[92] providing the same is of a

81. Stein *v.* McGrath, 128 Ala. 175, 30 So. 792; Moss *v.* Robertson, 56 Neb. 774, 77 N. W. 403.

82. Holland *v.* Seaver, 21 N. H. 386; Kase *v.* Greenough, 88 Pa. 403.

83. Petty *v.* Hayden, 115 Iowa 212, 88 N. W. 339; Riley *v.* Ryan, 45 Misc. 151, 91 N. Y. Supp. 952; Herzog *v.* Tamsen, 22 Misc. 766, 49 N. Y. Supp. 1015; Uhlfelder *v.* Tamsen, 17 Misc. 296, 40 N. Y. Supp. 372.

84. McHugh *v.* Astrophe, 1 Misc. 218, 20 N. Y. Supp. 877; Hartel *v.* Money-weight Scale Co., 21 Pa. Dist. 1078.

85. Feneley *v.* Mahoney, 21 Pick. (Mass.) 212.

As to suits in forma pauperis, see the title "**Paupers.**"

86. Papineau *v.* Belgarde, 81 Ill. 61; Parr *v.* Van Horne, 40 Ill. 122; Conley *v.* Woonsocket Inst., 11 R. I. 147; Pratt *v.* Fenner, 8 R. I. 40.

87. Leazar *v.* Cota, 43 N. H. 81; Uhr *v.* Coulter, 172 App. Div. 413, 158 N. Y. Supp. 512 (trustee in bankruptcy); People *v.* Markowitz, 119 App. Div. 841, 104 N. Y. Supp. 872, assignee for the purpose of collection.

88. Hale *v.* Mason, 86 Hun 499, 33 N. Y. Supp. 789, 67 N. Y. St. 535; Kimberly *v.* Stewart, 22 How. Pr. (N. Y.) 281.

89. Colo.—Ward *v.* Wilms, 16 Colo. 86, 27 Pac. 247. **Mass.**—Feneley *v.* Mahoney, 21 Pick. 212. **P. R.**—Cail Co. *v.* Catala, 6 Porto Rico Fed. 96. **R. I.** Conley *v.* Woonsocket Inst., 11 R. I. 147.

90. N. H.—Leazar *v.* Cota, 43 N. H. 81. **N. Y.**—Edward Thompson Co. *v.* Lobenthal, 33 N. Y. Supp. 417, 24 Civ. Proc. 247, 67 N. Y. St. 419. **N. J.** President of Steamboat Co. *v.* Andrews, 8 N. J. L. 177. **Pa.**—Chew *v.* Rubicam, 23 Pa. Dist. 491; Lutz *v.* Heasley, 12 Pa. Dist. 139.

91. Norton *v.* Mackie, 8 Hun (N. Y.) 520; Didricksen *v.* American R. Co., 6 Porto Rico Fed. 478.

92. Ala.—First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733. **Ark.**—Palmer *v.* Hicks, 17 Ark. 505. **Del.**—Fidelity Mut. F. Ins. Co. *v.* Hart, 1 Penne. 447, 41 Atl. 974. **Idaho.**—Kissler *v.* Budge, 24 Idaho 246, 133 Pac. 125. **Ill.**—La Pointe *v.* Stewart, 16 Ill. 291. **Ind.** Malaby *v.* Hinkston, 4 Blackf. 127. **Ky.**—Hopkins *v.* Chambers, 7 T. B. Mon. 254. **Md.**—Mayer *v.* Tyson, 1 Bland 559. **Mass.**—Shute *v.* Bills, 198 Mass. 544, 84 N. E. 862. **Mich.**—Osowicki *v.* Ferrick, 106 Mich. 41, 63 N. W. 981. **Mont.**—Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339. **Neb.**—Moss *v.* Rob-

permanent character.[93] A foreign corporation is a non-resident within the statute, although it has the right to transact business in the state,[94] or has its office therein.[95] Under a statute authorizing an executor or administrator appointed in another state to sue or to be sued in like manner as a non-resident, the defendant may compel a foreign administrator to file security for costs as a matter of right.[96]

2. **Change of Residence Pending Suit.** — Where a plaintiff becomes a non-resident pending suit, the court may order him to furnish security for costs,[97] including such costs as have accrued prior

ertson, 56 Neb. 774, 77 N. W. 403. **N. H.**—Sanford *v.* Candia, 54 N. H. 419, 422. **N. J.**—Kienzle *v.* Gardner, 73 N. J. L. 258, 63 Atl. 10; Scull *v.* Carhart's Assignees, 15 N. J. L. 430. **N. Y.**—Tuthill *v.* Forbes, 160 App. Div. 510, 145 N. Y. Supp. 660; Craig *v.* Du Cros, 63 Misc. 524, 117 N. Y. Supp. 384; Myers *v.* Stephens, 52 Misc. 632, 102 N. Y. Supp. 929. **N. C.**—Moore *v.* Banner, 39 N. C. 293. **Ohio.**—Standard Pub. Co. *v.* Bartlett, 6 Ohio Dec. (Reprint) 965. **Pa.**—Thomas *v.* Gibbons, 25 Pa. Co. Ct. 28; Freeman Bros. *v.* Refowich, 20 Pa. Co. Ct. 15. **P. R.**—Cail & Co. *v.* Catala, 6 Porto Rico Fed. 96. **R. I.**—Pratt *v.* Fenner, 8 R. I. 40. **S. D.**—Lawrence *v.* Hughes, 37 S. D. 134, 156 N. W. 904. **Va.**—Evans *v.* Bradshaw, 10 Gratt. (51 Va.) 207. **Wash.**—State *v.* Superior Court, 17 Wash. 564, 50 Pac. 482. **W. Va.**—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444; Nease *v.* Capehart, 15 W. Va. 299.

[a] **Residence in another county** (1) is not sufficient (Weeks *v.* Trask, 2 Mart. O. S. [La.] 247; Wiley *v.* Arnoux, 60 How. Pr. [N. Y.] 137), unless (2) the statute provides otherwise. Tedeschi *v.* Bacigalupo, 89 Misc. 153, 151 N. Y. Supp. 649.

[b] **Though he has a place of business** within the state, a non-resident plaintiff may be required to furnish security for costs (Krom *v.* Kursheedt, 6 Civ. Proc. (N. Y.) 371), except (2) that in actions in the city court of New York it is sufficient that he have an office in that city for the transaction of business in person. Beebe *v.* Parker, 4 N. Y. Supp. 97, 22 Abb. N. C. 445, 16 Civ. Proc. 320, 24 N. Y. St. 120.

[c] **That he has property in the state** does not relieve a non-resident from the necessity of giving security for costs. Churchman *v.* Merritt, 50 Hun 270, 2 N. Y. Supp. 843, 15 Civ. Proc. 245, 19 N. Y. St. 171.

[d] **But a non-resident who has obtained a lien** for his claim does not need to give security for costs in an action brought to enforce such claim. Western Pub. House *v.* Valentine, 3 Pa. Dist. 242.

93. Davis *v.* Brandon (Ala.), 75 So. 908.

[a] **Mere physical** absence of a plaintiff from the state without intent to change his residence does not constitute a plaintiff a non-resident requiring him under the statute to furnish security for costs. **Ala.**—Davis. *v.* Brandon, 75 So. 908. **Ky.**—Erwin *v.* Allen, 124 Ky. 458, 99 S. W. 322. **N. Y.** Taylor *v.* Norris, 104 App. Div. 21, 93 N. Y. Supp. 356; Ball *v.* Randall, 87 Misc. 194, 149 N. Y. Supp. 595.

[b] **Where plaintiff claims an intention to return** but has no place in the state where service of process can be made upon him he must be deemed a non-resident. Thomas *v.* Gibbons, 25 Pa. Co. Ct. 28.

[c] **Being temporarily within the jurisdiction** does not make a resident of one whose permanent abode is beyond the state. Torrijos *v.* Fernandez, 6 Porto Rico Fed. 171.

94. Fidelity Mut. F. Ins. Co. *v.* Hart, 1 Penne. (Del.) 447, 41 Atl. 974.

95. Henry Huber Co. *v.* Warren, 29 Misc. 588, 61 N. Y. Supp. 247.

96. Smiley *v.* Finucane, 134 N. Y. Supp. 59.

Non-resident decedent or heirs, see *infra,* IV, C, 3.

97. **Ala.**—Pennsylvania Cas. Co. *v.* Perdue, 164 Ala. 508, 51 So. 352; *Ex parte* Louisville & N. R. Co., 124 Ala. 547, 27 So. 239. **Del.**—Townsend *v.* Houston, 2 Harr. 157. **Ind.**—Malaby *v.* Hinkston, 4 Blackf. 127. **Mass.**—Dooley *v.* Beane, 213 Mass. 601, 100 N. E. 1089. **N. H.**—Leazar *v.* Cota, 43 N. H. 81. **N. J.**—Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249. **N. Y.** Levy *v.* Meirowitz, 16 Misc. 284, 38 N. Y. Supp. 123, 74 N. Y. St. 576. **Pa.**

to his removal from the state.[98] But the fact that a plaintiff who was a non-resident at the time of the commencement of the action thereafter becomes a resident does not relieve him from filing security for costs,[99] and does not of itself justify an order releasing the sureties in a cost bond previously furnished,[1] although the court may vacate the order requiring security for costs by reason of plaintiff having become a resident.[2]

3. Nominal and Beneficial Plaintiffs. — The statute pertaining to security for costs applies to actions brought for the use of a non-resident although the nominal plaintiff is a resident of the state.[3] But it has been held that a personal representative of an estate who resides within the state is not required to give security for costs although the decedent was,[4] or his heirs are,[5] non-residents. And a guardian who is a resident cannot be required to give security for costs although the minor does not reside within the state.[6] Where an action is brought by a non-resident for the use of a resident, in some jurisdictions security for costs is required,[7] while in others the fact that the party for whose benefit the action is brought is a resident takes the case out of the statute.[8] And it has been held that where after assignment an action is continued in the name of the original plaintiff who is a non-resident the action for the purpose of security for costs is to be treated as though no such assignment has been made.[9] Some statutes expressly provide that where the beneficial or the nominal plaintiff reside in the state no security for costs shall be required.[10]

4. Joint Plaintiffs. — An action instituted by several plaintiffs, one of whom is a resident, does not come within the statute relating to security for costs in actions instituted by non-residents although the other plaintiffs are non-residents,[11] and the resident plaintiff is

Jack *v.* McClure, 26 Pa. Co. Ct. 59. **S. D.**—Lawrence *v.* Hughes, 37 S. D. 134, 156 N. W. 904.

98. *Ex parte* Louisville & N. R. Co., 124 Ala. 547, 27 So. 239.

99. Ambler *v.* Ambler, 8 Abb. Pr. (N. Y.) 340; McCalley *v.* Moore, 14 Pa. Co. Ct. 37.

1. Standard Pub. Co. *v.* Bartlett, 6 Ohio Dec. (Reprint) 965.

2. Nicholls *v.* Johns, 2 Cranch C. C. 66, 18 Fed. Cas. No. 10,232.

3. **Ill.**—Smith *v.* Robinson, 11 Ill. 119. **Ind.**—State *v.* Roche, 91 Ind. 406. **Md.**—State *v.* Layman, 46 Md. 190.

4. Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437.

Non-resident administrator, see *supra,* IV, C, 1.

5. *Ex parte* Bromberg, 121 Ala. 361, 25 So. 994; Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437.

6. Crossett *v.* Dean, 69 Misc. 69, 124 N. Y. Supp. 916.

7. **Ala.**—*Ex parte* Louisville & N. R. Co., 124 Ala. 547, 27 So. 239. **Ky.** Dean *v.* Boyd, 9 Dana 169. **N. Y.** Mills *v.* Nassau Bank, 123 App. Div. 514, 108 N. Y. Supp. 559.

8. O'Connell *v.* Rea, 51 Ill. 306; Caton *v.* Harmon, 2 Ill. 581.

9. Lawrence *v.* Hughes, 37 S. D. 134, 156 N. W. 904.

10. Stillman *v.* Dunklin & Co., 48 Ala. 175; *Ex parte* Bush, 29 Ala. 50; Lewis *v.* Lewis, 25 Ala. 315.

11. **Ala.**—Eudora Min. & D. Co. *v.* Barclay, 122 Ala. 506, 26 So. 113; *Ex parte* Jemison, 31 Ala. 392. **Ill.**—Wood *v.* Goss, 24 Ill. 626. **Ind.**—Thalman *v.* Barbour, 5 Ind. 178. **Ky.**—Milner *v.* Hatfield, 8 Ky. Op. 536. **N. J.**—Jones *v.* Knauss, 33 N. J. Eq. 188; State Bank *v.* Evans, 14 N. J. L. 298. **N. Y.**—Sims *v.* Bonner, 16 N. Y. Supp. 800, 21 Civ. Proc. 379, 42 N. Y. St. 14.

shown to be financially irresponsible.[12] But it has been held that where the statute leaves the matter in the court's discretion, security may be required although one of the several plaintiffs is a resident.[13] And it is provided by some rules of court that a non-resident plaintiff where joined with a resident must furnish security for costs.[14]

V. TIME TO FURNISH SECURITY.[15] — Under statutes providing that security for costs must be furnished at the time the action is commenced,[16] it is, in some states, a prerequisite to the maintenance of the proceeding.[17] Elsewhere the filing of security at that time is not considered a jurisdictional matter,[18] but, in the discretion of the court, the plaintiff may be permitted to give such security thereafter.[19] Some statutes expressly provide that security for costs may be filed either at the commencement of the action or within such time as shall be fixed by the court.[20] And a judgment is not void because the record fails to show that the plaintiff gave a cost bond although under the statute he was required to do so.[21]

VI. PROCEEDINGS TO OBTAIN SECURITY. — A. MOTION.[22]

12. Ten Broeck *v.* Reynolds, 13 How. Pr. (N. Y.) 462.

13. Colbeth *v.* Colbeth, 117 Wis. 90, 93 N. W. 829.

14. Electric Vehicle Co. *v.* Gallagher, 145 Fed. 394.

15. Upon motion, see *infra,* VI, A, 2.

16. Ala.—Hutto *v.* Walker County, 185 Ala. 505, 64 So. 313, Ann. Cas. 1916B, 372. **Ark.**—Robinson *v.* Meyer, 25 Ark. 79. **Ind.**—Hughes *v.* Osborn, 42 Ind. 450. **Ky.**—Erwin *v.* Allen, 124 Ky. 458, 99 S. W. 322; Hopkins *v.* Chambers, 7 Mon. 254. **Me.**—Rowe *v.* Truitt, 14 Me. 393. **Mass.**—Dooley *v.* Beane, 213 Mass. 601, 100 N. E. 1089. **Minn.**—Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444. **Neb.**—King *v.* Jackson, 25 Neb. 466, 41 N. W. 448. **N. H.** Farley *v.* Day, 26 N. H. 527. **N. J.** Scull *v.* Carhart's Assignees, 15 N. J. L. 430. **N. D.**—Bergh *v.* John Wyman Farm Land & Loan Co., 30 N. D. 158, 152 N. W. 281. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **Tex.**—Gilmer *v.* Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907.

17. Ala.—Hutto *v.* Walker County, 185 Ala. 505, 64 So. 313, Ann. Cas. 1916B, 372; Alabama & T. R. R. Co. *v.* Harris, 25 Ala. 232. **Colo.**—Edgar Gold & S. Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113. **N. D.**—Bergh *v.* John Wyman Farm Land & Loan Co., 30 N. D. 158, 152 N. W. 281. **S. C.**—McCarley *v.* Turner, 33 S. C. 161, 11 S. E. 645.

Remedies for failure to furnish security, see *infra,* VIII.

18. Cal.—Stinson *v.* Carpenter, 78 Cal. 571, 21 Pac. 304; Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179. **Ill.**—Baker *v.* Palmer, 83 Ill. 568; Cramer *v.* Illinois Com. Assn., 176 Ill. App. 1; Baltimore & O. S. W. Ry Co. *v.* Keck, 84 Ill. App. 159. **Minn.**—Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **Utah.**—Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011.

19. Ark.—Robinson *v.* Meyer, 25 Ark. 79. **Cal.**—Stinson *v.* Carpenter, 78 Cal. 571, 21 Pac. 304. **Colo.**—Edgar Gold & S. Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113. **Ill.**—Richards *v.* People, 100 Ill. 390. **Ind.**—Hughes *v.* Osborn, 42 Ind. 450; Culley *v.* Laybrook, 8 Ind. 285. **Ky.**—Van Hooser *v.* Atkinson, 168 Ky. 1, 181 S. W. 610. **Md.** Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67. **Mich.**—Gray *v.* Wilcox, 56 Mich. 58, 22 N. W. 109. **Minn.**—Henry *v.* Bruns, 43 Minn. 295, 45 N. Y. 444. **Mo.**—Needles *v.* Burk, 98 Mo. 474, 11 S. W. 1008. **Neb.**—King *v.* Jackson, 25 Neb. 466, 41 N. W. 448. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **Tenn.**—Sharp *v.* Miller, 3 Sneed 42. **Tex.**—Missouri Pac. Ry. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

20. Richards *v.* People, 100 Ill. 390.

21. Plaff *v.* Pacific Express Co., 251 Ill. 243, 96 N. E. 1089; Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227.

22. See generally the title **"Motions."**

1. In General. — A party seeking an order for security for costs must make application by motion[23] to the court in which the action is pending.[24]

2. Time To Make. — The application must be promptly made[25] after a knowledge by the movant of the facts,[26] or else the right to require security is waived,[27] even where security for costs under the statute is a matter of right.[28] Thus it is proper to deny the application where it is made after pleading to the merits,[29] or after a demur-

23. **Ariz.**—Miami Copper Co. *v.* Strohl, 14 Ariz. 410, 130 Pac. 605. **Colo.** Payton *v.* M. Spiesberger & Son Co., 40 Colo. 289, 90 Pac. 605. **Del.**—Rauche *v.* Blumenthal, 4 Penne. 521, 57 Atl. 368. **Ill.**—Barr *v.* Florentine Alabaster Co., 174 Ill. App. 256. **Ia.**—Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446. **Me.**—Ferguson *v.* Gardner, 92 Me. 245, 42 Atl. 393; Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71. **N. J.**—Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249. **N. Y.**—Banes *v.* Rainey, 192 N. Y. 286, 85 N. E. 71; United States *v.* Bangs, 134 App. Div. 215, 118 N. Y. Supp. 936; Pelz *v.* Roth, 46 Misc. 419, 92 N. Y. Supp. 263; Champlin *v.* Pierce, 3 Wend. 445. **N. C.**—Wilson *v.* Fowler, 104 N. C. 471, 10 S. E. 566. **Okla.** Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **Pa.**—Terriberry *v.* Broude, 173 Pa. 48, 33 Atl. 699; Bogardus *v.* Williams, 1 Pa. Co. Ct. 673. **Tex.**—Shackleford, Sampson & Co. *v.* Wallace, 4 Tex. 239. **Wis.**—Stark *v.* Small, 72 Wis. 215, 39 N. W. 359.

24. Longstreet *v.* Hearey, 21 Civ. Proc. 16, 39 N. Y. St. 693, 15 N. Y. Supp. 608.

25. **U. S.**—Winkley Co. *v.* Bowen Mfg. Co., 180 Fed. 624. **Ariz.**—Miami Copper Co. *v.* Strohl, 14 Ariz. 410, 130 Pac. 605. **N. Y.**—United States *v.* Bangs, 134 App. Div. 215, 118 N. Y. Supp. 936. **Pa.**—Foster *v.* Pennsylvania R. Co., 36 Pa. Co. Ct. 634. **Utah.** Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011.

26. **Del.**—Gillen *v.* Wilmington, 2 Marv. 154, 42 Atl. 430. **N. Y.**—Di Stefano *v.* Peekskill L. & R. Co., 149 App. Div. 745, 134 N. Y. Supp. 204; Mills *v.* Nassau Bank, 123 App. Div. 514, 108 N. Y. Supp. 559. **Utah.** Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011.

[a] **Where defendant has no knowledge** of the fact that plaintiff is a non-resident and applies for security for costs as soon as he is apprised of that fact, he cannot be said to have been guilty of laches. Wilson *v.* Eveline, 39 App. Div. 129, 56 N. Y. Supp. 632.

[b] **The fact that the complaint is verified** by plaintiff's agent upon the ground of plaintiff's absence from the state does not establish defendant's knowledge that plaintiff is a non-resident. Wilson *v.* Eveline, 39 App. Div. 129, 56 N. Y. Supp. 632.

27. **U. S.**—Karns *v.* Imlay Rapid Cyanide Process Co., 181 Fed. 751. **Ariz.** Miami Copper Co. *v.* Strohl, 14 Ariz. 410, 130 Pac. 605. **Colo.**—Payton *v.* M. Spiesberger & Son Co., 40 Colo. 289, 90 Pac. 605. **Md.**—Hatton *v.* Weems, 12 Gill & J. 83. **Mass.**—Capron *v.* Thompson, 3 Metc. 59. **N. J.**—Shuttleworth *v.* Dunlop, 34 N. J. Eq. 488. **N. Y.**—United States *v.* Bangs, 134 App. Div. 215, 118 N. Y. Supp. 936. **Utah.** Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011. **W. Va.**—Hulings *v.* Jones, 63 W. Va. 696, 60 S. E. 874; Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444. **Wis.**—Conrad *v.* Cole, 15 Wis. 545.

28. **N. Y.**—Tedeschi *v.* Bacigalupo, 89 Misc. 153, 151 N. Y. Supp. 649; Fagan *v.* Strong, 11 N. Y. Supp. 766, 19 Civ. Proc. 88. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **Utah.** Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011.

29. **Ala.**—Heflin *v.* Rock Mills Mfg. & L. Co., 58 Ala. 613; Weeks *v.* Napier, 33 Ala. 568. **Ariz.**—Muldon *v.* Place, 2 Ariz. 4, 6 Pac. 479. **Ark.**—Lincoln *v.* Hancock, 5 Ark. 703; Ormsby *v.* Kendall, 2 Ark. 338. **Ill.**—Widmayer *v.* Davis, 231 Ill. 42, 83 N. E. 87. **Ind.** Jeffersonville M. & I. R. Co. *v.* Hendricks, 41 Ind. 48. **Ia.**—Randolph *v.* Cottage Hospital, 103 N. W. 157; Vohs *v.* A. E. Shorthill Co., 124 Iowa 471, 100 N. W. 495; Adae & Co. *v.* Zangs, 41 Iowa 536. **Ky.**—Tibb's Heirs *v.* Clarkson, 2 B. Mon. 34. **Mich.**—Lacomb *v.* Godkin, 143 Mich. 193, 106 N. W. 702. **N. J.**—Roumage *v.* Mechanics' Ins. Co.,

rer,[30] notice of trial,[31] hearing of a motion for a receiver,[32] or on the day of the trial,[33] or after going to trial,[34] or after the cause is sent to a referee,[35] or is ready for submission,[36] or after verdict,[37] or judgment.[38] But the court in the exercise of its discretion may allow the motion even where made out of time.[39]

3. Affidavits. — a. *Necessity for.* — In some jurisdictions the defendant must file with such motion an affidavit of merits,[40] but in the absence of a statute no such affidavit is necessary.[41]

b. *Contents.* — The affidavit must disclose sufficient facts to show a case in which under the statute security for costs is demandable,[42]

12 N. J. L. 95. **N. Y.**—Ives Mfg. Co. *v.* Smith & Hemenway Co., 166 App. Div. 910, 151 N. Y. Supp. 275; Henderson, Hull & Co. *v.* McNally, 33 App. Div. 132, 53 N. Y. Supp. 351, 28 Civ. Proc. 174, 6 N. Y. Ann. Cas. 166; Nassar *v.* Elias, 115 N. Y. Supp. 106; Ampel *v.* Seifert, 86 N. Y. Supp. 17. **Pa.**—Voss *v.* Sensenig, 14 Pa. Co. Ct. 631. **S. C.** Fonville *v.* Richey, 2 Rich. L. 10. **Tenn.** Hall *v.* Fowlkes, 9 Heisk. 745. **Utah.** Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011. **Wash. Ter.**—Swift *v.* Stine, 3 Wash. Ter. 518, 19 Pac. 63.

[a] **An extension of time to answer** for an unreasonable length of time leaves the matter of determining whether the application is timely in the discretion of the court. Gibbons *v.* Bush Co., 98 App. Div. 283, 90 N. Y. Supp. 603.

30. Clark *v.* Gibson, 2 Ark. 109; People *v.* Cloud, 50 Ill. 439.

31. Kienzle *v.* Gardner, 73 N. J. L. 258, 63 Atl. 10.

32. Shuttleworth *v.* Dunlop, 34 N. J. Eq. 488.

33. **Conn.**—Phelps *v.* Phelps, Kirby 344. **Del.**—Bennett *v.* Shute, 2 Harr. 197. **Ill.**—Baltimore & O. S. W. Ry. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197. **Mont.**—Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339. **Utah.**—Sciutti *v.* Union Pac. Coal Co., 30 Utah 462, 85 Pac. 1011.

34. Conrad *v.* Cole, 15 Wis. 545.

[a] **After Jury Sworn.**—Adae & Co. *v.* Zangs, 41 Iowa 536.

35. Swan *v.* Mathews, 3 Duer (N. Y.) 613.

36. Karns *v.* Imlay Rapid Cyanide Process Co., 181 Fed. 751; Murphy *v.* Fairweather, 72 W. Va. 14, 77 S. E. 321.

37. Bay City *v.* Bay Circuit Judge, 126 Mich. 50, 85 N. W. 263.

38. **Ala.**—Duncan *v.* Richardson, 34 Ala. 117. **Cal.**—Comstock *v.* Clemens, 19 Cal. 77. **Colo.**—Payton *v.* M. Spiesberger & Son Co., 40 Colo. 289, 90 Pac. 605. **Ill.**—Kolbe *v.* People, 85 Ill. 336. **Ky.**—Farmers' Bank of Kentucky *v.* McCormack, 9 Ky. Op. 663; Townsend *v.* Britt, 8 Ky. Op. 602. **W. Va.**—Haymond *v.* Camden, 22 W. Va. 180.

39. **Ill.**—Widmayer *v.* Davis, 231 Ill. 42, 83 N. E. 87. **Ia.**—Vohs *v.* Shorthill Co., 124 Iowa 471, 100 N. W. 495. **N. Y.**—Cannon *v.* New York Ry. Co., 52 Misc. 633, 103 N. Y. Supp. 997; Cowen *v.* Rouss, 49 Misc. 338, 99 N. Y. Supp. 302; Dunaway *v.* Terry, 37 Misc. 510, 75 N. Y. Supp. 974.

[a] **After Answer Filed.**—**Ala.** First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733. **Ariz.**—Miami Copper Co. *v.* Strohl, 14 Ariz. 410, 130 Pac. 605. **Md.**—Watson *v.* Glassie, 95 Md. 658, 53 Atl. 428. **Mich.**—Goodenough *v.* Burton, 146 Mich. 50, 109 N. W. 52. **N. J** Den *v.* Wilson, 5 N. J. L. 680. **N. Y.** Corbett *v.* Brantingham, 65 App. Div. 335, 72 N. Y. Supp. 763; Scandinavian American Bank *v.* Lentzy, 30 App. Div. 485, 52 N. Y. Supp. 350; Segal *v.* Cauldwell, 22 App. Div. 95, 47 N. Y. Supp. 839; Smiley *v.* Finucane, 134 N. Y. Supp. 59; Nimcke *v.* New York Pub. Co., 133 N. Y. Supp. 1075.

40. **Del.**—Rauche *v.* Blumenthal, 4 Penne. 521, 57 Atl. 368. **Ia.**—Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446. **Pa.**—Terriberry *v.* Broude, 173 Pa. 48, 33 Atl. 699; Sheridan *v.* Cassidy, 1 W. N. C. 134.

See 1 STANDARD PROC. 652.

41. Corn Exch. Nat. Bank *v.* Kimball, 20 Abb. N. C. (N. Y.) 290.

42. **U. S.**—Holt *v.* Winters, 30 Fed. 29. **Ariz.**—Miami Copper Co. *v.* Strohl, 14 Ariz. 410, 130 Pac. 605. **Ill.**—Barr *v.* Florentine Alabaster Co., 174 Ill. App. 256. **Ia.**—Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446. **N. Y.**—Da-

and under some statutes it must set out the facts constituting the defense.[43]

c. *Counter Affidavits.* — A counter affidavit may be filed by the plaintiff showing why the motion for security for costs should be denied.[44]

4. Notice of Motion. — Pursuant to some statutes, reasonable notice that security for costs is required must be given;[45] while according to others notice need be given only in cases where it rests in the discretion of the court to require security for costs.[46] And in some jurisdictions no notice need be given at all.[47] Where the statute provides for an entry on the docket of the notice that security for costs is required of plaintiff, no other notice need be given.[48] And it has been held that the presence of counsel in court when the application is made constitutes sufficient notice thereof,[49] unless the statute expressly provides for previous notice.[50]

VII. ORDER FOR SECURITY.[51] — A. GENERALLY. — Upon granting the application the court makes an order requiring security for costs.[52]

B. FORM AND CONTENTS. — **1. In General.** — Unless the form of the order is prescribed by the statute,[53] it may be in general terms

vidson *v.* Bose, 57 App. Div. 212, 68 N. Y. Supp. 316; Pelz *v.* Roth, 46 Misc. 419, 92 N. Y. Supp. 263. **N. C.**—Wilson *v.* Fowler, 104 N. C. 471, 10 S. E. 566.

[a] **Where removal of plaintiff from the state** during the pendency of the action is the ground of the application the affidavit must contain an explicit denial of previous knowledge of such removal on the part of defendant. Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249; Bogardus *v.* Williams, 1 Pa. Co. Ct. 673.

43. Rauche *v.* Blumenthal, 4 Penne. (Del.) 521, 57 Atl. 368; Terriberry *v.* Broude, 173 Pa. 48, 33 Atl. 699; Trenton Rubber Co. *v.* Small, 3 Pa. Super. 8.

44. Illinois Southern R. Co. *v.* Hamill, 226 Ill. 88, 80 N. E. 745; Twining *v.* Martin, 65 Ill. 157; Hamilton *v.* Dunn, 22 Ill. 259.

[a] **It is error to refuse to accept** a counter-affidavit filed by plaintiff on such motion. Humrichous *v.* Thomas, 177 Ind. 593, 98 N. E. 419.

45. Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339; Dulany & Co. *v.* Elford, 22 S. C. 304; Dismukes *v.* Dismukes, 1 McCord 552.

[a] **Constructive notice** of an application for security for costs is not sufficient. Holshausen *v.* Hollingsworth, 32 Tex. 86.

46. Baum *v.* Morse Dry Dock & Repair Co., 160 App. Div. 14, 145 N. Y. Supp. 127; Kronfeld *v.* Liebman, 78 App. Div. 437, 79 N. Y. Supp. 1083; Kelley *v.* Kremer, 74 App. Div. 456, 77 N. Y. Supp. 515, 11 N. Y. Ann. Cas. 304.

[a] **Where defendant seeks security as a matter of right** given by the statute absolutely, he is authorized to proceed ex parte without notice. Baum *v.* Morse Dry Dock & Repair Co., 160 App. Div. 14, 145 N. Y. Supp. 127; Pursley *v.* Rodgers, 44 App. Div. 139, 61 N. Y. Supp. 1015.

47. Felton *v.* Hopkins, 89 Wis. 143, 61 N. W. 77.

48. Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

49. Thompson *v.* Miller, 2 Stew. (Ala.) 470; Frazer *v.* Moore, 28 Tex. Civ. App. 427, 67 S. W. 427.

50. Bergh *v.* John Wyman Farm Land & Loan Co., 30 N. D. 158, 152 N. W. 281.

51. Orders generally, see the title "**Orders.**"

52. **Miss.**—Walker *v.* Smith, 19 So. 102; Overstreet *v.* Davis, 24 Miss. 393. **Mo.**—Morrow *v.* Shepherd, 9 Mo. 214. **Tex.**—Shackleford, Sampson & Co. *v.* Wallace, 4 Tex. 239.

53. Colt *v.* Wheeler, 12 Abb. Pr. (N. Y.) 388; Champlin *v.* Pierce, 3 Wend. (N. Y.) 445.

requiring security for all the costs of the action.[54]

2. Fixing Time for Compliance. — It is the duty of the court to grant a reasonable time within which its order for security must be complied with.[55] The fixing of the time in the first instance,[56] or the extending it thereafter,[57] is a matter which rests in the court's discretion, unless the statute prescribes a definite time within which the order must be complied with.[58]

3. Fixing Amount of Security. — Where the statute fixes the amount of security for costs the court has no power to alter it[59] or to direct that a greater sum,[60] or a smaller amount,[61] be given as security.

4. Prescribing Form of Security. — The order for security may be expressed in general terms and it is not necessary that it should enumerate the various modes of furnishing security mentioned in the statute.[62] Where the statute does not prescribe the form of security the determination of this matter rests in the sound discretion of the court,[63] which may permit a deposit of money instead of a bond.[64]

C. NOTICE OF ORDER. — Where an order for security is made, actual notice of such order must be given to plaintiff.[65]

D. VACATING ORDER. — Where security for costs may be required in the court's discretion, an order requiring plaintiff to furnish security for costs may be set aside[66] on motion.[67] A succeeding judge cannot vacate or modify an order made by his predecessor.[68]

54. Gedney *v.* Purdy, 47 N. Y. 676.

55. Harris *v.* Swanson, 62 Ala. 299.

56. Colley *v.* Atlanta B. & I. Co., 196 Ala. 374, 72 So. 45; Cranmer *v.* Dinsmore, 15 N. D. 604. 109 N. W. 317.

57. **Ala.**—*Ex parte* Bradshaw, 174 Ala. 243, 57 So. 16. **Miss.**—Kittle *v.* Yazoo & M. V. R. Co., 92 Miss. 381, 45 So. 867. **W. Va.**—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

58. Douglas *v.* District Court, 45 Utah 486, 146 Pac. 562; Shaw *v.* Webster, 21 Wis. 129.

59. Meade County Bank *v.* Bailey, 137 Cal. 447, 70 Pac. 297.

60. Di Stefano *v.* Peekskill L. & R. Co., 149 App. Div. 745, 134 N. Y. Supp. 204; Turell *v.* Erie R. Co., 46 App. Div. 296, 61 N. Y. Supp. 308.

61. Kissler *v.* Budge, 24 Idaho 246, 133 Pac. 125.

62. Marsh *v.* Kinna, 2 Mont. 547.

63. Smith *v.* Kent Circuit Judge, 139 Mich. 463, 102 N. W. 971.

64. **Ala.**—Western Union Tel. Co. *v.* Howington, 73 So. 550. **Md.**—Ammidown *v.* Woodman, 31 Me. 580. **Mich.** Smith *v.* Perkins, 139 Mich. 463, 102 N. W. 971. **N. Y.**—Wheelock *v.* Brinckerhoff, 13 Johns. 481. **Ohio.**—Columbus Cent. Ry. Co. *v.* Wilkin, 8 Ohio N. P. 35.

See *infra*, IX, E.

65. Houston *v.* Sublett, 1 Tex. 523.

[a] **A memorandum of the judge upon his docket,** being merely directory to the clerk, cannot be regarded as a record so as to charge parties with knowledge thereof. Claiborne *v.* Harris, 11 Ala. 647.

66. Kelley *v.* Kremer, 74 App. Div. 456, 77 N. Y. Supp. 515; De Stefano *v.* Brown, 84 N. Y. Supp. 165.

67. Anderson *v.* Smith, 2 Mackey (D. C.) 1; Mississippi & A. R. Co. *v.* Ballard, 5 Smed. & M. (Miss.) 606.

[a] **Notice of such motion** ordinarily must be given unless the circumstances of the case are such that no showing can be made in opposition to the motion. Moore *v.* Merritt, 9 Wend. (N. Y.) 482.

68. Cummings *v.* Wingo, 31 S. C. 427, 10 S. E. 107; Bomar *v.* Asheville & S. R. Co., 30 S. C. 450, 9 S. E. 512.

As to the powers of a succeeding judge to review the acts of his predecessor generally, see 16 STANDARD PROC. 642; 18 STANDARD PROC. 811.

VIII. REMEDIES FOR FAILURE TO GIVE SECURITY.[69] — The failure of plaintiff to furnish security for costs may be taken advantage of by a plea in abatement,[70] or motion to dismiss,[71] but it cannot be pleaded in bar to the action and does not constitute a defense.[72]

A stay of proceedings is authorized by some statutes until the demand for security is complied with according to the statutory provisions.[73] And the power of staying proceedings on this ground is incidental to the power to require security and may be exercised independent of the statute.[74]

IX. FORM AND SUFFICIENCY OF SECURITY. — A. IN GENERAL. — The security filed must be in substantial compliance with the statute and the order of the court,[75] but the party entitled to security may waive a strict compliance with the statute and accept a different form of security.[76] Under some statutes no particular form of security is prescribed,[77] and it is not required to be given in such a manner as to necessarily constitute a part of the record.[78]

B. BOND OR UNDERTAKING.[79] — A bond or undertaking in the form prescribed by statute, or substantially so, is sufficient,[80] and even if it does not follow the form prescribed by the statute it will suffice if it contains the requisite of a good security.[81] It must be properly[82]

69. **Motion** for security, see *supra*, VI, A.

Effect of failure to furnish in required time, see *supra*, V.

Failure to give security as a ground for a continuance, see 5 STANDARD PROC. 470, et seq.

70. **Ark.**—Newton *v.* Cocke, 10 Ark. 169; Webb *v.* Jones, 2 Ark. 330. **Ga.** Board of Education *v.* Kelley, 126 Ga. 479, 55 S. E. 238; Sparks Imp. Co. *v.* Jones, 4 Ga. App. 61, 60 S. E. 810. **Ky.** Cabell *v.* Payne, 2 J. J. Marsh. 134. **N. H.**—Seaver *v.* Allen, 48 N. H. 473. **Vt.**—Whittaker *v.* Perry, 37 Vt. 631.

71. See *infra*, X.

72. Newton *v.* Cocke, 10 Ark. 169; Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

73. **Cal.**—Meade County Bank *v.* Bailey, 137 Cal. 447, 70 Pac. 297. **Mont.** Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339. **Pa.**—Haardt *v.* Wright, 15 Pa. Dist. 20. **P. R.**—Torrijos *v.* Fernandez, 6 Porto Rico Fed. 171.

74. People *ex rel.* Fuller *v.* Oneida Common Pleas, 18 Wend. (N. Y.) 652.

75. McCarley *v.* Turner, 33 S. C. 161, 11 S. E. 645; Willis *v.* Potter, 9 Rich. L. (S. C.) 411.

Order fixing character of security, see *supra*, VII, B, 4.

[a] **Necessity of Writing.**—To constitute security for costs as contemplated by the statute there must be an obligation in writing subscribed by the party to be charged, and an indorsement upon the complaint without signature made by an attorney upon a mere verbal authority is a nullity. Bullard *v.* Johns, 50 Ala. 382.

76. Warner *v.* Ross, 9 Abb. N. C. (N. Y.) 385.

77. **Kan.**—Balcom *v.* Peacock, 59 Kan. 136, 52 Pac. 76. **Me.**—Sawtelle *v.* Wardwell, 56 Me. 146. **Mich.**—Skinner *v.* Lucas, 68 Mich. 424, 36 N. W. 203. **N. Y.**—Wheelock *v.* Brinckerhoff, 13 Johns. 481.

78. Powers *v.* Decatur, 54 Ala. 214.

79. See generally the title "**Bonds.**"

80. **Ala.**—Lee *v.* State, 39 So. 720. **Ill.**—Linn *v.* Buckingham, 2 Ill. 451. **Mo.**—Baggs *v.* Lanning, 1 Mo. 261. **S. D.**—Lawrence *v.* Hughes, 37 S. D. 134, 156 N. W. 904.

[a] **The words of the statute** need not be followed strictly. Lee *v.* State (Ala.), 39 So. 720; Claggett *v.* Richards, 45 N. H. 360.

81. Holly *v.* Perry, 94 N. C. 30.

[a] **A bond written on the summons** in the case, though informal, must be treated as in effect a sufficient undertaking. Holly *v.* Perry, 94 N. C. 30.

82. **Ala.**—*Ex parte* Morgan, 30 Ala. 51. **Ark.**—Owings *v.* Finley, 3 Ark. 136. **N. Y.**—Warner *v.* Ross, 9 Abb. N. C. 385. **S. C.**—Taylor *v.* Dempsey, 66 S. C. 513, 45 S. E. 78.

conditioned, and be regularly executed[83] by sureties possessing the requisite qualifications.[84] The bond must describe the action wherein it is filed,[85] but the omission of the term of court at which the action is brought does not render a bond invalid.[86] An omission to date the bond is not material.[87] The names of the obligors need not be recited in the body of the bond or undertaking,[88] nor, except in certain jurisdictions,[89] need the obligees be named.[90] Where there are several defendants but one bond need to be given for the benefit of all of them.[91]

[a] **If no penalty** is prescribed the bond is insufficient. Warner *v.* Ross, 9 Abb. N. C. (N. Y.) 385.

[b] **If it secures payment of all the costs,** it is sufficient. Baggs *v.* Lanning, 1 Mo. 261.

[c] **An unconditional promise to pay the costs** should be set forth. Warner *v.* Ross, 9 Abb. N. C. (N. Y.) 385.

[d] **The amount** (1) in which the bond for costs must be given where required by statute (Nehring *v.* Haines, 70 Minn. 233, 72 N. W. 1061), otherwise (2) no stated amount need be recited. Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019.

[e] **A bond limiting the liability** thereon to a certain amount is fatally defective where the statute requires it to cover the costs of the action. **Ala.** Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; *Ex parte* Morgan, 30 Ala. 51. **Colo.**—Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202. **Ind.**—Hunt *v.* Butcher, 5 Blackf. 341.

83. Davis *v.* Jones, 123 Ala. 647, 26 So. 321.

[a] **A surety's signature below the affidavit of the clerk** renders the instrument invalid as a bond for costs required by the statute. Keeland *v.* Harper, 10 Ala. 178.

[b] **Failure to sign** by one of the sureties named in the body of the bond is not fatal where the bond is approved by the clerk without such signature. Davis *v.* Jones, 123 Ala. 647, 26 So. 321.

[c] **Must be witnessed by the clerk** where the statute so requires. McCarley *v.* Turner, 33 S. C. 161, 11 S. E. 645.

84. Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019.

[a] **Resident Sureties.**—The statute may require the sureties to be residents of the county (Smith *v.* McDermott, 93 Cal. 421, 29 Pac. 34), otherwise (2) they need not be. Brooks *v.* James, 16 Wash. 335, 47 Pac. 751.

[b] **A bond executed by an attorney** is not objectionable. Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019; Walker *v.* Holmes, 22 Wend. (N. Y.) 614. To the contrary, see Eslava *v.* Ames Plow Co., 47 Ala. 384; Cook *v.* Caraway, 29 Kan. 41.

[c] **Joinder of a non-resident plaintiff** with the sureties in the execution of the bond, not necessary. **Kan.** Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019. **N. Y.**—Ellensohn *v.* Haselbach, 17 Misc. 92, 39 N. Y. Supp. 332, 25 Civ. Proc. 345. **N. C.**—Wall *v.* Fairly, 66 N. C. 385. **Tex.**—Langham *v.* Thomason, 5 Tex. 127.

[d] **Justification** of sureties, see the title "**Justification of Sureties.**" Failure of clerk to require sureties to justify as to their qualifications does not destroy the validity of a bond. Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019.

85. Modglin *v.* Slay, 11 Ark. 693; Warnock *v.* Russell, 2 Ill. 383.

86. Himes *v.* Blakesley, 21 Ill. 509.

87. Meech *v.* Fowler, 14 Ark. 29.

88. Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019.

[a] **Signature sufficient** to show who are obligors. Simpson *v.* Rice, F. & M. Co., 43 Kan. 22, 22 Pac. 1019.

89. Becker *v.* Schmidlin, 153 Cal. 669, 96 Pac. 280; Stewart *v.* Dwyer, 22 N. D. 356, 133 N. W. 990.

[a] **To Defendant Personally.**—Stewart *v.* Dwyer, 22 N. D. 356, 133 N. W. 990.

90. **Kan.**—Obertino *v.* Fidelity Min. Co., 87 Kan. 297, 124 Pac. 172, Ann. Cas. 1913D, 573; Balcom *v.* Peacock, 59 Kan. 136, 52 Pac. 76. **Neb.**—McPherson *v.* Commercial Nat. Bank, 61 Neb. 695, 85 N. W. 895. **Tenn.**—Park: *v.* Allen, 2 Head 523.

91. Rothchild *v.* Wilson, 24 Abb. N. C. 123, 10 N. Y. Supp. 61; Rob-

C. RECOGNIZANCE. — Although a statute provides for a bond, a recognizance being an obligation of record entered into before the court is of at least equal validity and effect.[92] And an undertaking of the surety in a recognizance that defendant will pay whatever judgment the court may render in the case is a substantial compliance with the requirement of the law.[93] But a recognizance in which no sum is stated is of no effect.[94]

D. INDORSEMENT OF WRIT. — Some statutes require writs, in which the plaintiff is not an inhabitant of the state, to be endorsed by some responsible person who is a resident of the state.[95] And it has been held that under such statute the court is authorized to inquire into the pecuniary ability of the surety.[96] The court may permit an amendment of a writ improperly indorsed,[97] or to change the indorsement on a writ.[98]

E. DEPOSIT OF MONEY. — The sole object of the security in civil cases is to indemnify the defendant against costs and a deposit of money with the clerk therefore is sufficient,[99] except where a different form of security is prescribed by the statute.[1] The court has no power over the rights of the defendant to his security for costs once furnished until litigation in the action has ceased and cannot permit plaintiff to withdraw his deposit although judgment is rendered in his favor.[2]

X. ADDITIONAL SECURITY. — The court may at any stage of the proceedings prior to judgment,[3] and upon proper notice of the

inson *v.* Haller, 8 Wash. 309, 36 Pac. 134.

92. Kincaid *v.* Sharp, 3 Head (Tenn.) 151; Parks *v.* Allen, 2 Head (Tenn.) 523. See generally the title "Recognizances and Bail."

[a] **A recognizance conditioned in conformity with the statutory** provisions is sufficient. Collins *v.* Edson, 55 Vt. 48.

[b] **An omission of the Christian name** in a recognizance is not a fatal defect. Perkins *v.* Walker, 16 Vt. 240.

93. Kincaid *v.* Sharp, 3 Head (Tenn.) 151.

94. Sisco *v.* Hurlburt, 17 Vt. 118.

[a] **Amendment** as to amount not proper. Peck *v.* Smith, 3 Vt. 265.

95. **Ala.**—Bullard *v.* Johns, 50 Ala. 382. **Me.**—Rowe *v.* Truitt, 14 Me. 393. **Mass.**—Dooley *v.* Beane, 213 Mass. 601, 100 N. E. 1089; Johnson *v.* Sprague, 183 Mass. 102, 66 N. E. 422. **N. H.** Farley *v.* Day, 26 N. H. 527.

[a] **Indorsement by an attorney** who is a resident is sufficient. Ferguson *v.* Gardner, 92 Me. 245, 42 Atl. 393; Dooley *v.* Beane, 213 Mass. 601, 100 N. E. 1089.

[b] **The omission of the Christian name** in the signature is not a fatal defect. Sawtelle *v.* Wardwell, 56 Me. 146.

96. Farley *v.* Day, 26 N. H. 527.

97. Seaver *v.* Allen, 48 N. H. 473.

98. Whitcher *v.* Whitcher, 10 N. H. 440.

99. **Ala.**—Western Union Tel. Co. *v.* Howington, 73 So. 550. **Me.**—Ammidown *v.* Woodman, 31 Me. 580. **Mich.** Smith *v.* Kent Circuit Judge, 139 Mich. 463, 102 N. W. 971. **Ohio.**—Columbus Cent. Ry. Co. *v.* Wilkin, 8 Ohio N. P. 35.

[a] **A deposit of a note** though conceded to be good is not equivalent to a deposit of money and does not constitute a compliance with an order requiring security for costs. Bomar *v.* Asheville & S. R. Co., 30 S. C. 450, 9 S. E. 512.

1. Wheelock *v.* Brinckerhoff, 13 Johns. (N. Y.) 481.

2. First Nat. Bank *v.* Hall,, 19 Misc. 278, 44 N. Y. Supp. 255.

3. Banes *v.* Rainey, 192 N. Y. 286, 85 N. E. 71; Greer *v.* Whitfield, 4 Lea (Tenn.) 85; Owens' Admr. *v.* Grundy, 8 Yerg. (Tenn.) 436.

application,[4] order additional security,[5] where a change in conditions has arisen justifying it.[6] Such order should designate the time within which additional security is to be given,[7] and in case of failure to comply therewith the action may be dismissed.[8] A denial of a motion for additional security for costs where the motion should have been granted is not a sufficient ground for a reversal of a judgment in favor of the plaintiff.[9]

XI. DISMISSAL FOR WANT OF SECURITY. — A. GENERALLY. Where no security is given at the commencement of the action as required by statute,[10] or in compliance with the court's order,[11] the proceeding may be dismissed.

B. MOTION FOR. — Dismissal is made upon motion of the party

[a] **Not After Rendition of Judgment.**—Paul *v.* Hill, 3 Tenn. Ch. 342.

4. Houston *v.* Roberts, 10 Tex. 348.

5. **U. S.**—Deprez *v.* Thomson-Houston Elec. Co., 66 Fed. 22. **Ala.**—Reid *v.* Brasher, 7 Port. 448. **Del.**—Pritchard *v.* Henderson, 3 Penne. 128, 50 Atl. 217. **N. Y.**—Banes *v.* Rainey, 192 N. Y. 286, 85 N. E. 71; Reck *v.* Phenix Ins. Co., 53 Hun 630, 5 N. Y. Supp. 543. **N. C.**—Vaughan *v.* Vincent, 88 N. C. 116; Adams *v.* Reeves, 76 N. C. 412; State *v.* Cox, 46 N. C. 373.

[a] **Statute must authorize** the giving of additional security. Schroeder *v.* Page, 124 App. Div. 253, 108 N. Y. Supp. 721.

[b] **If the security is satisfactory to the party** for whose benefit it is given, the court is without power to order additional security. Harris *v.* Swanson, 62 Ala. 299.

[c] **But where a money deposit** is made (Republic of Honduras *v.* Soto, 112 N. Y. 310, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642) by a resident plaintiff (Carr *v.* Osterhout, 32 Kan. 277, 4 Pac. 318), no further security can be required.

[d] **Where security is voluntarily given** without order of court, no additional security can be ordered. Dunk *v.* Dunk, 177 N. Y. 264, 69 N. E. 539.

6. **Ill.**—Ball *v.* Bruce, 27 Ill. 332. **Mich.**—Craig *v.* Collingswood, 171 Mich. 33, 137 N. W. 117. **N. Y.**—Nugent *v.* Keenan, 21 Jones & S. 530; Tracy *v.* Dolan, 31 App. Div. 24, 52 N. Y. Supp. 351. **Tenn.**—Greer *v.* Whitfield, 4 Lea 85. **Tex.**—Holshausen *v.* Hollingsworth, 32 Tex. 86.

7. Murtha *v.* Howard, 20 S. D. 152, 105 N. W. 100.

8. Morris *v.* Warwick, 48 Wash. 426, 93 Pac. 905. See *infra*, XI.

9. Wilcox *v.* Byington, 36 Kan. 212, 12 Pac. 826; Manspeaker *v.* Pipher, 5 Kan. App. 879, 48 Pac. 868.

10. **Ala.**—First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733; Heflin *v.* Rock Mills Mfg. & L. Co., 58 Ala. 613. **Ariz.**—Muldon *v.* Place, 2 Ariz. 4, 6 Pac. 479. **Ark.**—Robinson *v.* Meyer, 25 Ark. 79; Newton *v.* Cocke, 10 Ark. 169; Lincoln *v.* Hancock, 5 Ark. 703. **Colo.**—Edgar Gold & S. Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113. **Ill.** People *v.* Cloud, 50 Ill. 439. **Ia.**—Randolph *v.* Cottage Hospital, 103 N. W. 157. **Ky.**—Erwin *v.* Allen, 124 Ky. 458, 99 S. W. 322; Lexington, L. & C. R. Co. *v.* Castleman, 8 Ky. Op. 883; Hopkins *v.* Chambers, 7 T. B. Mon. 254. **Me.**—Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71. **Minn.**—Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444. **N. H.** Seaver *v.* Allen, 48 N. H. 473. **N. C.** State *v.* Cox, 46 N. C. 373. **Okla.**—Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **S. C.**—Garrett *v.* Niel, 49 S. C. 560, 27 S. E. 512. **Tenn.**—Cowan *v.* Donaldson, 95 Tenn. 322, 327, 32 S. W. 457.

As to motion to compel the giving of security, see *supra*, VI, A.

11. **La.**—Grover's Succession, 49 La. Ann. 1050, 22 So. 313. **Mass.**—Feneley *v.* Mahoney, 21 Pick. 212. **Mich.**—Goodenough *v.* Burton, 146 Mich. 50, 109 N. W. 52. **Miss.**—Overstreet *v.* Davis, 24 Miss. 393. **N. Y.**—Hinman *v.* Pierce, 50 Hun 209, 2 N. Y. Supp. 861, 16 Civ. Proc. 138, 19 N. Y. St. 390. **N. D.** Cranmer *v.* Dinsmore, 15 N. D. 604, 109 N. W. 317. **Va.**—Anderson *v.* Johnson, 32 Gratt. (73 Va.) 558. **Wis.**—Colbeth *v.* Colbeth, 117 Wis. 90, 93 N. W. 829; Felton *v.* Hopkins, 89 Wis. 143, 61 S. W. 77.

entitled to security,[12] made before pleading to the merits,[13] or stipulating for a continuance of the case,[14] or prior to the beginning of the trial,[15] or before any action taken which would amount to a waiver of the failure to furnish the required security.[16] In some jurisdictions the motion to dismiss must be made at the term time when the order of court should have been complied with and cannot be made at a succeeding term.[17]

C. NOTICE OF MOTION. — Notice to the delinquent party is necessary in some jurisdictions,[18] but not in others.[19]

D. DISCRETION OF COURT. — Unless the statute deprives the court of any discretion in passing upon the motion,[20] it may grant further time to file security,[21] even though the statute provides for a dismissal

12. **Ky.**—Townsend *v.* Britt, 8 Ky. Op. 602. **N. Y.**—Hinds *v.* Woodbury, 29 How. Pr. 379, 19 Abb. Pr. 29. **N. C.** State *v.* Cox, 46 N. C. 373. **Tenn.** Irvins *v.* Mathis, 11 Humph. 603. **Tex.** Frazer *v.* Moore, 28 Tex. Civ. App. 427, 67 S. W. 427. **Wis.**—Felton *v.* Hopkins, 89 Wis. 143, 61 N. W. 77.

[a] **A plea in abatement** which is defective in form as such may be deemed sufficient as a motion to dismiss. Whittaker *v.* Perry, 37 Vt. 631.

[b] **Verification** of the motion not necessary. Rillito Canal Co. *v.* Schmidt, 11 Ariz. 49, 89 Pac. 523.

13. **Ala.**—Heflin *v.* Rock Mills Mfg. & L. Co., 58 Ala. 613. **Ark.**—Webb *v.* Jones, 2 Ark. 330. **Ill.**—People *v.* Cloud, 50 Ill. 439. **Md.**—State *v.* McCarty, 60 Md. 373. **Mass.**—Carpenter *v.* Aldrich, 3 Metc. 58. **N. J.**—Reed *v.* Benzine-ated Soap Co., 72 N. J. Eq. 622, 65 Atl. 1008. **N. C.**—State *v.* Cox, 46 N. C. 373. **S. C.**—*Ex parte* Hill, 55 S. C. 446, 33 S. E. 483; Garrett *v.* Niel, 49 S. C. 560, 27 S. E. 512. **Tenn.** Cowan *v.* Donaldson, 95 Tenn. 322, 327, 32 S. W. 457. **W. Va.**—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

14. State *v.* McCarty, 60 Md. 373.

15. Holt *v.* Tennallytown & R. Ry. Co., 81 Md. 219, 31 Atl. 809; *Ex parte* Hill, 55 S. C. 446, 33 S. E. 483.

16. See *supra*, VI, A, 2.

17. Irvins *v.* Mathis, 11 Humph. (Tenn.) 603.

18. Means *v.* Cromwell, 1 Ark. 247.

19. Joint School Dist. No. 7 *v.* Kemen, 72 Wis. 179, 39 N. W. 131.

[a] **Where both parties are present in court when the order is made** for security for costs and the order is not complied with, the action may be dismissed without further notice. Cranmer *v.* Dinsmore, 15 N. D. 604, 109 N. W. 317.

20. **Ala.**—Hutto *v.* Walker County, 185 Ala. 505, 64 So. 313, Ann. Cas. 1916B, 372. **Colo.**—Edgar Gold & S. Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113. **S. C.**—McCarley *v.* Turner, 33 S. C. 161, 11 S. E. 645.

[a] **Mandamus** is the appropriate remedy to compel a dismissal. *Ex parte* Bradshaw, 174 Ala. 243, 57 So. 16; First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733.

21. **Ala.**—*Ex parte* Jones, 83 Ala. 587, 3 So. 811; Whitaker *v.* Sanford, 13 Ala. 522; Reese *v.* Billing, 9 Ala. 263. **Ark.**—Robinson *v.* Meyer, 25 Ark. 79; Modglin *v.* Slay, 11 Ark. 693. **Cal.** Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179. **Idaho.**—Kissler *v.* Budge, 24 Idaho 246, 133 Pac. 125. **Ill.**—Richards *v.* People, 100 Ill. 390. **Ind.**—Lemon *v.* Temple, 7 Ind. 556. **Md.**—Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67. **Mich.**—McGill *v.* Beitner, 114 Mich. 646, 72 N. W. 613. **Miss.**—Kyle *v.* Stinson, 13 Smed. & M. 301. **Mo.** Needles *v.* Burk, 98 Mo. 474, 11 S. W. 1008. **Neb.**—Haskins *v.* Citizens Bank, 12 Neb. 39, 10 N. W. 466. **N. Y.** Cornuel *v.* Heinze, 67 Hun 652, 22 N. Y. Supp. 117, 51 N. Y. St. 461. **N. C.** Smith *v.* Mitchell, 63 N. C. 620. **Okla.** Fowler *v.* Fowler, 15 Okla. 529, 82 Pac. 923. **R. I.**—Rosenfeld *v.* Swarts, 22 R. I. 315, 47 Atl. 690. **Tex.**—Missouri Pac. Ry. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280. **Va.**—Vance *v.* Bird, 4 Munf. (18 Va.) 364. **W. Va.**—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

[a] **A denial of a motion** to dismiss is equivalent to an order granting leave to file security for costs. Plaff *v.* Pacific Express Co., 251 Ill. 243,

of the action where no security for costs is furnished.[22] But where defective security is given, leave should be granted to perfect it,[23] or to give a new security,[24] and it is error to dismiss the action.[25]

E. Effect of Dismissal. — A judgment of dismissal for failure to give security for costs has no effect as a final adjudication upon plaintiff's right to maintain the action,[26] but is equivalent to a dismissal without prejudice.[27] But the party is not entitled to have the complaint reinstated unless sufficient reason is shown why the order of the court requiring security for costs had not been complied with.[28]

F. Review of Order. — Generally the exercise of the discretion of the court in dismissing an action for failure to furnish a cost bond will not be interfered with on appeal.[29] And where the record does not disclose any evidence in support of the motion to dismiss for want of a bond for costs the presumption is in favor of the correctness of the order of dismissal.[30]

XII. PROCEEDINGS TO ENFORCE LIABILITY OF SURETIES.

A. In General. — In some jurisdictions the party in whose favor the judgment is rendered must proceed against the principal in the first instance,[31] while in other jurisdictions the sureties upon entry of judgment against the principal for costs become immediately liable therefor.[32]

B. Actions. — **1. Form of.** — Assumpsit[33] or case[34] are proper formal actions to enforce the sureties' liability.

95 N. E. 1089; Funk *v.* Church, 132 Iowa 1, 109 N. W. 286.

22. Robinson *v.* Meyer, 25 Ark. 79; Van Hooser *v.* Atkinson, 168 Ky. 1, 181 S. W. 610.

23. **Ala.**—Stribling *v.* Bank of Kentucky, 48 Ala. 451. **Ark.**—Mandel *v.* Peet, S. & Co., 18 Ark. 236. **Kan.** Obertino *v.* Fidelity Min. Co., 87 Kan. 297, 124 Pac. 172, Ann. Cas. 1913D, 573. **N. H.**—Seaver *v.* Allen, 48 N. H. 473. **N. C.**—Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713. **S. D.**—Lawrence *v.* Hughes, 37 S. D. 134, 156 N. W. 904. **Vt.**—Peck *v.* Smith, 3 Vt. 265.

24. **Ala.**—Jackson Lumber Co. *v.* Trammell, 74 So. 469; WcWhirter *v.* Frazier, 129 Ala. 450, 29 So. 445; Davis *v.* Jones, 123 Ala. 647, 26 So. 321; Good *v.* Jones, 56 Ala. 538; Stribling *v.* Bank of Kentucky, 48 Ala. 451. **Ark.** Meech *v.* Fowler, 14 Ark. 29. **Cal.** Becker *v.* Schmidlin, 153 Cal. 669, 96 Pac. 280. **Ill.**—Shaw *v.* Havekluft, 21 Ill. 127. **La.**—Mussina *v.* Alling, 12 La. Ann. 799. **N. H.**—Whitcher *v.* Whitcher, 10 N. H. 440. **N. Y.**—Dunk *v.* Dunk, 177 N. Y. 264, 69 N. E. 539; Rothchild *v.* Wilson, 24 Abb. N. C. 123, 10 N. Y. Supp. 61. **Vt.**—Collins *v.* Edson, 55 Vt. 48. **Wash.**—Morris *v.* Warwick, 48 Wash. 426, 93 Pac. 905.

25. Stribling *v.* Bank of Kentucky, 48 Ala. 451; Obertino *v.* Fidelity Coal Min. Co., 87 Kan. 297, 124 Pac. 172, Ann. Cas. 1913D, 573.

26. Randolph *v.* Cottage Hospital (Iowa), 103 N. W. 157.

Effect of dismissal, see 15 Standard Proc. 577, et seq.; 7 Standard Proc. 683.

27. Van Hooser *v.* Atkinson, 168 Ky. 1, 181 S. W. 610.

28. Frazer *v.* Moore, 28 Tex. Civ. App. 427, 67 S. W. 427.

29. Perkins *v.* Reagan, 14 Ark. 47.

30. Hickey *v.* Smith, 6 Ark. 456.

31. **Me.**—Neal *v.* Washburn, 24 Me. 331. **Mass.**—Ruggles *v.* Ives, 6 Mass. 494. **Tenn.**—Hammond *v.* St. John, 4 Yerg. 107.

32. McClaskey *v.* Barr, 79 Fed. 408; Woodward *v.* Peabody, 39 N. H. 189.

See *infra*, XII, C, and generally the title "**Summary Proceedings.**"

33. Carroll *v.* Williams, 18 R. I. 450, 28 Atl. 902. See generally the titles "**Assumpsit;**" "**Bonds;**" "**Recognizances and Bail.**"

34. Merrill *v.* Walker, 24 Me. 237.

2. Jurisdiction and Venue. — The sureties' liability, though properly enforceable in the court where the original action was pending,[35] and the costs were taxed,[36] may also be sued on in any other court of requisite jurisdiction.[37]

3. Parties.[38] — The obligee in the bond is entitled to recover all the cost regardless of whether or not he could be made liable therefor as he is a trustee suing for the benefit of all those who are designed to be protected by the bond.[39] According to some authorities, unless expressly authorized by statute, the cause of action given against the sureties by an undertaking cannot be split up into as many actions as there are persons interested in the recovery of the costs.[40] Elsewhere, however, it is held that a party entitled to a fee included in the costs of the action, may sue the surety therefor.[41]

4. Complaint or Declaration. — The security must be properly described in the complaint,[42] and it must be alleged with reasonable certainty who the parties to the original action were.[43] The complaint must show to whom the promise was made,[44] and that there is a breach of the condition of the bond.[45] The breach may be assigned in the words of the bond.[46] The complaint under some statutes need not show that the costs cannot be recovered from the principal,[47] but it must appear from the complaint that the plaintiff has paid or is liable for costs.[48] And the amount of costs incurred should be alleged.[49]

5. Judgment. — In an action on a cost bond plaintiff is entitled to a judgment for all costs taxed,[50] except to the extent that they exceed the penal sum named in the bond.[51]

See generally the title "**Case (The Action of Trespass on the).**"

35. Burson *v.* Mahoney, 6 Baxt. (Tenn.) 304.

36. Rogers *v.* Western Mut. Life Assn., 123 Iowa 722, 99 N. W. 589.

[a] **A surety of another county** not entitled to have the venue changed to that county. Rogers *v.* Western Mut. Life Assn., 123 Iowa 722, 99 N. W. 589.

37. Holt *v.* Tennallytown & R. Ry. Co., 81 Md. 219, 31 Atl. 809; Starlocki *v.* Williams, 34 Minn. 543, 26 N. W. 909.

38. See generally the title "**Parties,**" and 11 STANDARD PROC. 957, et seq.

39. Pryor *v.* Beck, 21 Ala. 393; M'Alexander *v.* Wright, 3 Mon. (Ky.) 189, 196, 16 Am. Dec. 93. See 20 STANDARD PROC. 909.

40. Hilliard *v.* Brown, 103 Ala. 318, 15 So. 605.

[a] **Separate actions cannot** be maintained by the various persons to whom the costs are payable. Hilliard *v.* Brown, 103 Ala. 318, 15 So. 605.

[b] **All Obligees Must Join.**—Where the defendant as well as the officers of the court are named as the obligees, they must be joined as plaintiffs. M'Alexander *v.* Wright, 3 Mon. (Ky.) 189, 196, 16 Am. Dec. 93. See 11 STANDARD PROC. 965.

41. **Ark.**—Byrd *v.* Crutchfield, 7 Ark. 149. **Mo.**—Garrett *v.* Cramer, 14 Mo. App. 401. **Tex.**—Bodeman *v.* Reinhard (Tex. Civ. App.), 54 S. W. 1051.

42. Chicago, K. & W. R. Co. *v.* Evans, 57 Kan. 286, 46 Pac. 303.

43. Farnum *v.* Bell, 3 N. H. 72.

[a] **The omission of the name of one** of several defendants has been held not to be material. Carroll *v.* Williams, 18 R. I. 450, 28 Atl. 902.

44. Louis *v.* Seaton, 7 Ky. L. Rep. 592.

45. Louis *v.* Seaton, 7 Ky. L. Rep. 592.

46. Pryor *v.* Beck, 21 Ala. 393.

47. Mix *v.* Page, 14 Conn. 329.

48. Hiett *v.* Davis, 88 Ind. 372.

49. Glidewell *v.* McGaughey, 2 Blackf. (Ind.) 359.

50. Downs *v.* Growney, 114 Mo. App. 575, 90 S. W. 119.

51. Zeigler *v.* Henry, 77 Mich. 480,

C. Summary Proceedings.[52] — Statutes[53] in some jurisdictions authorize a summary proceeding against the sureties on a cost bond by judgment on motion,[54] or by execution issued by the clerk without the entry of a judgment against the sureties.[55] Under some statutes notice must be previously given to the sureties,[56] while pursuant to others no notice to the sureties before entry of a summary judgment against them is necessary.[57] To sustain a summary judgment for costs it must appear affirmatively upon the record that every fact necessary to authorize the entry of such judgment exists.[58]

Jury Trial. — Where the proceedings, under the statute, are summary in nature, the sureties are not entitled to a jury trial.[59]

D. Scire Facias. — In some jurisdictions there is a remedy against an indorser of a writ by scire facias,[60] provided that the principal has avoided or is unable to pay the costs,[61] and it is necessary to show

43 N. W. 1018; Gay *v.* Hults, 56 Mich. 153, 22 N. W. 271; Fairlie *v.* Lawson, 5 Cow. (N. Y.) 424.

52. See generally the title **"Summary Proceedings."**

53. See the statutes.

[a] **A strict construction is given** these statutes since they are in derogation of the common law. Taylor *v.* State, 39 Ark. 291.

54. **U. S.**—McClaskey *v.* Barr, 79 Fed. 408. **Ala.**—Newsom *v.* Thornton, 61 Ala. 95. **Ark.**—Mills *v.* Sanderson, 68 Ark. 130, 56 S. W. 779. **Ill.**—Whitehurst *v.* Coleen, 53 Ill. 247. **Ia.**—Rogers *v.* Western Mut. Life Assn., 123 Iowa 722, 99 N. W. 589. **Kan.**—Dabney *v.* Comes, 89 Kan. 299, 131 Pac. 150; Sanford *v.* Frankhouser, 24 Kan. 98. **Mich.**—Vanderpool *v.* Notley, 71 Mich. 431, 42 N. W. 680. **Mo.**—Schawacker *v.* McLaughlin, 139 Mo. 333, 40 S. W. 935. **N. C.**—Rollins *v.* Henry, 84 N. C. 569. **S. C.**—Stuckey *v.* Crosswell, 12 Rich. L. 273. **S. D.**—Elder *v.* Horseshoe M. & M. Co., 11 S. D. 595, 79 N. W. 834. **Tenn.**—Williamson *v.* Burge & Co., 7 Heisk. (Tenn.) 117. **Tex.**—Glameyer *v.* Hamilton (Tex. Civ. App.), 60 S. W. 471. **Wis.**—Smith *v.* Lockwood, 34 Wis. 72.

[a] **Sheriffs and clerks of court only** entitled to the remedy. Mussina *v.* Alling, 12 La. Ann. 799.

[b] **Where plaintiff is non-resident, only.** Overstreet *v.* Davis, 24 Miss. 393.

[c] **Motion Necessary.**—Dow Wire Works Co. *v.* Englehardt, 136 Ala. 608, 33 So. 817; Williamson *v.* Burge & Co., 7 Heisk. (Tenn.) 117.

[d] **Time To Move.**—A motion for a summary judgment against the sureties may be made before the costs are taxed. Boswell *v.* Morton, 20 Ala. 235.

[e] **On appeal from justice's court,** where a bond for costs has been given, summary judgment may be entered against the sureties. Boatz *v.* Berg, 51 Mich. 8, 16 N. W. 184; Glameyer *v.* Hamilton (Tex. Civ. App.), 60 S. W. 471.

[f] **Where the bond has been lost** a judgment may be summarily entered against the sureties upon filing of an affidavit settling for the loss and the contents of the bond. Jordan *v.* Vaughn, 104 Mo. App. 110, 78 S. W. 316.

55. Whitehurst *v.* Coleen, 53 Ill. 247.

56. **U. S.**—McClaskey *v.* Barr, 79 Fed. 408. **Kan.**—Sanford *v.* Frankhouser, 24 Kan. 98. **S. C.**—Earle *v.* Cureton, 13 S. C. 19.

57. Martin *v.* Avery, 8 Ala. 430; Barton *v.* McKinney's Admrs., 3 Stew. & P. 274; Schawacker *v.* McLaughlin, 139 Mo. 333, 40 S. W. 935.

58. Martin *v.* Avery, 8 Ala. 430; Overstreet *v.* Davis, 24 Miss. 393.

59. Rogers *v.* Western Mut. Life Assn., 123 Iowa 722, 99 N. W. 589; Dabney *v.* Comes, 89 Kan. 299, 131 Pac. 150. See the title **"Summary Proceedings."**

60. **U. S.**—Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790. **Mass.** Johnson *v.* Sprague, 183 Mass. 102, 66 N. E. 422; McGee *v.* Barber, 14 Pick. 212. **Ohio.**—Newsom's Admr. *v.* Ran, 18 Ohio 240. **Vt.**—Stedman *v.* Ingraham, 22 Vt. 346.

61. Ruggles *v.* Ives, 6 Mass. 494.

in such proceeding that the costs have not been paid.[62] An indorser on a writ cannot upon scire facias dispute the validity of the judgment,[63] and it need not be alleged that the judgment is in force.[64]

See generally the title "**Scire Facias.**"

62. McGee *v.* Barber, 14 Pick. (Mass.) 212.

63. **U. S.**—Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790. **Mass.**—Sherburne *v.* Shepard, 142 Mass. 141, 7 N. E. 719. **Vt.**—Stedman *v.* Ingraham, 22 Vt. 346.

64. McGee *v.* Barber, 14 Pick. (Mass.) 212.

SECURITY TO KEEP THE PEACE

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CROSS-REFERENCES:

Breach of the Peace;

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For further references and cross-references, see the index to this work and the cross-references throughout this article

I. NATURE OF PROCEEDING. — The court may under certain circumstances require security to keep the peace from one who threatens injury to the person or property of another.[1] The remedy existed at common law,[2] and has been incorporated into the statutes substantially in its common law form.[3] It is a preventive measure of a

1. Cox *v.* State, 157 Ala. 1, 47 So. 1025; State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129.

2. State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129.

3. **Ala.**—Cox *v.* State, 157 Ala. 1, 47 So. 1025. **Ind.**—State *v.* Sayer, 35 Ind. 379. **La.**—State *v.* Murphy, 40 La. Ann. 855, 6 So. 107. **Minn.**—State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129.

criminal nature,[4] but entails no immediate punishment,[5] and cannot, strictly speaking, be deemed either a criminal or a civil proceeding.[6]

II. JURISDICTION TO ORDER. — The power to compel security to keep the peace can be properly exercised only within the limitations of the statutes,[7] and by the judicial officers therein designated. It has been exercised by justices of the peace,[8] committing magistrates,[9] recorders,[10] and county courts.[11]

III. PROCEEDINGS TO OBTAIN ORDER. — A. APPLICATION. **1. Necessity for.** — In certain cases specified in the statutes the court may of its own motion require security to keep the peace,[12] but, as a rule, authority to require such security is exercised only upon application of the complaining party[13] made by verified complaint[14]

Miss.—Ford *v.* State, 96 Miss. 85, 50 So. 497. **Tenn.**—State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

4. **Ala.**—Howard *v.* State, 121 Ala. 21, 25 So. 1000. **Ind.**—State *v.* Carey, 66 Ind. 72. **Ky.**—Adams *v.* Ashby, 2 Bibb 96. **Md.**—Hyde *v.* Greuch, 62 Md. 577. **Miss.**—Ford *v.* State, 96 Miss. 85, 50 So. 497. **S. C.**—State *v.* Maxcy, 1 McMull. 501. **Vt.**—State *v.* Benedict, 11 Vt. 236, 34 Am. Dec. 688.

5. State *v.* Tow, 5 Ind. App. 261, 31 N. E. 1120.

[a] **The object** of such a proceeding is not to punish the party for having committed a crime, but to prevent him from committing one. Hyde *v.* Greuch, 62 Md. 577.

6. **Ala.**—Howard *v.* State, 121 Ala. 21, 25 So. 1000. **Ga.**—Levar *v.* State, 103 Ga. 42, 29 S. E. 467. **Ind.**—State *v.* Cooper, 90 Ind. 575; Fisher *v.* Hamilton, 49 Ind. 341. **Kan.**—*In re* Mitchell, 39 Kan. 762, 19 Pac. 1. **Ky.**—Adams *v.* Ashby, 2 Bibb 96. **Minn.**—State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129. **Miss.**—State *v.* Goree, 108 Miss. 527, 66 So. 986. **Mo.**—State *v.* Emnitz, 27 Mo. 521. **N. C.**—State *v.* Lyon, 93 N. C. 575. **Ohio.**—*Ex parte* Christmas, 1 Ohio Dec. (Reprint) 594. **Wis.**—Weisselman *v.* State, 95 Wis. 274, 70 N. W. 169.

7. Cornett *v.* Com., 25 Ky. L. Rep. 1769, 78 S. W. 858.

8. **Ala.**—Cox *v.* State, 157 Ala. 1, 47 So. 1025. **Conn.**—*In re* Bion, 59 Conn. 372, 20 Atl. 662, 11 L. R. A. 694. **Ind.** Davis *v.* State, 138 Ind. 11, 37 N. E. 397. **Mich.**—Ware *v.* Branch Circuit Judge, 75 Mich. 488, 42 N. W. 997. **Miss.**—Ford *v.* State, 96 Miss. 85, 50 So. 497. **Mo.**—State *ex rel.* Benson *v.* Brooks, 167 Mo. App. 619, 150 S. W. 725. **Pa.**—Com. *v.* Snyder, 13 Pa. Co. Ct. 660. **Tenn.**—Estes *v.* State, 2 Humph. 496.

9. State *v.* Murphy, 40 La. Ann. 855, 6 So. 107; State *v.* Garlington, 56 S. C. 413, 34 S. E. 689.

10. People *v.* Mitchell, 2 Thomp. & C. (N. Y.) 172.

11. Welling's Case, 6 Gratt. (47 Va.) 670.

12. State *v.* Chandler, 31 Kan. 201, 1 Pac. 787.

[a] **Upon conviction** of a person of an offense less than a felony the court may require a bond to keep the peace in addition to the penalty imposed for the offense. **Kan.**—State *v.* Chandler, 31 Kan. 201, 1 Pac. 787. **Miss.**—City of Jackson *v.* Belew, 110 Miss. 243, 70 So. 346. **Tenn.**—Estes *v.* State, 2 Humph. 496.

[b] **But in the absence of such statute** a person convicted of a misdemeanor cannot be compelled to furnish a bond to keep the peace. State *v.* Foster, 26 W. Va. 272.

[c] **Where threats** to injure another are made in the presence of the court. Sands *v.* Benedict, 2 Hun (N. Y.) 479, 5 Thomp. & C. 19.

13. **Ala.**—Cox *v.* State, 157 Ala. 1, 47 So. 1025. **Kan.**—State *v.* Coughlin, 19 Kan. 537. **Ky.**—Com. *v.* Oldham, 1 Dana 466. **Minn.**—State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129. **N. Y.** Bradstreet *v.* Furgeson, 23 Wend. 638. **N. C.**—State *v.* Bass, 75 N. C. 139. **Pa.** Com. *v.* Duane, 1 Binn. 98, 2 Wheeler Cr. Cas. 533.

[a] **A husband** may make the application for his wife against a person from whom danger to her life or person may be justly feared. State *v.* Tooley, 1 Head (Tenn.) 9.

14. **Kan.**—State *v.* Coughlin, 19 Kan.

or affidavit,[15] and entitled in the name of the state or people.[16]

2. **Form and Sufficiency.**[17] — A complaint or affidavit drawn in substantial compliance with the provisions of the statute is sufficient,[18] even where the statute prescribes its form and the same is not strictly followed.[19] It must, however, appear therefrom that the accused has threatened or is about to commit an offense on the person or property of complainant,[20] and that there is reasonable ground to fear the threatened injury.[21] Under some statutes it must be alleged that the affidavit is not made from anger or malice.[22] It has been held that it is not necessary to specifically allege that the threats complained of were made in the jurisdiction of the justice of the peace or that defendant resides within such jurisdiction.[23]

B. WARRANT. — Upon presentation of a proper and sufficient affidavit or complaint, a warrant issues to bring the accused before the court.[24]

C. HEARING BEFORE MAGISTRATE.[25] — The court or magistrate without a jury[26] makes inquiry into the charge,[27] the investigation being confined to the question whether or not complainant had just cause to entertain the fears alleged in the complaint.[28] In order to determine such question the magistrate may hear evidence presented by complainant and introduced by the accused party.[29]

D. RETURN TO COURT OF RECORD. — Under some statutes the proceeding to require security to keep the peace is not finally disposed of by the magistrate but it is his duty to return all the papers to

537. **N. Y.**—Bradstreet *v.* Furgeson, 23 Wend. 638. **N. C.**—State *v.* Bass, 75 N. C. 139.

15. Cox *v.* State, 157 Ala. 1, 47 So. 1025; Ford *v.* State, 96 Miss. 85, 50 So. 497.

[a] **The affidavit may be sworn to** before a notary public although the statute provides that it shall be made before a justice of the peace. Davis *v.* State, 138 Ind. 11, 37 N. E. 397.

16. State *v.* Carey, 66 Ind. 72.

17. **Entitling,** see *supra,* III, A, 1.

18. **Ind.**—Davis *v.* State, 138 Ind. 11, 37 N. E. 397. **Miss.**—Ford *v.* State, 96 Miss. 85, 50 So. 497. **Mo.**—State *ex rel.* Benson *v.* Brooks, 167 Mo. App. 619, 150 S. W. 725.

19. Beckwith *v.* State, 21 Ind. 225.

20. Cox *v.* State, 157 Ala. 1, 47 So. 1025.

[a] **An affidavit setting forth in the alternative** various acts of the accused which the complainant is in fear of has been held not to be objectionable. Collins *v.* State, 11 Ind. 312; State *v.* Bridegroom, 10 Ind. 170.

21. Com. *v.* Snyder, 13 Pa. Co. Ct. 660.

[a] **The complainant by reasonable inquiry** must satisfy himself that he is in danger of being injured by violence in his person or property. Fisher *v.* Hamilton, 49 Ind. 341.

[b] **An affidavit is too indefinite** which merely shows that the complainant has just cause to fear that the accused will do him injury or procure others to do so is too indefinite. Steele *v.* State, 4 Ind. 561.

22. Stone *v.* State, 97 Ind. 345.

23. State *v.* Goree, 108 Miss. 527, 66 So. 986.

24. *In re* Bion, 59 Conn. 372, 20 Atl. 662, 11 L. R. A. 694.

25. **Hearing before court of record,** see *infra,* III, D.

26. State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129; Ford *v.* State, 96 Miss. 85, 50 So. 497.

27. State *v.* Goram, 83 N. C. 664.

[a] **Mandamus** is the proper remedy to compel a magistrate to hear the proceedings improperly dismissed by him. State *ex rel.* Benson *v.* Brooks, 167 Mo. App. 619, 150 S. W. 725.

28. Stone *v.* State, 97 Ind. 345.

29. Levar *v.* State, 103 Ga. 42, 29 S. E. 467.

the superior court, where they remain for final action.[30] The authority of the magistrate is restricted to the making of an order for the entry of a recognizance that the accused will appear at the next term of the court of record and will in the meantime keep the peace.[31] Upon failure of the complainant to appear in the higher court the matter may be discharged.[32] The question as to whether the complainant had just cause to fear injury, under some statutes, is to be submitted to a jury.[33] And it has been held that the verdict of the jury must be specifically responsive to the issue and that a general verdict of guilty in such case cannot be sustained.[34]

IV. ORDER FOR SECURITY. — Where e ears or the complainant are found to be justified, the magistrate is authorized to compel the accused to furnish bonds as security to keep the peace.[35] The amount of the undertaking required of the accused must be specified in the order.[36]

V. COSTS.[37] — The accused may be charged with costs where the statute so authorizes,[38] but not otherwise,[39] except in a few jurisdictions.[40] If the court finds that there is no sufficient ground for security to keep the peace the complaining party may be ordered to pay the costs of the proceedings,[41] though in some states the contrary rule prevails.[42] The accused cannot be imprisoned for a failure to pay the costs adjudged against him,[43] unless such authority is expressly given by statute.[44]

Where the proceeding under the statute is not finally determined

30. **Colo.**—Crump *v.* People, 2 Colo. 316. **Conn.**—Bill *v.* Scott, Kirby 62. **Ga.**—Levar *v.* State, 103 Ga. 42, 29 S. E. 467. **Ind.**—State *v.* Carey, 66 Ind. 72. **Mass.**—Com. *v.* Ward, 8 Mass. 497. **Mo.**—State *v.* Emnitz, 27 Mo. 521. **Tenn.**—State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756. **Tex.**—Lawton *v.* State, 5 Tex. 272.

[a] **The bonds together with the affidavit** and other evidence presented by the parties, (1) must, under the Georgia statute, be returned. Keith *v.* State, 27 Ga. 483. (2) Under other statutes no documents save the recognizance need be returned to the court of record. State *v.* Emnitz, 27 Mo. 521.

31. Com. *v.* Morey, 8 Mass. 78; Com. *v.* Ward, 4 Mass. 497; Queen *v.* Dunn, 12 Ad. & El. 599, 40 E. C. L. 299, 113 Eng. Reprint 939.

[a] **An order is void** which binds the accused to appear before a court which has no authority to require security to keep the peace. Com. *v.* Bartlett, 1 Leigh (28 Va.) 586.

32. State *v.* White, 47 Iowa 555.

[a] **A proceeding for breach of his recognizance** is not maintainable against accused upon such discharge but the only remedy of the complainant is to apply for security by requiring another recognizance. Com. *v.* Oldham, 1 Dana (Ky.) 466.

33. Collins *v.* State, 11 Ind. 312.

34. Long *v.* State, 10 Ind. 353.

35. State *v.* Garlington, 56 S. C. 413, 34 S. E. 689.

36. State *v.* Kennie, 24 Mont. 45, 60 Pac. 589.

37. See generally the title "**Costs.**"

38. State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129; Clallam Co. *v.* Hall, 23 Wash. 85, 62 Pac. 443.

39. **Ia.**—State *v.* Leathers, 16 Iowa 406. **Mass.**—Com. *v.* Morey, 8 Mass. 78. **Pa.**—Com. *v.* Rice, 3 Pa. Dist. 259. **Tenn.**—Mooneys *v.* State, 2 Yerg. 578.

40. Collins *v.* State, 57 Ark. 209, 21 S. W. 105; State *v.* Arnold, 56 Kan. 307, 43 Pac. 267.

41. Keith *v.* State, 27 Ga. 483; State *v.* Steinkopf, 94 Iowa 415, 62 N. W. 787.

42. State *v.* Dean, 24 Kan. 53.

43. *In re* Mitchell, 39 Kan. 762, 19 Pac. 1.

44. People *v.* Weeks, 99 Mich. 86, 57 N. W. 1091.

by the magistrate no costs can be exacted of either party until after the matter is passed upon by the court to which the recognizance is returned.[45]

VI. BOND.[46] — A separate bond should be given by each defendant although a bond executed by the defendants jointly may be enforced against either or all of them.[47]

Form and Sufficiency. — The bond must substantially[48] comply with the statutory provisions[49] and the order of the court.[50]

VII. COMMITMENT OF ACCUSED.[51] — In default of a peace bond the accused may be committed.[52] The order of commitment should show upon its face the cause of commital,[53] and the time for which the accused stands committed.[54] It need not disclose the amount of the bond,[55] nor the charge against the accused.[56]

VIII. REVIEW. — An appeal from the decision of the justice or magistrate in proceedings to require security to keep the peace, is authorized in some states,[57] in others not,[58] at least at the instance of the state or complaining witness.[59]

IX. PROCEEDINGS TO ENFORCE FORFEITURE. — Under some statutes the magistrate who exacted the security to keep the peace may cite the accused to appear before him to answer the alleged breach of the conditions of the recognizance and to declare it for-

45. Levar *v.* State, 103 Ga. 42, 29 S. E. 467.

46. **Order for,** see *supra,* IV.

47. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756.

48. State *v.* San Miguel, 4 Tex. Civ. App. 182, 23 S. W. 389.

[a] **Some statutes expressly provide** that no bond shall be deemed invalid unless it contains some error of substance and that no errors or irregularities in the prior proceedings shall have any effect upon the validity of the bond. State *v.* San Miguel, 4 Tex. Civ. App. 182, 23 S. W. 389.

49. Adams *v.* Ashby, 2 Bibb (Ky.) 96.

50. Smith *v.* Com., 9 Ky. L. Rep. 720.

[a] **A bond is invalid** which in its terms departs from the order of the court. Durein *v.* State, 38 Kan. 485, 17 Pac. 49.

51. **For failure to pay costs,** see *supra,* V.

52. **Ala.**—Howard *v.* State, 121 Ala. 21, 25 So. 1000. **La.**—State *v.* Murphy, 40 La. Ann. 855, 6 So. 107. **Minn.** State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129. **S. C.**—State *v.* Garlington, 56 S. C. 413, 34 S. E. 689.

[a] **If thereafter he becomes able to furnish bond** he should be taken before a judge on habeas corpus who may take the recognizance and discharge him. State *v.* Hill, 25 N. C. 398.

53. Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638.

54. Prickett *v.* Gratrex, 8 Q. B. 1020, 55 E. C. L. 1020, 115 Eng. Reprint 1158.

[a] **Period of Commitment.** — (1) Not to exceed six months. State *v.* Sargent, 74 Minn. 242, 76 N. W. 1129. (2) Not to exceed one year. State *v.* Kennie, 24 Mont. 45, 60 Pac. 589; State *v.* Garlington, 56 S. C. 413, 34 S. E. 689.

55. Prickett *v.* Gratrex, 8 Q. B. 1020, 55 E. C. L. 1020, 115 Eng. Reprint 1158.

56. State *v.* Kennie, 24 Mont. 45, 60 Pac. 589.

57. *Ex parte* Coburn, 38 Ala. 237; Weisselman *v.* State, 95 Wis. 274, 70 N. W. 169; Steuer *v.* State, 59 Wis. 472, 18 N. W. 433.

[a] **Appeal and not habeas corpus** is the remedy provided by the statute and the probate judge has no jurisdiction to review the action of the justice, on habeas corpus. *Ex parte* Coburn, 38 Ala. 237.

58. State *v.* Arnold, 56 Kan. 307, 43 Pac. 267; Lowe *v.* Com., 129 Ky. 565, 112 S. W. 647.

59. State *v.* Long, 18 Ind. 438.

feited,[60] or the court may on motion of the people declare the recognizance forfeited.[61] In such summary proceeding upon motion the defendant is not entitled to a trial by jury where the motion is based upon matters of record.[62] Pursuant to other statutes a peace bond may be declared forfeited by scire facias.[63] But in the absence of express statutory authority for a summary proceeding the only remedy to enforce a forfeiture of a peace bond is by a civil action.[64] The complaint should allege the proceedings requiring and the execution of bond and its provisions,[65] together with facts showing that the conditions of the bond were broken.[66]

Judgment against the obligor and the sureties for the full amount named in the bond will be rendered.[67]

60. State *v.* Oates, 88 N. C. 668.

61. State *v.* Sanders, 153 N. C. 624, 69 S. E. 272.

62. State *v.* Sanders, 153 N. C. 624, 69 S. E. 272. See generally the title "**Summary Proceedings,**" and 16 STANDARD PROC. 907.

63. State *v.* Dismukes, 101 Tenn. 694, 49 S. W. 756; Lawton *v.* State, 5 Tex. 272.

64. Combs *v.* Com., 24 Ky. L. Rep. 1310, 71 S. W. 504.

[a] **Action Prior to Return.**—Where the peace bond is made returnable to a court of record, and binds defendant to keep the peace in the meantime action may be brought upon it prior to the time at which the bond is returnable. Crump *v.* People, 2 Colo. 316.

65. See State *v.* Rudowskey, 65 Ind. 389 (containing a form held sufficient against demurrer) and the titles "**Bonds;**" "**Recognizances and Bail.**"

[a] **Certification of Bond.**—An averment that the peace bond was acknowledged by the justice of the peace and filed in the office of the clerk of the court of record sufficiently shows that the bond was duly certified to the district court. Crump *v.* People, 2 Colo. 316.

[b] **The statute provides that no irregularity** in the proceedings or in the form of the bond constitutes a defense to such action. State *v.* San Miguel, 4 Tex. Civ. App. 182, 23 S. W. 389.

66. Ball *v.* Com., 149 Ky. 260, 147 S. W. 953, 40 L. R. A. (N. S.) 186.

67. Shirley *v.* Terrell, 134 Ga. 61, 67 S. E. 436; Lawton *v.* State, 5 Tex. 272.

[a] **The penalty on a bond being a debt for a stated amount** no assessment of damages by a jury is required. Crump *v.* People, 2 Colo. 316.

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CROSS-REFERENCES:

Abduction;
Adultery;
Bastardy Proceedings;
Breach of Promise;
Criminal Conversation;
Indictment and Information;
Lewdness;
Prostitution;
Rape.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. CIVIL ACTION. — A. FORM OF REMEDY. — When the action is brought by a parent, guardian, master, or person standing in loco parentis, for the seduction of such person's daughter, ward, or servant, trespass on the case is the proper form of action.[1] According to some authorities, however, either trespass or case may be brought,[2] while by others it is held that if the defendant committed a trespass upon the plaintiff's property, as by entering his house, the plaintiff may sue in trespass and lay the debauching of the daughter as consequential damage, but that if no trespass was in truth committed, the damages being consequential and indirect, case is the proper form of action.[3]

1. **Ga.**—Kendrick *v.* McCrary, 11 Ga. 603. **Ill.**—Ball *v.* Bruce, 21 Ill. 161. **Me.**—Clough *v.* Tenney, 5 Greenl. 446. **N. J.**—Furman *v.* Applegate, 23 N. J. L. 28. **N. Y.**—Hewitt *v.* Prime, 21 Wend. 79. **N. C.**—Briggs *v.* Evans, 27 N. C. 16. See also note to McClure's Exrs. *v.* Miller, 11 N. C. 133, where this rule is announced. **Pa.**—Ream *v.* Rank, 3 Serg. & R. 215. See also Fairmount & A. S. P. Ry. Co. *v.* Stutler, 54 Pa. 375, 93 Am. Dec. 714, where it is said: "With us the action is commonly case, per quod, for seduction of a daughter . . . though in Ream *v.* Rank, 3 Serg. & R. 215, and Wert *v.* Vickers, 8 Wright 227, it was intimated that if the minor child be living in the father's house at the time the injury is done trespass is the more proper remedy, but if out of it, case." **Eng.** Dean *v.* Peel, 5 East. 45, 102 Eng. Reprint 986; Verry *v.* Watkins, 7 C. & P. 308, 32 E. C. L. 628.

Trespass on the case, generally see 4 STANDARD PROC. 610, et seq.

[a] **Historical Note.** — "There was no express remedy given by the law, to redress the wrong done the parent in the seduction of his child. The special action on the case was therefore allowed, in this, as in other instances where a wrong was done, and no 'original writ' would be found in the chancery that would suit the circumstances. This form of action was early accepted—grounded on the idea that the daughter bore the relation of a servant to the parent; the declaration alleging 'per quod servitum amisit.' Judicial history shows, however, that the relation of master and servant has but little more importance now than as a legal fiction, giving a 'technical' right to sue. In substance, the suit is to punish in damages the seducer for the dishonor, disgrace, and mental distress brought upon the parent." Ellington *v.* Ellington, 47 Miss. 329.

2. **N. J.**—Furman *v.* Applegate, 23 N. J. L. 28; Van Horn *v.* Freeman, 6 N. J. L. 322. **N. C.**—Briggs *v.* Evans, 27 N. C. 16. **Va.**—Parker *v.* Ellictte, Gilmer (21 Va.) 33.

3. **Me.**—Clough *v.* Tenny, 5 Greenl. 446. **Md.**—Mercer *v.* Walmsley, 5 Harr. & J. 27, 9 Am. Dec. 486. **N. Y.**—Sargent *v.* ————, 5 Cow. 106, 117. **Pa.** Ream *v.* Rank, 3 Serg. & R. 215. **Tenn.** Parker *v.* Meek, 3 Sneed 29.

B. PARTIES.[4] — **1. In General.** — At common law this action could not be maintained in the name of the injured female,[5] the only recognized mode being to bring the suit in the name of someone who had the right to the services of the seduced female, proceeding on the theory of loss of services.[6]

Under modern statutes in most states a father may maintain this action, irrespective of any loss of service,[7] and in some jurisdictions a female may now maintain an action for her own seduction.[8]

2. Personal Representatives.[9] — A cause of action for seduction is a personal one and abates with the death of the party,[10] unless, as is the case in some jurisdictions, statutes provide that the action may be maintained by or against the deceased's personal representative.[11]

3. Joinder of Defendants. — One performing an abortion upon the seduced female at the instance of the seducer may be joined in the action.[12]

C. PLEADING. — **1. Complaint.** — a. *General Requirements.* — The declaration or complaint must conform in general to the rules elsewhere treated.[13]

b. *Particular Allegations.* — **(I.) Character and Status of Female.**[14] —

4. See generally the title "**Parties.**"

5. Hamilton *v.* Lomax, 26 Barb. (N. Y.) 615, 6 Abb. Pr. 142; Conn *v.* Wilson, 2 Overt. (Tenn.) 233, 5 Ann. Dec. 663.

6. **Mich.**—Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489. **N. Y.**—Hamilton *v.* Lomax, 26 Barb. 615, 6 Abb. Pr. 142. **Ore.**—Anderson *v.* Aupperle, 51 Ore. 556, 95 Pac. 330. **R. I.**—Conlon *v.* Cassidy, 17 R. I. 518, 23 Atl. 100.

7. Anderson *v.* Aupperle, 51 Ore. 556, 95 Pac. 330.

[a] **Such statutes are cumulative;** the common law action per quod servitum amisit is not thereby replaced. Anderson *v.* Aupperle, 51 Ore. 556, 95 Pac. 330.

8. See generally the statutes and the following: **Cal.**—Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144. **Mich.**—Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111; Weiher *v.* Meyersahm, 50 Mich. 602, 16 N. W. 160. **N. C.**—Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397. **Tenn.**—Love *v.* Masoner, 6 Baxt. 24, 32 Am. Rep. 522.

9. See generally 8 STANDARD PROC. 725, et seq.

10. **Ga.**—Brawner *v.* Sterdevant, 9 Ga. 69. **N. Y.**—George *v.* Van Horn, 9 Barb. 523. **N. C.**—McClure's Exrs. *v.* Miller, 11 N. C. 133.

[a] **Statutes providing for survival of actions for damage done to personal property** do not include actions for seduction. McClure's Exrs. *v.* Miller, 11 N. C. 133.

11. See generally the statutes and the following: **Ind.**—Gimbel *v.* Smidth, 7 Ind. 627. **Ia.**—Shafer *v.* Grimes, 23 Iowa 550. **N. J.**—Noice *v.* Brown, 39 N. J. L. 569.

12. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762, where the court say: "If each had acted independently, the plaintiff might have been compelled to pursue them separately, although the consequences of their acts united." But, having determined that the one performing the abortion had acted in collusion with the seducer the court said that if he "chose to come in at any stage, he too is liable for the whole; for the law will not undertake to apportion damages in such cases."

13. See the titles "**Case (The Action of Trespass on the);**" "**Declaration and Complaint.**"

[a] **Anticipating and avoiding a defense of release,** although unnecessary, is not prejudicial to defendant. Jackson *v.* Brown, 74 Hun 25, 26 N. Y. Supp. 156, 57 N. Y. St. 272. See the title "**Release.**"

14. **In an indictment or information,** see *infra,* II, A, 2, b, (IV).

(A.) UNMARRIED.— At common law it is not necessary to allege that the female was unmarried.[15] But plaintiff must make such an allegation when suing under a statute providing for an action by an unmarried female for her own seduction.[16]

(B.) PRIOR CHASTITY. — The general rule is that no allegation as to the prior chastity of the female need be made.[17] If required, however, an allegation from which it definitely appears that the plaintiff was chaste and virtuous at the time of the alleged seduction is sufficient.[18]

(C.) MINORITY. — Minority of the injured female must be alleged where it is an essential fact,[19] otherwise such allegation is unnecessary.[20]

(II.) The Seduction. — (A.) GENERAL STATEMENT. — It is essential that there be a proper allegation of the seduction of the female[21] from which it shall appear that her consent was obtained by some trick or artifice rather than solicitation.[22] An allegation that the defendant "seduced, . . . was an averment that she was thereby drawn from the path of virtue. The declaration then did in effect aver chastity and sufficiently averred it."

15. Updergraff *v.* Bennett, 8 Iowa 72.

16. Galvin *v.* Crouch, 65 Ind. 56; Dowling *v.* Crapo, 65 Ind. 209; Thompson *v.* Young, 51 Ind. 599; Gover *v.* Dill, 3 Iowa 337.

[a] **The reason** is that at common law the plaintiff, in such a case, would have no right of action and "In asserting a right which did not exist at common law, but is wholly created by statute, the statute must be strictly complied with." Galvin *v.* Crouch, 65 Ind. 56. See also Dowling *v.* Crapo, 65 Ind. 209.

[b] **A subsequent marriage** to one other than the seducer, will not affect the situation. Dowling *v.* Crapo, 56 Ind. 209.

[c] **Aider by Verdict.**—Where it is not expressly alleged that the plaintiff was unmarried at the time of the seduction but such fact clearly appears by implication from what is alleged a verdict for the plaintiff will cure any defect that may have existed in the complaint in this regard. Dowling *v.* Crapo, 65 Ind. 209. To same effect: Smith *v.* Milburn, 17 Iowa 30.

17. **Ind.**—Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691. **Ia.**—Updergraff *v.* Bennett, 8 Iowa 72. **Mich.**—See Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466, where the court say, in answer to the objection that previous chastity was not alleged, that "The declaration did aver that defendant seduced the plaintiff. This,

[a] **The reason** is that the "plaintiff is not required to aver more than is necessary to prove" and "the presumption of law is in favor of a woman's chastity." Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.

18. Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551; Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466.

[a] **If this does not appear with definiteness** the pleading is still sufficient, in the absence of a timely objection, if it is enough to inform the defendant that such a claim will be made at the trial. Lampman *v.* Bruning, 120 Iowa 167, 94 N. W. 562.

19. Dood *v.* Focht, 72 Iowa 579, 34 N. W. 425, action by parent for loss of services of minor child.

[a] **Minority sufficiently appears** from an allegation that the female "was of the age of sixteen years." Lee *v.* Cooley, 13 Ore. 433, 11 Pac. 70.

20. See *infra*, this note.

[a] **Where it is alleged that the injured female was the servant** of the plaintiff and the action is quod servitium amisit it need not be alleged that she was a minor. Applegate *v.* Ruble, 2 A. K. Marsh. (Ky.) 128.

21. Lee *v.* Hodges, 13 Gratt. (54 Va.) 726.

22. Wooten *v.* Geisser, 9 La. Ann. 523; Welsund *v.* Schueller, 98 Minn. 475, 108 N. W. 483.

debauched and carnally knew,"[23] or even "debauched and carnally knew,"[24] the injured female, is sufficient in this respect.

(B.) MEANS OR ARTIFICES EMPLOYED. — A general statement of the means employed to effect the seduction is sufficient.[25] A complaint will not be rendered duplicitous by allegations of the means employed which, incidentally disclose some other cause of action against the defendant, or from which it appears that the seduction was accomplished partly by force and coercion.[26]

(III.) Time and Place of Seduction. — Allegations as to time and place are governed by the general rules elsewhere treated.[27]

23. Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860.

, [a] **Such an allegation is tantamount** "to saying that he used undue influence, artifice, deceit, fraud, or made some promise to induce the plaintiff to surrender her chastity and virtue to him." Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860.

24. **Ill.**—Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906; Leucker *v.* Steileu, 89 Ill. 545, 31 Am. Rep. 104, where the allegation was, "assaulted and debauched and carnally knew." **Mich.** See Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696, where it is said that the words "seduction" and "debauching" are used with substantially the same meaning in civil pleading. **Tenn.** Witcell *v.* Blackford, 6 Baxt. 141, "The language imports that the consent of the plaintiff was procured by corruption or seduction, and negatives the idea of voluntary fornication." **Utah.** See Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860, where the allegation was, "seduced, debauched and carnally knew," but the court added that as to an allegation which omitted the word "seduced" "it seems that the weight of authority holds that such a declaration is sufficient to charge seduction."

Compare Smith *v.* Young, 26 Mo. App. 575, where it was alleged that the defendant "debauched and carnally knew" the injured female. The court say: "We will also suggest, that if the plaintiff seeks to recover damages for the seduction of his daughter, it will be necessary for him to aver the seduction in his petition." See Com. *v.* Schull, 1 Pa. Co. Ct. 52.

25. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762; McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692; Hart *v.* Walker, 77 Ind. 331; Brown *v.* Kingsley, 38 Iowa 220, where the court say that to charge seduction, the ultimate fact is enough. "The evidence tending to establish it was neither necessary nor proper."

[a] **The reason** is that "It would be reciting evidence, rather than pleading the ultimate facts, to set forth in the complaint the items of languishing glances, sighs, clasping of hands, touches," etc., by which the seduction was accomplished. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

[b] **Reliance by the female on a promise of marriage** by means of which the seduction was accomplished need not be alleged. Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692.

[c] **Motion to make more specific** is proper remedy where the statements are so general as to be vague and indefinite. McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93.

In an indictment or information, see *infra,* II, A, 2, b, (II).

[d] **Money Consideration.**—A complaint which alleges that the means employed was a promise of a monetary consideration which was made deceitfully is bad, since such an agreement is immoral and illegal and contrary to public policy. Wilson *v.* Ensworth, 85 Ind. 399.

Bill of particulars, see *infra,* I, C, 3.

26. See *infra,* I, C, 1, c.

27. See 4 STANDARD PROC. 841, 844; 6 STANDARD PROC. 674, 676; 18 STANDARD PROC. 34.

[a] **When the action is brought in a court of general jurisdiction** it need not be alleged that the seduction was accomplished within the state, since jurisdiction is presumed. Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686.

[b] **Continuando.**—The time of acts of intercourse may be alleged under a

(IV.) Relationship. — In a common law action, when the female was of age, the complaint must allege the existence of the relationship of master and servant between her and the plaintiff.[28] Such an allegation is not required, however, when the female is alleged to be a minor who is legally under the control of, and might be required to render service for, the plaintiff,[29] and in such a case it need not be alleged that the minor resides, or did reside at the time of the seduction, with the plaintiff.[30] Statutes which provide that this action may be maintained without any allegation of loss of service have been construed not to dispense with the necessity of alleging the existence of the relation of master and servant.[31] Knowledge of the relationship by the defendant need not be alleged.[32]

(V.) Loss of Service. — At common law it was necessary to allege a loss by the plaintiff of the services of the female seduced,[33] but, under the statutes of many states, such an allegation is no longer required,[34] except, perhaps, for the purpose of aggravating the damages sustained.[35]

(VI.) Willingness or Refusal To Marry. — It need not be alleged that the defendant has failed or refused to comply with a promise of marriage under which the seduction was accomplished,[36] nor that the female is able or willing to marry the defendant.[37]

(VII.) Damages. — A special averment of general, *i. e.*, natural and

continuando. Lemmon *v.* Moore, 94 Ind. 40; Haymond *v.* Saucer, 84 Ind. 3.

Bill of particulars as to time and place, see *infra*, I, C, 3.

28. **Ill.**—Ball *v.* Bruce, 21 Ill. 161. **Mich.**—Ryan *v.* Fralick, 50 Mich. 483, 15 N. W. 561. **W. Va.**—Hudkins *v.* Haskins, 22 W. Va. 645.

29. **Ill.**—Ball *v.* Bruce, 21 Ill. 161. **Ind.**—Bolton *v.* Miller, 6 Ind. 262. **Md.** Greenwood *v.* Greenwood, 28 Md. 369. **Va.**—Lee *v.* Hodges, 13 Gratt. (54 Va.) 726. **W. Va.**—Hudkins *v.* Haskins, 22 W. Va. 645.

30. Ball *v.* Bruce, 21 Ill. 161.

[a] **The reason** is that "If the minor be legally under the control of, and may be required to perform service for the plaintiff, that gives the right to maintain the action." Ball *v.* Bruce, 21 Ill. 161.

31. Taylor *v.* Daniel, 30 Ky. L. Rep. 377, 98 S. W. 986; Riddle *v.* McGinnis, 22 W. Va. 253.

32. Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770.

33. **Ill.**—Ball *v.* Bruce, 21 Ill. 161. **Mich.**—Ryan *v.* Fralick, 50 Mich. 483, 15 N. W. 561. **W. Va.**—Riddle *v.* McGinnis, 22 W. Va. 253. **Eng.**—Bennett *v.* Allcott, 2 T. R. 166, 100 Eng. Reprint 90; Grinnell *v.* Wells, 7 M. & G. 1033, 49 E. C. L. 1033, 135 Eng. Reprint 419, where it is said that an allegation that plaintiff was compelled to pay the expenses arising from the seduction does not supply an allegation of loss of service.

34. See generally the statutes and the following: **Ind.**—Donohue *v.* Dyer, 23 Ind. 521. **Kan.**—Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L. R. A. 757. **Ky.**—Taylor *v.* Daniel, 30 Ky. L. Rep. 377, 98 S. W. 986. **Mich.**—Ryan *v.* Fralick, 50 Mich. 483, 15 N. W. 561; Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489. **Tenn.** Franklin *v.* McCorkle, 16 Lea 609, 1 S. W. 250, 57 Am. Rep. 244. **Va.**—Clem *v.* Holmes, 33 Gratt. (74 Va.) 722, 36 Am. Rep. 793. **W. Va.**—Riddle *v.* McGinnis, 22 W. Va. 253.

Relation of master of servant must still be alleged under such statutes, see *supra*, I, C, 1, b, (IV).

35. Franklin *v.* McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 244.

Allegations of damages generally, see *infra*, I, C, 1, b, (VII).

36. Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.

37. Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551.

consequential damages need not be made,[38] but special damages, as expenditures of money, should be expressly alleged,[39] and, if not necessary, it is at least proper to allege the existence of facts which go in aggravation of the damages sustained.[40]

c. *Joinder and Duplicity.* — Actions for seduction are governed by the general rules as to joinder and duplicity.[41] Matters of inducement,[42] such as a promise of marriage,[43] the use of force, threats and intimidation,[44] and matters of aggravation, as a subsequent abortion,[45] do not amount to statements of separate and substantive causes of action and do not render the pleading duplicitous.

2. Plea or Answer. — The general rules as to pleas and answers are followed.[46] A denial is sufficient to put in issue the questions of

38. **Ind.** — McIlvain *v.* Emery, 88 Ind. 298. **Mass.**—Phillips *v.* Hoyle, 4 Gray 568. **N. H.**—Lunt *v.* Philbrick, 59 N. H. 59. **N. J.**—Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770. **Vt.**—Rollins *v.* Chalmers, 51 Vt. 592, involving recovery for shock to plaintiff's feelings and the attendant dishonor.

See 13 STANDARD PROC. 364.

[a] **After verdict** a complaint is sufficient in this respect which, after charging the seduction, alleges "That the plaintiff has been damaged by the defendant in the sum of $5000, for which plaintiff asks judgment." Gray *v.* Bean, 27 Iowa 221.

39. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341. See also Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770.

40. Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451 (where the defendant, after the act of intercourse, publicly proclaimed the commission thereof); Davis *v.* Young, 90 Tenn. 303, 16 S. W. 473.

41. See the titles **"Duplicity;" "Joinder of Actions."**

42. Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489, where there were allegations of an assault by force and arms and an allegation that the defendant purposed to bring her within his power that he might keep her for the purposes of concubinage. The court say: "This was not alleged as a separate or substantive cause of action, but as matter of aggravation of the offense charged."

43. Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551; Hart *v.* Walker, 77 Ind. 331, where the complaint alleged that the victim of the seduction was living in the home of her seducer; that she was an orphan and worked in the defendant's home in return for a reasonable compensation, her schooling, etc. The court say: "The complaint, however, does not show a good cause of action for work and labor. No value, nor agreed price, nor failure to pay is averred, and the allegations concerning the subject were made manifestly by way of inducement to the alleged seduction." Lee *v.* Hefley, 21 Ind. 98.

44. De Haven *v.* Helvie, 126 Ind. 82, 25 N. E. 874; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692; Verwers *v.* Carpenter, 166 Iowa 273, 147 N. W. 742.

[a] **Seduction cannot be accomplished by force alone,** but the other averments with which those objected to are coupled make a case of seduction. If the arts and wile set out were employed to gain the plaintiff's confidence, and her consent was finally obtained by persuasion and force combined, we are not prepared to say that this would not be seduction. That it remains uncertain whether the intercourse was had by means of force, or by arts which amount to seduction, or both combined was not ground for demurrer.

45. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

[a] **The reason** is that, "all the parts of one continuous wrong, with the damages accruing from each part, constitute but one entire cause of action, which may properly be stated in one count against the wrongdoer." Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

[b] **Abortion performed by another** at the instance of the seducer. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

46. See the titles **"Answers;" "Confession and Avoidance;" "De-**

whether or not the female was the servant of the plaintiff,[47] whether or not the defendant practiced any seductive arts or deception in accomplishing his purpose,[48] and the prior chastity of the female.[49] A plea of infancy cannot be interposed to an allegation of a promise of marriage as the means of seduction.[50]

3. Bill of Particulars.[51] — In some jurisdictions the defendant may obtain a bill of particulars as to the time and place of and the means used in accomplishing the seduction,[52] and the plaintiff may be given the same right as to previous acts of intercourse alleged by the defendant.[53]

D. TRIAL. — **1. Matters for the Jury.**[54] — Whether or not it was the devices and persuasions of the defendant that induced the female to yield her person to him,[55] and whether, in the case of protestations of affection, promises, etc., she believed and relied upon the same,[56] are ultimate facts for the jury to determine from all the evidence. Likewise, any question as to the existence of the relationship of master and servant,[57] or the prior chastity of the female,[58] must be decided by the jury.

2. Instructions. — In conformity with the general rules elsewhere treated[59] the instructions should inform the jury as to the constituent elements of seduction,[60] and they must not be vague or indefinite in this regard.[61]

3. Special Verdicts.[62] — A special verdict which finds the ultimate facts submitted is sufficient and proper.[63]

nials;'' and titles dealing with particular pleas and defenses.

47. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100. But see Salter *v.* Walker, 21 L. T. N. S. (Eng.) 360.

48. Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860.

49. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Wandell *v.* Edwards, 25 Hun (N. Y.) 498.

[a] **Not Affirmative Defense.**—Want of prior chastity is not considered an affirmative defense within the meaning of a rule of court requiring that an affirmative defense must be plainly set forth in a notice attached to defendant's plea. Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466.

[b] **The answer should specifically** deny such material affirmative allegations as that the plaintiff was an unmarried female of previous chaste character. Gover *v.* Dill, 3 Iowa 337.

50. Lee *v.* Hefley, 21 Ind. 98.

51. **Bills of particulars,** generally see 4 STANDARD PROC. 372, et seq.

52. Knight *v.* Engle, 61 L. T. N. S. (Eng.) 780. See also Tourgee *v.* Rose, 19 R. I. 432, 37 Atl. 9.

53. Schwartz *v.* Green, 60 Hun 582, 14 N. Y. Supp. 833, 20 N. Y. Civ. Proc. 431.

54. See generally the title **''Province of Judge and Jury.''**

55. **Ind.**—Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762. **Ia.**—Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261. **Mich.**—Becker *v.* Mason, 93 Mich. 336, 53 N. W. 361.

56. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

57. Hartman *v.* McCrary, 59 Mo. App. 571. See generally the title **''Master and Servant.''**

58. Dalman *v.* Koning, 54 Mich. 320, 20 N. W. 61.

59. See the title **''Instructions.''**

60. **Ind.**—Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112. **Ky.**—Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637. **Ore.**—Breon *v.* Hinkle, 14 Ore. 494, 13 Pac. 289.

61. Breon *v.* Hinkle, 14 Ore. 494, 13 Pac. 289.

62. See the titles **''Verdict;'' ''Special Interrogatories to Juries.''**

63. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

[a] **An Illustration.**—A special ver-

II. CRIMINAL PROSECUTION. — A. INDICTMENT OR INFORMATION. — **1. General Statement.** — Subject to the general rules and limitations elsewhere treated[64] an indictment or information for seduction is usually sufficient if it follows the language of the statute defining the offense,[65] or language substantially equivalent thereto.[66] It must allege the existencce of every fact which the statute makes an element of the offense,[67] unless such facts appear by a necessary implication from the facts stated,[68] and words in addition thereto are usually regarded as harmless surplusage.[69] These necessary facts

dict that the victim of the seduction "believed" and "relied" upon the seducer's promises and protestations of affection and "yielded" her person on account thereof, is in proper form. These are ultimate facts for the jury to find, not conclusions of laws to be determined from special facts found. Any other rule would operate "to substitute the evidence for the verdict." Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762.

64. See the title "**Indictment and Information.**"

65. **Ark.**—Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28. **Cal.**—People *v.* Higuera, 122 Cal. 466, 55 Pac. 252. **Ind.**—Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196. **Ia.**—State *v.* Whalen, 98 Iowa 662, 68 N. W. 554. **Mo.**—State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372. See also State *v.* O'Keefe, 141 Mo. 271, 42 S. W. 725. **N. C.**—State *v.* Whitley, 141 N. C. 823, 53 S. E. 820. **Wash.**—See State *v.* Rogan, 18 Wash. 43, 50 Pac. 582.

See 12 STANDARD PROC. 447.

[a] **That prosecutrix promised to marry defendant** need not be alleged where the offense charged is seduction "under promise of marriage." State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372.

[b] **An indictment for abandoning seduced female after marriage** within a time prescribed by statute, need not allege that the marriage was the result of, or to avoid prosecution for, seduction. Whitaker *v.* Com., 172 Ky. 846, 189 S. W. 1113, under §1214, Ky. St., which provides that marriage of the defendant to the injured female shall provide immunity from prosecution "unless he shall wilfully and without such cause as constitutes a statutory ground of divorce to the husband, abandon or desert her within three years."

66. **Ark.**—Cheaney *v.* State, 36 Ark. 74. **Ind.**—Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; State *v.* Stogdel, 13 Ind. 565. **Ia.**—State *v.* Olson, 108 Iowa 667, 77 N. W. 332. **Mo.** State *v.* O'Keefe, 141 Mo. 271, 42 S. W. 725.

Compare Com. *v.* Schull, 1 Pa. Co. Ct. 52, where it was said that there was no word to be substituted for the word "seduce" as used in the statute.

67. **Ala.**—Wilson *v.* State, 73 Ala. 527. **Ark.**—Walton *v.* State, 71 Ark. 398, 75 S. W. 1. **Cal.**—People *v.* Roderigas, 49 Cal. 9. **Conn.**—State *v.* Bierce, 27 Conn. 319. **Ga.**—Langston *v.* State, 109 Ga. 153, 35 S. E. 166, 779. **Ia.**—State *v.* Whalen, 98 Iowa 662, 68 N. W. 554. **Kan.**—State *v.* Bryan, 34 Kan. 63, 8 Pac. 260. **Ky.**—Cargill *v.* Com., 12 Ky. L. Rep. 149, 13 S. W. 916. **Minn.**—State *v.* Abresch, 41 Minn. 41, 42 N. W. 543; State *v.* Gates, 27 Minn. 52, 6 N. W. 404. **Mo.**—State *v.* Primm, 98 Mo. 368, 11 S. W. 732. **N. Y.** Crozier *v.* People, 1 Park. Crim. 453. **Tex.**—Luckie *v.* State, 33 Tex. Crim. 562, 28 S. W. 533.

68. Moore *v.* State, 65 Ind. 213; State *v.* Bryan, 34 Kan. 63, 8 Pac. 260.

69. State *v.* Napper, 141 Mo. 401, 42 S. W. 957; State *v.* Whitley, 141 N. C. 823, 53 S. E. 820.

[a] *Compare* Langston *v.* State, 109 Ga. 153, 35 S. E. 166, 779, decided under §387 of Ga. Penal Code which provides that seduction may be accomplished "by persuasion and promises of marriage" or "by other false and fraudulent means." In this case the charge was that the seduction was "by persuasion and promises of marriage, and by other false and fraudulent means." The objection was that the facts constituting the "false and

appearing, it is not necessary to anticipate and negative any matter of defense.[70] The pleading will not be rendered insufficient by formal errors[71] and verbal variances[72] which do not mislead, nor by mistakes in grammar[73] or punctuation,[74] or the inadvertent omission of words which do not affect the plain meaning of the charge.[75]

2. Particular Requirements. — a. *Name of Female.* — The indictment or information must state the name of the woman charged to have been seduced.[76] All that is required in this regard is that it apprise the accused of the identity of the person whom he is charged to have seduced and slight errors which do not defeat this purpose are not fatal.[77]

b. *Charging the Offense.* — **(I.) General Statement.** — It must be charged that the defendant "seduced" the injured female.[78] The words "seduce" and "debauch" in the statement that the defendant "did seduce, carnally know and debauch" a woman named, charge the offense of seduction.[79] When so used they import the idea of illicit intercourse accomplished by arts, promises, or deception.[80] An act of intercourse[81] need not be specifically charged where the words

fraudulent means" were not stated, to which it was replied that the words "false and fraudulent means" might be rejected as surplusage and the charge still be good as alleging a seduction under promise of marriage. A divided court held that they could not be so treated; that "they were vital, pregnant, and full of significance . . ." "Doubtless they might well have been omitted . . . but as they were inserted . . . a demand for a statement of their full intent and meaning could not be met by adjudging . . . that they had no meaning whatever."

70. Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28, want of chastity is a matter of defense and chastity need not therefore be averred. See *infra*, II, A, 2, b, (IV), (C); Hoff *v.* State, 83 Miss. 488, 35 So. 950.

71. State *v.* Burns, 119 Iowa 663, 94 N. W. 238.

72. State *v.* Burns, 119 Iowa 663, 94 N. W. 238; State *v.* Olson, 108 Iowa 667, 77 N. W. 332.

[a] **Charging seduction of an "unmarried person"** where the statute defining the offense says an "unmarried female," is not a fatal defect where, from the context, it clearly appears that an unmarried female is referred to. State *v.* Olson, 108 Iowa 667, 77 N. W. 332.

73. State *v.* Ratliff, 170 N. C. 707, 86 S. E. 997.

74. State *v.* Ratliff, 170 N. C. 707, 86 S. E. 997.

75. State *v.* Ratliff, 170 N. C. 707, 86 S. E. 997, where the language of the statute was, "innocent and virtuous" and the indictment charged the offense to have been committed upon an "innocent and virtuous" female.

76. State *v.* Burns, 119 Iowa 663, 94 N. W. 238; State *v.* Marshall, 121 Mo. 476, 26 S. W. 562.

77. State *v.* Burns, 119 Iowa 663, 94 N. W. 238. See generally 12 STANDARD PROC. 369, et seq.; and the titles "Names;" "Variance and Failure of Proof."

[a] **A slight variance in the name,** or even the use of a wrong name affords no ground for setting aside a conviction if this is accomplished. State *v.* Burns, 119 Iowa 663, 94 N. W. 238.

78. Com. *v.* Schull, 1 Pa. Co. Ct. 52, where the court say that no other word may be substituted for the word "seduced" and that, for example, it is not enough to charge illicit intercourse under promise of marriage.

Compare supra, I, C, 1, b, (II), (A).

79. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

80. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

81. State *v.* Bierce, 27 Conn. 319; State *v.* Whalen, 98 Iowa 662, 68 N. W.

"seduce" or "seduction" are used as such words imply sexual connection.

(II.) Means Employed. — The manner in which the seduction was accomplished must appear,[82] though it is ordinarily sufficient to follow the language of the statute in this respect.[83] Where the charge is of seduction under promise of marriage it need not be alleged that the promise was made to the injured female, though it is better pleading to do so.[84]

(III.) Time. — The exact time of the commission of the offense need not be alleged.[85]

(IV.) Character and Status of Parties. — (A.) UNMARRIED. — It need not be alleged that the accused was unmarried at the time of the commission of the offense,[86] nor, as a general rule, that the female was unmarried.[87] However, under statutes where it must appear that the female was unmarried at the time of her seduction it is enough that this fact appears by a reasonable inference from facts expressly alleged.[88]

(B.) AGE. — The age of the parties need not be alleged.[89]

(C.) PRIOR CHASTITY OF FEMALE. — In some jurisdictions the indictment must aver the chastity of the injured female prior to the alleged

554; State *v.* Conkright, 58 Iowa 338, 12 N. W. 283.

[a] **The reason** is that although "carnal knowledge" implies sexual intercourse "seduce and debauch" include the same meaning. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

82. Langston *v.* State, 109 Ga. 153, 35 S. E. 166, 779.

[a] **In such detail as to inform** the accused of the precise nature of the charge preferred against him and enable him to anticipate the character of proof upon which the state will rely for a conviction. Langston *v.* State, 109 Ga. 153, 35 S. E. 166, 779.

83. Wilson *v.* State, 73 Ala. 527, where the indictment charged the means employed in the words of the statute defining the offense, *i. e.*, "by means of temptation, deceptions, arts, flattery or a promise of marriage." But see Langston *v.* State, 109 Ga. 153, 35 S. E. 166, 779, to the effect that charging seduction "by means of persuasion and promises of marriage" would, without further detail, be sufficient; but "by false and fraudulent means" is not enough.

84. People *v.* Higuera, 122 Cal. 466, 55 Pac. 252. See also Norton *v.* State, 72 Miss. 128, 16 So. 264, 48 Am. St. Rep. 538.

85. State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; Carlisle *v.* State, 73 Miss. 387, 19 So. 207.

[a] **Under a statute making seduction an offense only when pregnancy ensues** the time and place of prior acts of intercourse need not be stated with certainty. "The rule that time and place must be stated with certainty . . . is applicable only where that which happened at a certain time and place was indictable." Price *v.* State, 61 N. J. L. 500, 39 Atl. 709.

86. **Ga.**—Jordan *v.* State, 120 Ga. 864, 48 S. E. 352. **Kan.**—State *v.* Bryan, 34 Kan. 63, 8 Pac. 260. **Ky.** Davis *v.* Com., 98 Ky. 708, 34 S. W. 699. **Miss.**—Norton *v.* State, 72 Miss. 128, 16 So. 264, 48 Am. St. Rep. 538.

87. **Ia.**—State *v.* Savage, 48 Iowa 562. **Kan.**—State *v.* Bryan, 34 Kan. 63, 8 Pac. 260. **Ky.**—Davis *v.* Com., 98 Ky. 708, 34 S. W. 699. **Miss.**—Hoff *v.* State, 83 Miss. 488, 35 So. 950; Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538.

88. **Ind.**—Moore *v.* State, 65 Ind. 213. **Miss.**—Norton *v.* State, 72 Miss. 128, 16 So. 264, 48 Am. St. Rep. 538. **Minn.**—State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100.

89. **Ark.**—Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17. **Miss.**—Carlisle *v.* State, 73 Miss. 387, 19 So. 207. **Mo.** State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

seduction,[90] while in others no such allegation is necessary.[91]

B. TRIAL.[92] — In conformity with the general rules elsewhere treated,[93] the instructions given must clearly define the elements of the offense,[94] and should inform the jury as to what must be established to authorize a conviction.[95] Whether or not the female yielded her person because of the artifices or deceptions of the accused or on account of her own lustful desires,[96] whether or not she was previously chaste and virtuous,[97] or, if she had previously stepped aside from the path of virtue, whether or not she had reformed at the time of the illicit connection,[98] are all matters to be determined by the jury.

90. State *v.* Gates, 27 Minn. 52, 6 N. W. 404; State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372.

[a] **An allegation** which, after stating the fact of seduction, proceeds that the female was "then and there" of previous chaste character is a sufficient allegation that she was such at, and immediately preceding, the time of the seduction. State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100.

91. **Ark.**—Wilhite *v.* State, 84 Ark. 67, 104 S. W. 531; Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28. **Miss.**—Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492. **S. C.**—State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

92. **Evidence,** on trial for seduction, see 11 ENCY. OF EV. 666, et seq.

93. See the title "**Instructions.**"

94. State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511; State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Putnam *v.* State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738; Gorzell *v.* State, 43 Tex. Crim. 82, 63 S. W. 126.

In civil trials for seduction, see *supra,* I, D, 2.

[a] **Reading the statute** under which the prosecution is being had, and directing the jury's attention to the means employed as alleged in the indictment, where some of the means named in the statute are not relied upon, is a proper manner of instructing the jury as to the elements of the offense. Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

95. State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

96. State *v.* Higdon, 32 Iowa 262; People *v.* Van Alstyne, 78 Hun 509, 29 N. Y. Supp. 542, 9 N. Y. Cr. 300, 61 N. Y. St. 232.

97. State *v.* Stolley, 121 Iowa 111, 96 N. W. 707; State *v.* Carron, 18 Iowa 372, 87 Am. Dec. 401.

98. State *v.* Bennett, 137 Iowa 427, 110 N. W. 150.

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CROSS-REFERENCES:

Arrest of Judgment;
Infants;
Judgments;
Mandate and Proceedings Thereafter;
Pardon;
Penalties, Forfeitures and Fines;
Review;
Summary Proceedings;
Supersedeas and Stay of Proceedings.

Sentence and judgment in various criminal proceedings, see specifi titles.

For further references and cross-references, see the index to thi work and the cross-references throughout this article.

I. DEFINITION AND NATURE. — A sentence is the judgment of the court imposing upon the accused a penalty for the crime of which he has been convicted or to which he has confessed.[1] It denotes the final action of a court of criminal jurisdiction as contradistinguished from conviction which refers only to the ascertainment of the guilt of the defendant,[2] whether by plea of guilty or by verdict,[3] or by the finding or judgment of the judge or magistrate where trial is without a jury,[4] though conviction is sometimes used in the sense of a judgment or sentence.[5] While the "sentence" and the "judgment" in a criminal case are generally treated as one and the same,[6] yet under some statutes there seems to be a distinction between them for certain purposes;[7] and when the case is tried without a jury there must be a judgment or finding of guilt upon which to base the sentence.[8]

II. POWER AND DUTY OF COURT TO PRONOUNCE. — A. IN GENERAL. — Sentence can be pronounced only by a legally[9] con-

1. **Ala.**—Wright *v.* State, 103 Ala. 95, 15 So. 506. **Conn.**—Belden *v.* Hugo, 88 Conn. 500, 91 Atl. 369. **Fla.**—State *v.* Barnes, 24 Fla. 153, 4 So. 560. **Ill.** People *v.* Murphy, 257 Ill. 564, 100 N. E. 980; Featherstone *v.* People, 194 Ill. 325, 62 N. E. 684. **Mass.**—Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699. **N. C.**—State *v.* Ballard, 122 N. C. 1024, 29 S. E. 899. **Pa.**—Allen *v.* Delaware, 161 Pa. 550, 29 Atl. 288. **Tex.**—Mayfield *v.* State, 40 Tex. 289; Pennington *v.* State, 11 Tex. App. 281.

[a] **Not a mere formal judgment** in favor of the commonwealth but the imposition of a punishment. Com. *v.* Bishoff, 13 Pa. Co. Ct. 503.

[b] **An indeterminate sentence** imposed under a law authorizing such sentence, is a sentence for the maximum term prescribed for the offense committed, coupled with a provision which permits but does not require an earlier release. State *ex rel.* Petcoff *v.* Reed, 138 Minn. 465, 163 N. W. 984.

2. **Ark.**—Fanning *v.* State, 47 Ark. 442, 2 S. W. 70. **Ia.**—See Judge *v.* Powers, 156 Iowa 251, 136 N. W. 315, Ann. Cas. 1915B, 280. **La.**—State *v.* Moise, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701. **Mass.**—Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699. **Mich.**—People *v.* Adams, 95 Mich. 541, 55 N. W. 461. **N. J.**—State *v.* Henson, 66 N. J. L. 601, 50 Atl. 468. **Pa.** Wright *v.* Donaldson, 158 Pa. 88, 27 Atl. 867. **Tex.**—Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685; Johnson *v.* State, 14 Tex. App. 306. **Vt.**—Bugbee *v.* Boyce, 68 Vt. 311, 35 Atl. 330.

[a] **Not Part of the Trial.**—See People *v.* Stokes, 5 Cal. App. 205, 89 Pac. 997; Reed *v.* State, 147 Ind. 41, 46 N. E. 135.

3. State *v.* Knowles, 98 Me. 429, 57 Atl. 588.

4. See Lewis *v.* State, 5 Penne. (Del.) 100, 58 Atl. 945.

5. See the following cases: **Cal.** People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481. **Ill.**—Faunce *v.* People, 51 Ill. 311. **Ia.**—Judge *v.* Powers, 156 Iowa 251, 136 N. W. 315, Ann. Cas. 1915B, 280. **Ky.**—Dial *v.* Com., 142 Ky. 32, 133 S. W. 976. **Mass.**—Com. *v.* Kiley, 150 Mass. 325, 23 N. E. 55. **Mo.**—State *v.* Townley, 147 Mo. 205, 48 S. W. 833. **Neb.**—Marion *v.* State, 16 Neb. 349, 20 N. W. 289. **N. Y.**—Blaufus *v.* People, 69 N. Y. 107, 25 Am. Rep. 148. **Pa.** Com. *v.* McDermott, 224 Pa. 363, 73 Atl. 427, 24 L. R. A. (N. S.) 431. **Tex.** Gallagher *v.* State, 10 Tex. App. 469.

6. See cases in preceding notes.

Necessity for separate judgment, see *infra,* II, C, 1, note 21 [b].

7. Burrell *v.* State, 16 Tex. 147 (the judgment is the entry of record of what is subsequently pronounced as a sentence); Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685.

8. Lewis *v.* State, 5 Penne. (Del.) 100, 58 Atl. 945.

9. Gorman *v.* People, 17 Colo. 596, 31 Pac. 335, 31 Am. St. Rep. 350. But see Greenville *v.* Foster, 101 S. C. 318, 85 S. E. 769, that sentence by de facto court cannot be collaterally attacked.

[a] **A court which was abolished** prior to the trial of the cause has no

stituted court, and at an authorized session thereof.[10] It may be imposed by a judge other than the one who presided at the trial of the cause,[11] and where the court consists of more than one judge it is not necessary that at the time of pronouncing the sentence all of the trial judges be present,[12] except where all must act together,[13] nor that the court be composed of the same judges who presided at the trial.[14]

The court cannot be deprived of its power to sentence, by any agreement of the prosecuting attorney with the accused.[15]

The performance of the court's duty in the premises, in so far as it is ministerial merely may be compelled by mandamus.[16] A formal judgment is unnecessary upon a verdict of acquittal,[17] and, in some jurisdictions, in misdemeanor cases.[18]

power to pronounce sentence. Gorman *v.* People, 17 Colo. 596, 31 Pac. 335, 31 Am. St. Rep. 350.

[b] **Acts of de facto judge,** see 16 STANDARD PROC. 702, and Orme *v.* Com., 21 Ky. L. Rep. 1412, 55 S. W. 195; State *v.* Bloom, 17 Wis. 521.

10. Douglas *v.* State, 5 Okla. Cr. 682, 114 Pac. 1128; Dodd *v.* State, 77 Tex. Crim. 543, 179 S. W. 564; *Ex parte* Juneman, 28 Tex. App. 486, 13 S. W. 783. See also the title "**Courts,**" and **Ia.**—Jones *v.* McClaughry, 169 Iowa 281, 151 N. W. 210. **Kan.**—State *v.* Palmer, 40 Kan. 474, 20 Pac. 270. **N. Y.** Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. 202.

[a] **If court was not in session** when sentence was imposed, it is absolutely void. *Ex parte* Juneman, 28 Tex. App. 486, 13 S. W. 783.

[b] **While sitting in a civil cause** the court may impose sentence where the statute provides that the court shall always be open for the transaction of criminal business. Com. *v.* O'Brien, 175 Mass. 37, 55 N. E. 466.

[c] **At Chambers or in Vacation—Plea of Guilty.**—Statutes may permit judgment (1) on a plea of guilty, at chambers (McCarty *v.* Hopkins, 61 Neb. 550, 85 N. W. 540), or (2) in vacation. Jones *v.* McClaughry, 169 Iowa 281, 151 N. W. 210.

11. **U. S.**—Meldrum *v.* United States, 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324. **Ala.**—Clanton *v.* State, 96 Ala. 111, 11 So. 299; Charles *v.* State, 4 Port. 107. **Cal.**—People *v.* Felix, 45 Cal. 163. **Fla.**—*Ex parte* Williams, 26 Fla. 310, 8 So. 425. **Ind.**—Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631. **Ia.**—State *v.* Jones, 115 Iowa 113, 88 N. W. 196. **Mich.**—People *v.* Reilly, 53 Mich. 260, 18 N. W. 849. **Mo.** State *v.* Gordon, 196 Mo. 185, 95 S. W. 420; State *v.* Shea, 95 Mo. 85, 8 S. W. 409, judge who was attorney for the state at trial. **N. Y.**—People *v.* Bork, 96 N. Y. 188; People *v.* Brown, 77 Misc. 611, 138 N. Y. Supp. 569, magistrate. **S. C.**—State *v.* Knotts, 70 S. C. 400, 50 S. E. 9. **Va.**—Cleek *v.* Com., 21 Gratt. (62 Va.) 777. **Wis.**—Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128; Pegalow *v.* State, 20 Wis. 61.

[a] **Upon a disagreement** amongst the trial judges as to the punishment, the supreme court may, upon certiorari, pass judgment. Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610.

[b] **Where sentence was suspended** by the trial judge and the accused released on his own recognizance, a subsequent judge should not impose sentence. Weaver *v.* People, 33 Mich. 296.

12. United States *v.* Gordon, 5 Blatchf. 18, 25 Fed. Cas. No. 15,231. See 6 STANDARD PROC. 74.

13. People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

14. People *v.* Brown, 153 App. Div. 234, 138 N. Y. Supp. 7.

15. Com. *v.* Stewart, 44 Pa. Super. 620.

16. State *v.* Shea, 95 Mo. 85, 8 S. W. 409. See the title "**Mandamus,**" and *Ex parte* United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129, Ann. Cas. 1917B, 355, L. R. A. 1917E, 1178.

17. Mills *v.* McCoy, 4 Cow. (N. Y.) 406.

[a] **But defendant is entitled to** have a judgment of acquittal entered. State *ex rel.* Gabe *v.* Main, 66 Wash. 381, 119 Pac. 844.

18. Ryan *v.* State, 32 Tex. 280.

B. STATUTORY AUTHORIZATION. — The power to pass sentence upon defendant must be authorized by law,[19] and upon conviction no greater punishment can be given than the statute warrants.[20]

C. FOUNDATION FOR. — **1. In General.** — It is essential to a legal sentence that it be based on a valid conviction[21] after a plea[22] to an accusation sufficient in substance to confer jurisdiction upon the court.[23]

19. Jenkins *v.* State, 13 Ga. App. 695, 79 S. E. 861.

[a] **Where no punishment is prescribed** by statute, the court has no power to sentence. Jenkins *v.* State, 13 Ga. App. 695, 79 S. E. 861.

[b] **The repeal of a statute** without (1) a saving clause during the pendency of a prosecution for an offense created under it, arrests the proceeding and withdraws all authority to pronounce judgment even after conviction. Com. *v.* Kimball, 21 Pick. (Mass.) 373; State *v.* Williams, 97 N. C. 455, 2 S. E. 55; State *v.* Long, 78 N. C. 571. (2) But where a statute is repealed after the court has pronounced sentence upon the defendant the repeal of the law does not affect the execution of the sentence. State *v.* Addington, 2 Bailey (S. C.) 516, 23 Am. Dec. 150.

[c] **An indeterminate sentence law** does not operate upon crimes committed prior to the taking effect of the law. Stehr *v.* State, 94 Neb. 151, 142 N. W. 670, 45 L. R. A. (N. S.) 563.

20. *Ex parte* Adams, 187 Ala. 10, 65 So. 514; People *v.* Harrington, 75 Mich. 112, 42 N. W. 680; Brown *v.* People, 39 Mich. 57.

[a] **Where the punishment is changed by an amendment** of the statute after the commission of the crime the defendant must be punished in accordance with the law as it prevailed at the time of commission of the offense. State *v.* Fletcher, 1 R. I. 193; Gregg *v.* State, 3 W. Va. 705.

21. Com. *ex rel.* Fagan *v.* Francies, 53 Pa. Super. 278. See the title "**Verdict.**"

Distinction between conviction and sentence, see *supra,* I.

A plea of guilty operates as a conviction. See *infra,* II, C, 2.

[a] **Upon an agreement of the parties** as to what the evidence will show, there can be no sentence without a verdict, or plea of guilty or nolo contendere. State *v.* Cross, 34 Me. 594; United States *v.* Pobre, 11 Phil. Isl. 51. But see State *v.* Jones, 18 Tex. 874, in case of misdemeanor punishable only by fine.

[b] **A separate judgment or finding by the court** is not necessary (1) after the verdict and before sentence, since the sentence itself embodies or implies a judgment. **U. S.**—Davis *v.* Territory, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153. **Ala.**—*Ex parte* Roberson, 123 Ala. 103, 26 So. 645, 82 Am. St. Rep. 107; Thames *v.* State, 12 Ala. App. 307, 68 So. 474. **Ill.**—People *v.* Hartsig, 249 Ill. 348, 94 N. E. 525; Hoch *v.* People, 219 Ill. 265, 76 N. E. 356, 109 Am. St. Rep. 327. **Ia.**—State *v.* Rudd, 97 Iowa 389, 66 N. W. 748. Nor is an independent judgment necessary after plea of guilty or nolo contendere. See *infra,* II, C, 2. (2) But where the case is tried by a magistrate or judge without a jury, there must be a finding or judgment of guilt upon which to base the sentence. Lewis *v.* State, 5 Penne. (Del.) 100, 58 Atl. 945.

Conformity to conviction, see *infra,* V, H.

22. See 2 STANDARD PROC. 873, et seq., and *infra,* II, C, 2.

[a] **Where the accusation contains two counts** but defendant pleaded to only one, a verdict of guilty on the other will not support a judgment or sentence thereon. Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456. See also 2 STANDARD PROC. 847, note 74.

[b] **But an arraignment is not necessary to due process of law** where the accused takes objections to the information and is put to trial before a jury in all respects as though he had entered a formal plea of guilty. Garland *v.* Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. ed. 772, *overruling* Crain *v.* United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097.

23. Com. *ex rel.* Fagan *v.* Francies, 53 Pa. Super. 278; Pate *v.* State, 21 Tex. App. 191, 17 S. W. 461.

See generally the title "**Indictment and Information.**"

2. On Plea of Guilty or Nolo Contendere. — Unless the statute requires the question of punishment to be submitted to a jury,[24] the court may upon a plea of guilty,[25] or a plea of nolo contendere,[26] pronounce judgment and sentence,[27] or even proceed to sentence the accused without an independent judgment,[28] and to the same extent as under a verdict.[29] Where the defendant pleads guilty of a crime of which there are several degrees under some statutes the court,[30] under others a jury[31] must determine the degree of the crime committed, and evidence may be introduced in regard thereto.[32] The fixing of the pun-

[a] **Even upon a plea of guilty** no valid sentence can be imposed in the absence of a proper accusation. Com. *ex rel.* Fagan *v.* Francies, 53 Pa. Super. 278.

[b] **The loss of an indictment** does not deprive court of power to sentence (Mount *v.* State, 14 Ohio 295, 45 Am. Dec. 542), nor (2) does the loss of an information. Klein *v.* State, 157 Ind. 146, 60 N. E. 1036. Restoration of lost indictment or information, see 12 STANDARD PROC. 160.

Conformity to accusation, see *infra,* V, G.

24. See *infra,* this section.

25. See 2 STANDARD PROC. 895.

26. See 2 STANDARD PROC. 906.

[a] **A plea of nolo contendere** is equivalent to a plea of guilty in so far as it gives the court the power to punish. State *v.* Burnett, 174 N. C. 796, 93 S. E. 473, L. R. A. 1918A, 955.

27. Green *v.* Com., 12 Allen (Mass.) 155.

[a] **Even in Capital Cases.**—Green *v.* Com., 12 Allen (Mass.) 155.

[b] **Upon plea of guilty to all counts** of a charge the court may impose sentence upon any of the counts. People *v.* Morris, 80 Mich. 634, 45 N. W. 591, 8 L. R. A. 685; Polinsky *v.* People, 11 Hun (N. Y.) 390.

28. **Ark.**—State *v.* Wright, 96 Ark. 203, 131 S. W. 688. **Haw.**—*In re* Kim, 21 Hawaii 295. **Ill.**—People *v.* Hartsig, 249 Ill. 348, 94 N. E. 525; Coates *v.* People, 72 Ill. 303. **Kan.**—State *v.* Plowman, 28 Kan. 569. **Me.**—State *v.* Herlihy, 102 Me. 310, 66 Atl. 643. **Mass.**—Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449. **N. Y.**—People *ex rel.* Evans *v.* McEwen, 67 How. Pr. 105.

[a] **The plea of guilty operates as a conviction** just as effectually as does the verdict of a jury or the judgment of the court in a jury-waived case. *In re* Kim, 21 Hawaii 295.

29. People *v.* Miller, 114 Cal. 10, 45 Pac. 986.

Sentence upon verdict, see *infra,* II, C, 3.

[a] **The court may mitigate the penalty** for murder to imprisonment for life. Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7.

30. **Cal.**—People *v.* Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88; People *v.* Miller, 137 Cal. 642, 70 Pac. 735; People *v.* Jefferson, 52 Cal. 452. **Ia.**—State *v.* Cumberland, 90 Iowa 525, 58 N. W. 885. **Ky.**—Mounts *v.* Com., 89 Ky. 274, 12 S. W. 311. **Mont.** State *v.* Mish, 36 Mont. 168, 92 Pac. 459, 122 Am. St. Rep. 343. **N. H.** State *v.* Comery, 95 Atl. 670; State *v.* Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744.

[a] **Failure to conduct a hearing** for this purpose (1) is prejudicial error (People *v.* Jefferson, 52 Cal. 452), except (2) where the accused pleads guilty to a particular degree of crime charged. *Ex parte* Haase, 5 Cal. App. 54, 90 Pac. 946.

[b] **The finding of the court** (1) must appear of record (McCauley *v.* United States, Morris [Ia.] 486), unless (2) the sentence imposed shows what the finding must have been. State *v.* Cumberland, 90 Iowa 525, 58 N. W. 885.

[c] **The recitals** of the judgment are sufficient to show the proceedings taken. *Ex parte* Woods, 5 Cal. Unrep. 149, 41 Pac. 796.

31. **Ala.**—See Nelson *v.* State, 46 Ala. 186. **Okla.**—State *v.* McDonald, 10 Okla. Crim. 413, 137 Pac. 362. **Tex.** Miller *v.* State, 58 Tex. Crim. 600, 126 S. W. 864; Josef *v.* State, 33 Tex. Crim. 251, 26 S. W. 213; Evers *v.* State, 32 Tex. Crim. 283, 22 S. W. 1019; Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886, even in the absence of statute.

32. **Cal.**—People *v.* Miller, 114 Cal.

ishment by the jury is sometimes provided for by statute.[33] The rules governing the power of courts to suspend sentences[34] are applicable to cases in which the defendant enters a plea of guilty.[35]

3. Upon Verdict.[36] — Where the judgment and sentence are based on a verdict it must be a legal and sufficient one.[37]

4. Upon Default. — Judgment by default cannot be taken against the accused,[38] except where authorized by statute in misdemeanor cases.[39]

III. TIME TO PRONOUNCE SENTENCE.[40] — A. In General. Except where the statute requires the lapse of a designated period of time after the verdict before sentence can be pronounced,[41] it is

10, 45 Pac. 986. **Ia.**—State *v.* Cumberland, 90 Iowa 525, 58 N. W. 885. **Ky.** Mounts *v.* Com., 89 Ky. 274, 12 S. W. 311. **Tex.**—Evers *v.* State, 32 Tex. Crim. 283, 22 S. W. 1019, evidence necessary when submitted to jury.

[a] **An oral examination** of the witnesses is essential and a reading of their testimony is not sufficient. Com. *v.* Staush, 256 Pa. 620, 101 Atl. 72.

[b] **The presumption,** in the absence of evidence, is that murder is of the second degree, and there must be evidence of premeditation to justify a finding of first degree murder. Com. *v.* Morgenthau, 249 Pa. 139, 94 Atl. 551.

33. See the title "**Verdict.**"

34. **Suspension of sentence,** see *infra,* III, B.

35. People *ex rel.* Dunnigan *v.* Webster, 14 Misc. 617, 36 N. Y. Supp. 745.

36. **Necessity of verdict on plea of guilty,** see *supra,* II, C, 2.

37. **Ala.**—Zaner *v.* State, 90 Ala. 651, 8 So. 698. **Cal.**—People *v.* Ah Ye, 31 Cal. 451. **Tenn.**—State *v.* Ragsdale, 10 Lea 671. **Tex.**—Parks *v.* State, 29 Tex. App. 597, 16 S. W. 532.

See generally the title "**Verdict.**"

Conformity to verdict, see *infra,* V, H.

38. Com. *v.* Lehigh Valley R. Co., 14 Pa. Co. Ct. 341.

Plea necessary, see 2 Standard Proc. 873, et seq.

Defendant must be present, see *infra,* IV, A.

39. See the statutes and Com. *v.* Neat, 89 Ky. 241, 12 S. W. 256; Pursifull *v.* Com., 20 Ky. L. Rep. 863, 47 S. W. 772; State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875; State *v.* Slack, 28 W. Va. 372.

40. **On plea of guilty,** see 2 Standard Proc. 904.

41. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471; Powers *v.* Com., 139 Ky. 815, 83 S. W. 146 (applies to felony cases); State *v.* Lu Sing, 34 Mont. 31, 85 Pac. 521.

[a] **Statute directory** merely. Seaborn *v.* State, 20 Ala. 15.

[b] **Defendant may waive** such (1) statutory provision and consent to an immediate sentence. **U. S.**—United States *v.* Cerecedo, 6 Porto Rico Fed. 622. **Cal.**—People *v.* Robinson, 46 Cal. 94; People *v.* Vaughn, 25 Cal. App. 736, 147 Pac. 116; People *v.* Creitser, 25 Cal. App. 647, 145 Pac. 109; People *v.* Flavin, 21 Cal. App. 244, 131 Pac. 321. **N. Y.**—See People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62. **Okla.** Kerkendall *v.* State, 5 Okla. Crim. 570, 115 Pac. 612. **Tex.**—Doans *v.* State, 36 Tex. Crim. 468, 37 S. W. 751. **Utah.** See *In re* Barton, 6 Utah 264, 21 Pac. 998. (2) Failure to object or except to the violation of the statute waives the error on appeal. Hansford *v.* Com., 170 Ky. 700, 186 S. W. 498. See also People *v.* Barton, 88 Cal. 176, 25 Pac. 1117.

[c] **In computing the minimum time** Sunday should not be counted. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471.

[d] **A sentence pronounced before the expiration** of the statutory time will not be set aside unless it is shown that the defendant was prejudiced thereby. Holly *v.* Com., 18 Ky. L. Rep. 441, 36 S. W. 532; Parrish *v.* State, 45 Tex. 51.

[e] **If the court is not to remain in session for the minimum period** the statute sometimes provides (1) that as remote a date as possible be fixed. State *v.* Lu Sing, 34 Mont. 31, 85 Pac. 521, 9 Ann. Cas. 344; Beaubein *v.* State, 13 Okla. Crim. 440, 165 Pac. 213. (2) Where the term ends on the same day as the conviction, sentence on that day

not necessary that any particular time shall elapse before imposing sentence after verdict.[42] Statutes frequently fix the limits of time within which the court may or must pronounce sentence.[43] While sentence should not be unreasonably delayed,[44] it need not be imposed immediately on conviction.[45] Where the statute requires the court to fix a time for sentence,[46] it should be imposed at the time fixed unless the defendant is entitled to a postponement.[47]

At What Term.— Unless the statute forbids, the sentence of the court, as a rule, may be pronounced at a succeeding term[48] where the case

is not illegal. People *v.* Spencer, 179 N. Y. 408, 72 N. E. 461. (3) But if defendant is tried at a special term called merely for that purpose, the minimum time for sentence must be allowed before adjournment. Powers *v.* Com., 139 Ky. 815, 83 S. W. 146.

42. See *infra*, this section and the following cases: **Ala.**—Wright *v.* State, 103 Ala. 95, 15 So. 506. **Ill.**—People *v.* Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473. **Ky.**—Neace *v.* Com., 165 Ky. 739, 178 S. W. 1062. **La.** State *v.* Johnson, 31 La. Ann. 482. **Mo.** State *v.* Snyder, 98 Mo. 555, 12 S. W. 369.

43. See the statutes and the cases cited *supra*, and *infra*, this section.

[a] **Extension of Time To Hear Motion for New Trial.**—Where the state provides that sentence shall be pronounced in not less than two nor more than five days, unless the court extend the time not more than ten days longer for the purpose of hearing or determining any motion for new trial or in arrest, it is not necessary that such a motion be actually pending, to justify the extension, if defendant counsel has announced his intention of making the motion. People *v.* Treschenko, 159 Cal. 456, 114 Pac. 578.

[b] **A judgment pronounced after the maximum statutory limit** is erroneous and (1) subject to reversal on appeal, but is not in excess of jurisdiction and cannot therefore be prevented by writ of prohibition. Rankin *v.* Superior Court, 157 Cal. 189, 106 Pac. 718. *Compare* People *v.* Charon, 7 Porto Rico, 416, and *infra*, III, B. (2) Defendant may waive the statutory requirement. People *v.* Vaughan, 25 Cal. App. 736, 147 Pac. 116; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62.

44. Hall *v.* Patterson, 45 Fed. 352.

45. U. S.—Hall *v.* Patterson, 45 Fed. 352. **Kan.**—*In re* Terry, 71 Kan. 362, 80 Pac. 586. **Pa.**—Com. *v.* Thompson, 18 Pa. Co. Ct. 487, though the statute says "forthwith." See also *infra*, this section.

Postponement of sentence, see *infra*, III, B.

46. See the statutes and Dalton *v.* State, 6 Okla. Crim. 368, 118 Pac. 1001, presumption on appeal that time was fixed.

[a] **Failure to fix a date** previous to pronouncement of sentence held nonprejudicial. State *v.* Usher, 136 Iowa 606, 111 N. W. 811.

47. Rankin *v.* Superior Court, 157 Cal. 189, 106 Pac. 718.

48. U. S.—Miner *v.* United States, 244 Fed. 422, 157 C. C. A. 48. **Ala.** Clanton *v.* State, 96 Ala. 111, 11 So. 299. **Ark.**—Cox *v.* State, 114 Ark. 234, 169 S. W. 789; Barwick *v.* State, 107 Ark. 115, 153 S. W. 1106; Joiner *v.* State, 94 Ark. 198, 126 S. W. 723; Thurman *v.* State, 54 Ark. 120, 15 S. W. 84. **Cal.**—People *v.* Felix, 45 Cal. 163. **D. C.**—United States *v.* May, 2 MacArthur 512. **Fla.**—*Ex parte* Williams, 26 Fla. 310, 8 So. 425. **Ind.** Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; Harbin *v.* State, 133 Ind. 698, 33 N. E. 635. **Ky.**—Neace *v.* Com., 165 Ky. 739, 178 S. W. 1062. **Me.**—Tuttle *v.* Lang, 100 Me. 123, 60 Atl. 892. **Mich.**—People *v.* Reilly, 53 Mich. 260, 18 N. W. 849. **Miss.**—Hoggett *v.* State, 101 Miss. 269, 57 So. 811. **Mo.**—State *v.* Watson, 95 Mo. 411, 8 S. W. 333. **N. C.**—State *v.* Whitt, 117 N. C. 804, 23 S. E. 452; State *v.* Overton, 77 N. C. 485. **Okla.**—*Ex parte* Sparks, 9 Okla. Crim. 665, 132 Pac. 1118. **Tenn.**—Dunn *v.* State, 127 Tenn. 267, 154 S. W. 969. **Tex.**—Robinson *v.* State, 54 Tex. Crim. 559, 113 S. W. 763; *Ex parte* Beard, 41 Tex. 234. **Utah.** *In re* Flint, 25 Utah 338, 71 Pac. 531, 95 Am. St. Rep. 853.

[a] **On Plea of Guilty.**—Spencer *v.* State, 114 Ark. 574, 169 S. W. 790; Shaffer *v.* State, 100 Ind. 365.

is regularly continued,[49] or where the statute provides that all matters which remain undisposed of during a term shall without any order of continuance stand continued to the next term.[50]

A motion in arrest of judgment should be disposed of, in some states, before sentence is pronounced.[51]

Motion for New Trial. — In some jurisdictions, sentence should be delayed until the right to move for a new trial has been exercised or waived, or if the motion is made, until it is disposed of,[52] while, under some statutes, sentence may be pronounced although a motion for a new trial is pending.[53]

Bills of Exceptions. — The court may pass sentence before the time for settling exceptions on appeal has expired,[54] and the statute sometimes specifically so provides.[55]

B. POSTPONEMENT OR SUSPENSION OF SENTENCE. — **1. In General.**[56] The court may, where it sees fit, and subject to statutory limitations, postpone the imposition of sentence[57] without thereby losing juris-

49. Clanton *v.* State, 96 Ala. 111, 11 So. 299.

50. Cleek *v.* Com., 21 Gratt. (62 Va.) 777.

51. **Ala.**—Hood *v.* State, 44 Ala. 81. **Ill.**—People *v.* Barrett, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 230, 63 L. R. A. 82. **La.**—See State *v.* Gardner, 10 La. Ann. 25. **N. Y.**—People *v.* Morrisette, 20 How. Pr. 118.

[a] **Not reversible error** to pronounce sentence pending motion in arrest, where no prejudicial injury follows. Young *v.* State, 6 Ohio 435. See also State *v.* Eisenhour, 132 Mo. 140, 37 S. W. 785.

52. **Cal.**—See People *v.* Felix, 45 Cal. 163. **Ind.**—Reed *v.* State, 147 Ind. 41, 46 N. E. 135; Quinn *v.* State, 123 Ind. 59, 23 N. E. 977. **La.**—See State *v.* Whitbeck, 134 La. 812, 64 So. 759, 52 L. R. A. (N. S.) 883; State *v.* Gardner, 10 La. Ann. 25. **Mo.**—State *v.* Riley, 228 Mo. 431, 128 S. W. 731; State *v.* Schierhoff, 103 Mo. 47, 15 S. W. 151; *In re* Loehr, 11 Mo. App. 53. **Tenn.** Dunn *v.* State, 127 Tenn. 267, 154 S. W. 969.

[a] **The subsequent reconsideration of a motion** previously made and denied, if the motion is again denied, does not invalidate the sentence. Fletcher *v.* State, 37 Tex. Crim. 193, 39 S. W. 116.

53. State *v.* Vaughan, 71 Conn. 457, 42 Atl. 640; State *v.* Hoyt, 46 Conn. 330.

[a] **The subsequent filing and denial of a motion for new trial does not invalidate the sentence.** Com. *v.* Mediote, 38 Pa. Super. 194.

54. Becker *v.* People, 48 Mich. 43, 11 N. W. 779.

[a] **Where Frivolous and for Delay.** People *v.* Wright, 89 Mich. 70, 50 N. W. 792. See also Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1; Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

55. See State *v.* Morrill, 105 Me. 207, 73 Atl. 1091; Com. *v.* O'Brien, 175 Mass. 37, 55 N. E. 466.

56. **The term suspending sentence** is applied (1) both to delay in imposing sentence and to suspending the enforcement of a sentence already imposed. See Gehrmann *v.* Osborne, 79 N. J. Eq. 430, 439, 82 Atl. 424. (2) It has both meanings when used in the statute. People *v.* Goodrich, 149 N. Y. Supp. 406.

Suspending or staying execution of sentence, see the title "**Supersedeas and Stay of Proceedings.**"

57. **U. S.**—See *Ex parte* United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129, Ann. Cas. 1917B, 355, L. R. A. 1917E, 1178. **D. C.**—Miller *v.* United States, 41 App. Cas. 52. **N. Y.**—People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; People *v.* Goodrich, 149 N. Y. Supp. 406. **N. C.** State *v.* Greer, 173 N. C. 759, 92 S. E. 147; State *v.* Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848.

[a] **In the absence of legislative prohibition** courts have inherent power to suspend sentence. People *ex rel.*

diction to pronounce it subsequently,[58] A sentence cannot be imposed in part and suspended in part,[59] and the power to postpone sentence cannot be exercised so as to deprive defendant of his right to assign errors and seek a review of the proceedings of the trial court.[60] The court may at any time revoke its order of postponement.[61]

2. Grounds. — A postponement of sentence may be ordered on various grounds,[62] as, for example, to enable the court to hear motions in arrest of judgment,[63] or for a new trial,[64] or to enable the court to gain information by which it may impose a just sentence;[65] or to give the defendant an opportunity to perfect an appeal,[66] or because

Hirschberg *v.* Seeger, 100 Misc. 51, 165 N. Y. Supp. 32.

Statutory limitations as to time for sentence, see *supra,* III, A.

Suspending sentence indefinitely, see *infra,* III, B, 3.

[b] **Municipal courts** are authorized to suspend sentence. State *v.* Tripp, 168 N. C. 150, 83 S. E. 630.

58. **U. S.**—Miner *v.* United States, 244 Fed. 422, 157 C. C. A. 48. **Ark.** Joiner *v.* State, 94 Ark. 198, 126 S. W. 723; Thurman *v.* State, 54 Ark. 120, 15 S. W. 84. See Barwick *v.* State, 107 Ark. 115, 153 S. W. 1106. **Cal.** *Ex parte* Moore, 12 Cal. App. 161, 107 Pac. 129. See Rankin *v.* Superior Court, 157 Cal. 189, 106 Pac. 718, fixing time for sentence in excess of the maximum statutory period does not deprive court of jurisdiction, though such action be erroneous. **Colo.**—Young *v.* People, 53 Colo. 251, 125 Pac. 117. **D. C.**—United States *v.* May, 2 MacArthur 512. **Fla.** *Ex parte* Williams, 26 Fla. 310, 8 So. 425. **Ind.**—Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631. **Ia.**—State *v.* Ray, 50 Iowa 520. **Kan.**—State *v.* Massa, 90 Kan. 129, 132 Pac. 1182. **Miss.**—Hoggett *v.* State, 101 Miss. 269, 57 So. 811. **Mo.**—State *v.* Watson, 95 Mo. 411, 8 S. W. 383. **N. Y.**—People *ex rel.* Dunnigan *v.* Webster, 14 Misc. 617, 36 N. Y. Supp. 745. **N. C.**—State *v.* Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848; State *v.* Whitt, 117 N. C. 804, 23 S. E. 452. **Ohio.** Schaefer *v.* State, 27 Ohio C. C. 791. **Tenn.**—Greenfield *v.* State, 7 Baxt. 18.

But see People *v.* Heise, 257 Ill. 443, 100 N. E. 1000.

Effect of indefinite suspension, see *infra,* III, B, 3.

[a] **Municipal Court.** — Hancock *v.* Rogers, 140 Ga. 688, 79 S. E. 558.

59. **Ala.**—*Ex parte* State, 94 Ala. 431, 10 So. 549. **Kan.**—*In re* Beck, 63 Kan. 57, 64 Pac. 971. **Mass.**—Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326. **Mich.**—People *v.* Felker, 61 Mich. 110, 27 N. W. 869. **N. J.**—State *v.* Clifford, 84 N. J. L. 595, 87 Atl. 97; State *v.* Addy, 43 N. J. L. 113, 39 Am. Rep. 547. **Pa.**—Com. *ex rel.* Nuber *v.* Keeper of Workhouse, 6 Pa. Super. 420.

But see *supra,* V, D, note 66.

[a] **But an order for payment of costs** as condition to a further postponement of the imposition of a sentence does not destroy the power of court to pronounce sentence thereafter. *Ex parte* Williams, 26 Fla. 310, 8 So. 425.

60. State *v.* Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848.

[a] **Consent to the postponement** of sentence does not constitute a waiver of his right of appeal. State *v.* Tripp, 168 N. C. 150, 83 S. E. 630.

61. People *v.* Patrick, 118 Cal. 332, 50 Pac. 425; *Ex parte* Bates, 20 N. M. 542, 151 Pac. 698, L. R. A. 1916A, 1285.

[a] **Order of Judge Temporarily Presiding.**—The regular judge of a court may revoke the suspension of a sentence ordered by a judge of another court presiding temporarily at the trial of a criminal case. Com. *v.* Dunleavy, 16 Pa. Super. 380.

62. See *Ex parte* United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129, Ann. Cas. 1917B, 355, L. R. A. 1917E, 1178.

63. *In re* Beck, 63 Kan. 57, 64 Pac. 971.

64. People *v.* Felix, 45 Cal. 163; People *v.* Rhodes, 17 Cal. App. 789, 121 Pac. 935; People *v.* Kennedy, 58 Mich. 372, 25 N. W. 318.

65. People *v.* Kennedy, 58 Mich. 372, 25 N. W. 318; Com. *v.* Mayloy, 57 Pa. 291.

66. People *v.* Felker, 61 Mich. 110,

of mitigating circumstances,[67] or because of defendant's pregnancy,[68] or insanity.[69]

3. To What Time.[70] — The postponement must, as a rule, be for a fixed period of time,[71] and not indefinitely,[72] though there is author-

27 N. W. 869; People *v.* Kennedy, 58 Mich. 372, 25 N. W. 318.

67. **Fla.**—*Ex parte* Williams, 26 Fla. 310, 8 So. 425. **Ind.**—Smith *v.* Hess, 91 Ind. 424; Spade *v.* State, 44 Ind. App. 529, 89 N. E. 604. **N. Y.**—People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

68. State *v.* Arden, 1 Bay (S. C.) 487. See *Ex parte* United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129, Ann. Cas. 1917B, 355, L. R. A. 1917E, 1178.

69. Ferguson *v.* Martineau, 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421.

[a] **Pending inquiry** as to defendant's insanity. **Ark.**—Ince *v.* State, 77 Ark. 418, 88 S. W. 818. **Fla.**—Williams *v.* State, 45 Fla. 128, 34 So. 279. **Neb.**—State *v.* Barker, 79 Neb. 361, 112 N. W. 1143, 113 N. W. 197. **N. Y.** People *v.* Skwirsky, 213 N. Y. 151, 107 N. E. 47. **N. C.**—State *v.* Vann, 84 N. C. 722. **Pa.**—Hover's Petition, 19 Pa. Dist. 512. As to inquiry into defendant's sanity, see the title "**Insane Persons.**"

[b] **But where the court has no doubt** as to defendant's sanity it may disregard a plea of insanity offered at the time of imposition of sentence. **Ark.**—Duncan *v.* State, 110 Ark. 523, 162 S. W. 573. **Cal.**—People *v.* Pico, 62 Cal. 50. **Okla.**—Kearns *v.* State, 14 Okla. Cr. 142, 168 Pac. 242. **Pa.**—Com. *v.* Schmous, 162 Pa. 326, 29 Atl. 644. **Tenn.**—Bonds *v.* State, Mart. & Y. 143, 17 Am. Dec. 795.

[c] **Where verdict passes upon defendant's sanity** (1) no postponement is authorized (Davidson *v.* Com., 174 Ky. 789, 192 S. W. 846. *Contra,* Ince *v.* State, 77 Ark. 418, 88 S. W. 818), (2) unless it is contended that the defendant became insane after conviction. State *v.* Potts, 49 La. Ann. 1500, 22 So. 738.

As to proceedings to determine sanity, see the title "**Insane Persons.**"

70. **Statutory limitations** as to time for sentence, see *supra,* III, A.

71. **U. S.**—United States *v.* Wilson, 46 Fed. 748. **Ala.**—*Ex parte* State, 94 Ala. 431, 10 So. 549. **Ark.**—Phillips *v.* State, 100 Ark. 515, 140 S. W. 734. **Cal.**—People *v.* Felix, 45 Cal. 163. **Fla.** Ragland *v.* State, 55 Fla. 157, 46 So. 724; *Ex parte* Williams, 26 Fla. 310, 8 So. 425. **Haw.**—Republic *v.* Pedro, 11 Hawaii 287, under statute. **Kan.**—*In re* Terry, 71 Kan. 362, 80 Pac. 586. **Mass.**—Com. *v.* Dowdican's Bail, 115 Mass. 133. **Mich.**—People *v.* Reilly, 53 Mich. 260, 18 N. W. 849. **Miss.** Parker *v.* State, 51 Miss. 535. **Mo.** State *v.* Watson, 95 Mo. 411, 8 S. W. 383. **N. H.**—State *v.* Drew, 75 N. H. 604, 76 Atl. 191; Philpot *v.* State, 65 N. H. 250, 20 Atl. 955. **N. J.**—Gehrmann *v.* Osborne, 79 N. J. Eq. 430, 82 Atl. 424. **N. M.**—United States *v.* Folsom, 8 N. M. 651, 46 Pac. 447. **N. Y.** People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386; Lowenberg *v.* People, 26 How. Pr. 202, 27 N. Y. 336; People *ex rel.* Sullivan *v.* Flynn, 55 Misc. 639, 106 N. Y. Supp. 925. **N. C.**—State *v.* Hilton, 151 N. C. 687, 65 S. E. 1011; State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260. **Ohio.**—Weber *v.* State, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472. **Pa.**—Com. *v.* Mayloy, 57 Pa. 291. **Tenn.**—State *v.* Miller, 6 Baxt. 513. **Utah.**—People *v.* Blackburn, 6 Utah 347, 23 Pac. 759.

[a] **Not for an Unreasonable Time.** People *v.* Kennedy, 58 Mich. 372, 25 N. W. 318.

72. **U. S.**—*Ex parte* United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129, Ann. Cas. 1917B, 355, L. R. A. 1917E, 1178; United States *v.* Wilson, 46 Fed. 748. **Colo.**—Grundel *v.* People, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75. **Ga.**—Hancock *v.* Rogers, 140 Ga. 688, 79 S. E. 558; Neal *v.* State, 104 Ga. 509, 30 S. E. 858, 69 Am. St. Rep. 175, 42 L. R. A. 190. **Haw.** Hawaii *v.* Pedro, 11 Hawaii 287. **Idaho.** *Ex parte* Peterson, 19 Idaho 433, 113 Pac. 729, 33 L. R. A. (N. S.) 1067. **Ill.**—People *v.* Heise, 257 Ill. 443, 100 N. E. 1000; People *v.* Barrett, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 230, 63 L. R. A. 82. **Ind.**—Gray *v.* State, 107 Ind. 177, 8 N. E. 16. **Ia.**—State *v.* Voss, 80 Iowa 467, 45 N. W. 898, 8

ity to the effect that the imposition of a sentence may be postponed indefinitely upon stated terms,[73] the breach of which revokes the order and authorizes the court to impose sentence.[74] In the absence of a

L. R. A. 767. **Kan.**—State *v.* Sapp, 87 Kan. 740, 125 Pac. 78, 42 L. R. A. (N. S.) 249; *In re* Strickler, 51 Kan. 700, 33 Pac. 620. **Mass.**—Com. *v.* Maloney, 145 Mass. 205, 13 N. E. 482. **Miss.**—Hoggett *v.* State, 101 Miss. 269, 57 So. 811. **N. M.**—United States *v.* Folsom, 8 N. M. 651, 46 Pac. 447. **N. D.**—*In re* Markuson, 5 N. D. 180, 64 N. W. 939. **Tenn.**—Spencer *v.* State, 125 Tenn. 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680. But see Fults *v.* State, 2 Sneed 232. **Utah.**—Reese *v.* Olsen, 44 Utah 318, 139 Pac. 941; *In re* Flint, 25 Utah 338, 71 Pac. 531, 95 Am. St. Rep. 853. **Wis.**—*In re* Webb, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356.

See notes in L. R. A. 1916A, 1169, 39 L. R. A. (N. S.) 242, 33 L. R. A. (N. S.) 112.

[a] **From term to term** is not indefinite. Miner *v.* United States, 244 Fed. 422, 157 C. C. A. 48.

[b] **Jurisdiction to subsequently impose sentence defeated** by indefinite postponement. **U. S.**—United States *v.* Wilson, 46 Fed. 748. **Colo.**—Grundel *v.* People, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75. **Haw.**—Hawaii *v.* Pedro, 11 Hawaii 287. **Idaho.**—*Ex parte* Peterson, 19 Idaho 433, 113 Pac. 729, 33 L. R. A. (N. S.) 1067. **Ill.** People *v.* Barrett, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 230, 63 L. R. A. 82; People *v.* Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473. **Ind.**—Gray *v.* State, 107 Ind. 177, 8 N. E. 16. **Kan.**—State *v.* Sapp, 87 Kan. 740, 125 Pac. 78, 42 L. R. A. (N. S.) 249; *In re* Strickler, 51 Kan. 700, 33 Pac. 620. **Me.**—Tuttle *v.* Lang, 100 Me. 123, 60 Atl. 892. **Mo.**—State *v.* Hockett, 129 Mo. App. 639, 108 S. W. 599. **Okla.** *Ex parte* Clendenning, 22 Okla. 108, 97 Pac. 650, 132 Am. St. Rep. 628, 19 L. R. A. (N. S.) 1041. **Utah.**—*In re* Flint, 25 Utah 338, 71 Pac. 531, 95 Am. St. Rep. 853.

[c] **That jurisdiction is not lost,** see **U. S.**—Morgan *v.* Adams, 226 Fed. 719, 141 C. C. A. 475. **Cal.**—Rankin *v.* Superior Court, 157 Cal. 189, 106 Pac. 718. **Fla.**—Tanner *v.* Wiggins, 54 Fla. 203, 45 So. 459. **Me.**—*In re* St. Hilaire, 101 Me. 522, 64 Atl. 882, 8 Ann. Cas. 385. **Miss.**—Hoggett *v.* State, 101 Miss. 269, 57 So. 811; Fuller *v.* State, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242. **N. H.**—Philpot *v.* State, 65 N. H. 250, 20 Atl. 955. **S. C.**—State *v.* Abbott, 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B, 1189, 33 L. R. A. (N. S.) 112.

Sentence at subsequent term, see *supra,* III, A.

Suspending or staying execution of sentence indefinitely, see the title "**Supersedeas and Stay of Proceedings.**"

73. **Mass.**—Com. *v.* Dowdican's Bail, 115 Mass. 133. **Mich.**—People *v.* Reilly, 53 Mich. 260, 18 N. W. 849. **N. H.** State *v.* Drew, 75 N. H. 604, 76 Atl. 191. **N. J.**—See Gehrmann *v.* Osborne, 79 N. J. Eq. 430, 82 Atl. 424 (with consent of defendant); State *v.* Addy, 43 N. J. L. 113, 39 Am. Rep. 547. But see Blazier *v.* Keffer, 79 N. J. L. 252, 75 Atl. 439. **N. Y.**—See People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856. **N. C.**—State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260. See State *v.* Everett, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848. **Ohio.**—Webster *v.* State, 43 Ohio St. 696, 4 N. E. 92.

See People *v.* Patrick, 118 Cal. 332, 50 Pac. 425, where done on defendant's motion.

74. State *v.* Mallahan, 65 Wash. 287, 118 Pac. 42.

[a] **Defendant Entitled to Notice and Hearing.**—*Ex parte* Lucero, 23 N. M. 433, 168 Pac. 713, L. R. A. 1918C, 549; State *v.* Burnette, 173 N. C. 734, 91 S. E. 364, in open court.

[b] **The defendant is not entitled to a jury trial** to determine (1) whether the conditions of the suspension have been violated. *Ex parte* Lucero, 23 N. M. 433, 168 Pac. 713, L. R. A. 1918C, 549; State *v.* Everett, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848. (2) But he is entitled to such trial upon the question of his identity. *Ex parte* Lucero, 23 N. M. 433, 168 Pac. 713, L. R. A. 1918C, 549.

[c] **Compliance with the conditions** and the discharge of the defendant deprives the court of the power to afterwards impose sentence. State *v.*

statute a court is not empowered to suspend sentence during good behavior of the defendant,[75] but some statutes confer upon the court the power to suspend the imposition of sentence on conditions.[76]

IV. MATTERS PRECEDING AND ATTENDING THE PRONOUNCEMENT OF SENTENCE. — A. PRESENCE OF DEFENDANT AND HIS ATTORNEY.[77] — The presence of the defendant at the time of pronouncing sentence is necessary where corporal punishment[78] is in-

Hilton, 151 N. C. 687, 65 S. E. 1011. See also State *v.* Addy, 43 N. J. L. 113, 39 Am. Rep. 547.

75. *Ex parte* United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129, Ann. Cas. 1917B, 355, L. R. A. 1917E, 1178; State *v.* Abbott, 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B, 1189, 33 L. R. A. (N. S.) 112. *Compare* People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

76. **Cal.**—See *Ex parte* Slattery, 163 Cal. 176, 124 Pac. 856; *Ex parte* Giannini, 18 Cal. App. 166, 122 Pac. 831; People *v.* Bartley, 12 Cal. App. 773, 108 Pac. 868. **Ill.**—See People *v.* Heise, 257 Ill. 443, 100 N. E. 1000. **Ind.**—Spade *v.* State, 44 Ind. App. 529, 89 N. E. 604. **Mass.**—See Marks *v.* Wentworth, 199 Mass. 44, 85 N. E. 81. **Mich.**—See People *v.* Dudley, 173 Mich. 389, 138 N. W. 1044. **Neb.**—See Casper *v.* State, 100 Neb. 367, 160 N. W. 92. **N. M.**—*Ex parte* Bates, 20 N. M. 542, 151 Pac. 698, L. R. A. 1916A, 1285. **N. Y.**—People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856. **N. C.**—State *v.* Johnson, 169 N. C. 311, 84 S. E. 767. **P. I.**—United States *v.* Tandiana, 25 Phil. Isl. 64.

[a] **Upon Application Before Trial and Recommendation of Jury.**—Barnett *v.* State, 74 Tex. Crim. 619, 170 S. W. 143; Johnson *v.* State, 74 Tex. Crim. 627, 169 S. W. 1151; Weatherford *v.* State, 73 Tex. Crim. 440, 166 S. W. 149. As to recommendation by jury see "**Verdict.**"

[b] **As to good behavior,** see *Ex parte* Hamm (N. M.), 172 Pac. 190, L. R. A. 1918D, 694, and note.

[c] **Suspension may be revoked** and sentence imposed on violation of the conditions. **Cal.**—*Ex parte* Slattery, 163 Cal. 176, 124 Pac. 856; *Ex parte* Sizelove, 158 Cal. 493, 111 Pac. 527. **N. M.**—*Ex parte* Bates, 20 N. M. 542, 151 Pac. 698, L. R. A. 1916A, 1285. **N. Y.**—People *ex rel.* Valiant *v.* Patton, 221 N. Y. 409, 117 N. E. 614. **N. C.**—State *v.* Greer, 173 N. C. 759, 92 S. E. 147. But see *Ex parte* Lawson, 76 Tex. Crim. 419, 175 S. W. 698. As to notice and trial, see *supra*, note 74.

Suspending execution of sentence, see the title "**Supersedeas and Stay of Proceedings.**"

77. **Presence at trial,** see the title "**Trial.**"

78. **U. S.**—Ball *v.* United States, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377; *Ex parte* Waterman, 33 Fed. 29. **Ala.**—Wright *v.* State, 103 Ala. 95, 15 So. 506. **Ark.**—Cole *v.* State, 10 Ark. 318. **Cal.**—People *v.* Walker, 132 Cal. 137, 64 Pac. 133. **Fla.**—Brown *v.* State, 29 Fla. 543, 10 So. 736. **Ga.**—Smith *v.* State, 60 Ga. 430. **Ill.**—Harris *v.* People, 130 Ill. 457, 22 N. E. 826; Fielden *v.* People, 128 Ill. 595, 21 N. E. 584; Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147. **Ind.** Sturgeon *v.* Gray, 96 Ind. 166. **Mass.** Com. *v.* Costello, 121 Mass. 371, 23 Am. Rep. 277. **Mich.**—Matter of Fowler, 49 Mich. 234, 13 N. W. 530. **Miss.**—Rolls *v.* State, 52 Miss. 391. **Mo.**—State *v.* McClain, 156 Mo. 99, 56 S. W. 731. **Neb.**—Dodge *v.* People, 4 Neb. 220. **N. J.**—West *v.* State, 22 N. J. L. 212. **N. C.**—State *v.* Cherry, 154 N. C. 624, 70 S. E. 294. **Ohio.**—Carper *v.* State, 27 Ohio St. 572. **Pa.**—Hamilton *v.* Com., 16 Pa. 129, 55 Am. Dec. 485. **S. D.** State *v.* Pearse, 19 S. D. 75, 102 N. W. 222. **Tenn.**—Andrews *v.* State, 2 Sneed 550. **Tex.**—Cain *v.* State, 15 Tex. App. 41. **Va.**—Hooker *v.* Com., 13 Gratt. (54 Va.) 763. **Wash.**—State *ex rel.* Gabe *v.* Main, 66 Wash. 381, 119 Pac. 844. **W. Va.**—State *v.* Dolan, 58 W. Va. 263, 52 S. E. 181, 6 Ann. Cas. 450; State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875. **Wis.**—French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402. **Eng.**—Rex *v.* Boltz, 5 B. & C. 334, 11 E. C. L. 486, 108 Eng. Reprint 125.

[a] **Record must affirmatively show** defendant's presence. No presumption

flicted upon the defendant; hence this is the rule in felony cases,[79] and also in misdemeanors, where there is a sentence of imprisonment,[80] and the right to be present at the time the sentence is pronounced cannot be waived.[81] The defendant's presence is unnecessary, however, unless the court in its discretion requires it, where a fine only is imposed,[82] even though imprisonment might have been inflicted;[83] nor need he be present at the proceedings which refer only to the execution of the sentence after its pronouncement.[84]

By virtue of statute in some states, sentence may be imposed in misdemeanor cases in the defendant's absence, even in case of imprisonment.[85]

In case of acquittal defendant's presence is not necessary to the entry of a judgment of acquittal.[86]

Criminal Contempt. — Where criminal contempt is committed in the presence of the court and no hearing is therefore necessary, an order or sentence of commitment may be made in the absence of the guilty party.[87] The rule is otherwise, however, as to punishment for criminal contempt not committed in the court's presence.[88]

will be indulged. Harris *v.* People, 130 Ill. 457, 22 N. E. 826.

79. **Ala.**—Gibson *v.* State, 39 Ala. 693. **Ark.**—Cole *v.* State, 10 Ark. 318. **Cal.**—People *v.* Sprague, 54 Cal. 92. **Fla.**—Brown *v.* State, 29 Fla. 543, 10 So. 736. **Ill.**—Harris *v.* People, 130 Ill. 457, 22 N. E. 826. **La.**—State *v.* Davenport, 33 La. Ann. 231. **Miss.**—Dyson *v.* State, 26 Miss. 362. **Mo.**—State *v.* McClain, 156 Mo. 99, 56 S. W. 731. **N. Y.**—People *v.* Winchell, 7 Cow. 525. **Pa.**—Dougherty *v.* Com., 69 Pa. 286. **S. D.**—State *v.* Pearse, 19 S. D. 75, 102 N. W. 222. **Wis.**—French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

80. **Ill.**—Harris *v.* People, 130 Ill. 457, 22 N. E. 826. **Tenn.**—State *v.* Jones, 2 Yerg. 22. **W. Va.**—State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

See also cases in preceding notes. But see Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214.

81. Dodge *v.* People, 4 Neb. 220, 233; Prine *v.* Com., 18 Pa. 103. See Smith *v.* People, 8 Colo. 457, 8 Pac. 920 (except in misdemeanor cases); Harris *v.* People, 138 Ill. 63, 27 N. E. 706.

Judgment by default, see *supra,* II, C, 4.

82. See cases in preceding notes and Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214; Son *v.* People, 12 Wend. (N. Y.) 344.

[a] **Where a sentence of fine is imposed and the defendant is committed** to jail until (1) the payment of the fine, his presence is necessary. Davis *v.* Com., 13 Pa. Co. Ct. 545. (2) But where the sentence includes no provision for imprisonment the fact that defendant may be imprisoned if he fails to pay the fine assessed, does not require his presence. Son *v.* People, 12 Wend. (N. Y.) 344; Com. *v.* Thompson, 18 Pa. Co. Ct. 487.

83. **N. Y.**—People *v.* Taylor, 3 Den. 91. **Tex.**—Cain *v.* State, 15 Tex. App. 41. **Va.**—Com. *v.* Crump, 1 Va. Cas. (3 Va.) 172.

84. People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670; State *v.* Haddox, 50 W. Va. 222, 40 S. E. 387.

85. **Ark.**—Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214. **Ia.**—State *v.* Hughes, 4 Iowa 554. **Ky.**—Com. *v.* Cheek, 1 Duv. 26. **N. Y.**—People *v.* Kaminsky, 208 N. Y. 389, 102 N. E. 515; Son *v.* People, 12 Wend. 344. **Okla.**—Beaubein *v.* State, 13 Okla. Crim. 440, 165 Pac. 213. **Va.**—Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838. **W. Va.** See State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

86. State *ex rel.* Gabe *v.* Main, 66 Wash. 381, 119 Pac. 844.

87. *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405. See Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

88. Strother *v.* State, 1 Mo. 772; *Ex parte* Mylius, 61 W. Va. 405, 56 S. E. 602, 10 L. R. A. (N. S.) 1098. *Compare*

Error in sentencing defendant in his absence does not require a new trial but merely necessitates resentencing in accordance with law.[89]

The absence of a co-defendant is no valid ground for objecting to imposition of sentence.[90]

The absence of defendant's attorney at the time of sentence does not require reversal on appeal where not shown to be prejudicial.[91]

B. Informing Defendant of Proceedings and Rights. — Statutes sometimes require that the defendant appearing for judgment be informed, by the court, or by the clerk, under its direction, of the nature of the charge against him, and of his plea, and the verdict if any thereon.[92]

C. Affording Opportunity To Show Cause Against Sentence. At common law, it is essential in capital cases that inquiry be made of the defendant, before judgment is passed, whether he has anything to say why the sentence of death should not be pronounced upon him,[93] thus giving him an opportunity to plead any ground of arrest,[94] or to plead a pardon, if he had obtained one,[95] or to urge any other legal objection to further proceedings against him.[96] This pro-

Merchants' Stock & G. Co. *v.* Chicago Board of Trade, 201 Fed. 20, 120 C. C. A. 582.

89. **Ark.**—Cole *v.* State, 10 Ark. 318. **Ill.**—Harris *v.* People, 130 Ill. 457, 22 N. E. 826. **Miss.**—Kelly *v.* State, 3 Smed. & M. 518. **Mo.**—State *v.* McClain, 156 Mo. 99, 56 S. W. 731. **N. C.** State *v.* Cherry, 154 N. C. 624, 70 S. E. 294. **Pa.**—Jewell *v.* Com., 22 Pa. 94.

90. Sturgeon *v.* Gray, 96 Ind. 166; State *v.* Bradley, 30 La. Ann. 326.

91. Miller *v.* State (Tex. Crim.), 44 S. W. 162.

92. See the statutes and the following: **Cal.**—People *v.* Walker, 132 Cal. 137, 64 Pac. 133. **Ohio.**—Carper *v.* State, 27 Ohio St. 572. **Okla.**—Rhea *v.* United States, 6 Okla. 249, 50 Pac. 992. **Wyo.** Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

[a] **This Statute Is Mandatory.** People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

[b] **The giving of the information will be presumed,** in the absence of a bill of exceptions to the contrary. Bond State, 23 Ohio St. 349.

[c] **On reversal, the case is remanded** for proper judgment and sentence. Rhea *v.* United States, 6 Okla. 249, 50 Pac. 992.

93. **U. S.**—Schwab *v.* Berggren, 143 U. S. 442, 446, 12 Sup. Ct. 525, 36 L. ed. 218; Ball *v.* United States, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377. **N. Y.**—People *v.* Faber, 199 N. Y. 256, 92 N. E. 674. **N. M.**—State *v.* Ybarra, 174 Pac. 212. **Eng.**—King *v.* Speke, 3 Salk. 358, 91 Eng. Reprint 872; Rex *v.* Geary, 2 Salk. 630, 91 Eng. Reprint 532.

[a] **Rule Applies Only to Courts of Original Jurisdiction.**—Schwab *v.* Berggren, 143 U. S. 442, 447, 12 Sup. Ct. 525, 36 L. ed. 218. See also the title "Review."

[b] **"Even in clergyable felonies"** an allocution was required at common law. See State *v.* Hoyt, 47 Conn. 518, 543, 36 Am. Rep. 89, *quoting* 1 Chit. Crim. Law 700.

[c] **This ancient practice originated** at a time when prisoners were not allowed the benefit of counsel and when the court was counsel for the prisoner, so far as to see that he was deprived of no legal right. Besides the benefit of clergy was claimed at this stage of the case. Sarah *v.* State, 28 Ga. 576, 583.

94. Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218.

95. Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218; Raymond *v.* United States, 25 App. Cas. (D. C.) 555.

96. Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218.

[a] **He May Plead Insanity.**—Raymond *v.* United States, 25 App. Cas. (D. C.) 555.

ceeding is known as the "allocution," or "allocutus,"[97] and is sometimes designated as an "arraignment."[98]

Under Modern Practice. — There is considerable conflict under the modern practice as to the necessity of an allocution.[99] In some jurisdictions the requirement exists only in capital cases, and not in prosecutions for minor felonies.[1] In other jurisdictions this practice is required in all felony cases, noncapital as well as capital.[2] And in some cases, the courts while recommending the practice as being the better practice,[3] hold that the reason therefor has ceased to exist, and that the rule is no longer obligatory in any case, capital or noncapital.[4] And in some jurisdictions, an allocution seems to be unnecessary if the accused pleads guilty.[5] In misdemeanor cases, however, it is generally held that an allocution is not necessary,[6] especially where the sentence therefor can be imposed in the defendant's absence.[7]

[b] **Non identity may be pleaded** by a prisoner who escapes after conviction. United States *v.* Santos, 18 Phil. Isl. 66; Washington *v.* State, 31 Tex. Crim. 84, 19 S. W. 900, under statute.

97. **Ind.**—Lillard *v.* State, 151 Ind. 322, 328, 50 N. E. 383. **Mass.**—Jeffries *v.* Com., 12 Allen 145. **Mo.**—State *v.* Ball, 27 Mo. 324.

98. See People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

99. See *infra*, this section.

1. **U. S.**—Ball *v.* United States, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377. **Ga.**—Grady *v.* State, 11 Ga. 253. **Ill.**—Bressler *v.* People, 117 Ill. 422, 8 N. E. 62. **La.**—State *v.* Sims, 117 La. 1036, 42 So. 494; State *v.* Ikenor, 107 La. 480, 32 So. 74; State *v.* Shields, 33 La. Ann. 991. **Mass.**—Jeffries *v.* Com., 12 Allen 145. **Mich.**—People *v.* Palmer, 105 Mich. 568, 63 N. W. 656. **N. J.** Dodge *v.* State, 24 N. J. L. 455; West *v.* State, 22 N. J. L. 212. **N. M.** United States *v.* Sena, 15 N. M. 187, 106 Pac. 383. **Ore.**—State *v.* Sally, 41 Ore. 366, 70 Pac. 396, query whether rule extends to minor felonies.

2. Wright *v.* State, 103 Ala. 95, 15 So. 506; Crim *v.* State, 43 Ala. 53; Perry *v.* State, 43 Ala. 21; People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

3. Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250; Gannon *v.* People, 127 Ill. 507, 521, 21 N. E. 525, 11 Am. St. Rep. 147; Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89, 93.

[a] **"But we do strongly recommend and advise** that the practice be followed in all cases in which either the death penalty or confinement in penitentiary can be imposed." Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89, 93.

4. **Conn.**—State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89, a homicide case. **Ga.**—Sarah *v.* State, 28 Ga. 576. **Md.** Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89, a capital case. **Mich.**—People *v.* Palmer, 105 Mich. 568, 63 N. W. 656. **N. J.**—Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415. **Tenn.**—State *v.* Frazier, 6 Baxt. 539.

5. Carper *v.* State, 27 Ohio St. 572, query.

6. **U. S.**—Turner *v.* United States, 66 Fed. 286, 13 C. C. A. 442. **Ala.** Cranford *v.* State (Ala. App.), 75 So. 274. **Ia.**—State *v.* Stiefle, 13 Iowa 603. **Kan.**—State *v.* Lund, 51 Kan. 1, 32 Pac. 657. **N. Y.**—People *v.* Kaminsky, 208 N. Y. 389, 395, 102 N. E. 515.

[a] **After suspending sentence** in a misdemeanor case, the court may subsequently impose sentence without issuing a rule nisi to the defendant. Hancock *v.* Rogers, 140 Ga. 688, 79 S. E. 558.

[b] **In Missouri,** the statute provides that in all cases of misdemeanor, the statute is deemed directory, and the omission to comply with it shall not invalidate the judgment or sentence. State *v.* Clinkenbeard, 232 Mo. 539, 543, 134 S. W. 537.

7. People *v.* Kaminsky, 208 N. Y. 389, 102 N. E. 515.

Necessity of the defendant's presence, see *supra*, IV, A.

There is no prescribed formula for the question.[8]

Waiver. — The allocution may be waived,[9] as where a motion in arrest of judgment is made at the time of pronouncing sentence.[10] And, in some jurisdictions, a motion for new trial is a waiver.[11] But a waiver of the two days' stay given by law and a consent to immediate judgment is not a waiver of the allocution.[12]

Cure of Omission. — If the allocution is omitted, the trial judge may cure the error by again calling the prisoner to the bar and reimposing sentence pursuant to the requirements of the law.[13]

Effect of Omission. — A failure to ask the defendant whether he had legal cause to show why judgment should not be pronounced against him is fatal to the judgment, in some states,[14] and a statute requiring it is mandatory so that a noncompliance with it invalidates the sentence.[15] But in some states, the omission does not necessitate a reversal[16] in cases of felonies less than capital,[17] and even in capital cases,[18] unless it is apparent that the prisoner is prejudiced by the omission.[19] And it is sometimes provided that the statute is not mandatory when either a motion for new trial or a motion in arrest is filed and heard.[20]

If a defendant is sentenced in his absence without a pretense of

8. **Neb.**—Tracey *v.* State, 46 Neb. 361, 64 N. W. 1069. **Nev.**—*Ex parte* Salge, 1 Nev. 449. **N. C.**—State *v.* Johnson, 67 N. C. 55. **Pa.**—Rizzolo *v.* Com., 126 Pa. 54, 17 Atl. 520.

9. Hill *v.* State, 9 Okla. Crim. 629, 132 Pac. 950.

10. **Conn.**—State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89. **Mass.**—Jeffries *v.* Com., 12 Allen 145. **Mo.**—State *v.* Nagel, 136 Mo. 45, 37 S. W. 821. **Ore.** State *v.* Sally, 41 Ore. 366, 70 Pac. 396.

11. **Ind.**—See Lillard *v.* State, 151 Ind. 322, 50 N. E. 383. **Kan.**—State *v.* Lund, 51 Kan. 1, 32 Pac. 657. **N. C.** State *v.* Johnson, 67 N. C. 55.

Contra, People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

12. People *v.* Nesce, 201 N. Y. 111, 94 N. E. 655.

13. Reynolds *v.* State, 68 Ala. 502; Keffer *v.* State, 12 Wyo. 49, 68, 73 Pac. 556.

14. People *v.* Kaminsky, 208 N. Y. 389, 102 N. E. 515; People *v.* Nesce, 201 N. Y. 111, 94 N. E. 655; King *v.* Speke, 3 Salk. 358, 91 Eng. Reprint 872; Rex *v.* Geary, 2 Salk. 630, 91 Eng. Reprint 532.

15. **Cal.**—People *v.* Walker, 132 Cal. 137, 64 Pac. 133. **Fla.**—Keech *v.* State, 15 Fla. 591. **Mo.**—State *v.* Nagel, 136 Mo. 45, 37 S. W. 821. **Neb.**—McCormick *v.* State, 66 Neb. 337, 92 N. W. 606; Tracey *v.* State, 46 Neb. 361, 64 N. W. 1069. **N. Y.**—People *v.* Faber, 199 N. Y. 256, 92 N. E. 674. **Okla.** Rhea *v.* United States, 6 Okla. 249, 50 Pac. 992. **Pa.**—Com. *v.* Preston, 188 Pa. 429, 41 Atl. 534.

16. Lamb *v.* People, 219 Ill. 399, 76 N. E. 576; Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147, "in any case" the omission is not ground for reversal. See State *v.* Sally, 41 Ore. 366, 70 Pac. 396, where defendant moved for new trial and in arrest, he was practically accorded the right.

17. **Ga.**—Grady *v.* State, 11 Ga. 253. **Ill.**—Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250. **Mo.**—State *v.* Ball, 27 Mo. 324.

18. **Conn.**—State *v.* Hoyt, 47 Conn. 518, 546, 36 Am. Rep. 89. **Ga.**—Sarah *v.* State, 28 Ga. 576. **Ill.**—Gannon *v.* People, 127 Ill. 507, 521, 21 N. E. 525, 11 Am. St. Rep. 147. **Md.**—Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89

[a] **Even When the Statute Is Silent.**—Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89.

19. Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89.

20. State *v.* Kanupka, 247 Mo. 706, 713, 153 S. W. 1056; State *v.* Kile, 231 Mo. 59, 132 S. W. 230; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821.

arraignment he may move to vacate the judgment,[21] but the omission furnishes no ground for a new trial.[22]

Proceedings on Reversal. — On reversal of a sentence and judgment because of the omission of the allocution, the verdict is not reversed or disturbed,[23] but the case is remanded to be proceeded with from the point where the error intervened, that is, the court will be called upon to make the required inquiry and then pronounce sentence again.[24]

D. HEARING MATTER IN MITIGATION AND IN AGGRAVATION OF PUNISHMENT. — If the court has a discretion as to the punishment, it may hear evidence both in aggravation and in mitigation of the punishment.[25] This right is sometimes recognized by statute.[26] And it is sometimes provided that in all cases where the court possesses any discretion as to the extent of punishment, it shall be the duty of the court, upon a plea of guilty, to examine witnesses as to the aggravation and mitigation of the offense.[27]

21. People *v.* Walker, 132 Cal. 137, 142, 64 Pac. 133.

[a] **The Order on the Motion Is the Subject of Exception.**—People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

22. State *v.* Hoyt, 47 Conn. 518, 543, 36 Am. Rep. 89; Sarah *v.* State, 28 Ga. 576, 583. See generally 20 STANDARD PROC. 458.

23. See Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89.

24. **Ala.**—Bryant *v.* State, 13 Ala. App. 206, 68 So. 704. **Neb.**—McCormick *v.* State, 66 Neb. 337, 92 N. W. 606. **N. Y.**—People *v.* Nesce, 201 N. Y. 111, 94 N. E. 655. **Pa.**—Com. *v.* Preston, 188 Pa. 429, 41 Atl. 534.

[a] **A new trial** for the omission will not be granted. People *v.* Nesce, 201 N. Y. 111, 94 N. E. 655.

25. **U. S.**—United States *v.* Standard Oil Co., 155 Fed. 305, 317. **Conn.** See State *v.* Hoyt, 47 Conn. 518, 543, 36 Am. Rep. 89, *quoting* Chitty Crim. Law 700. **D. C.**—Raymond *v.* United States, 25 App. Cas. 555, 561. **Mich.** People *v.* Smith, 94 Mich. 644, 54 N. W. 487. **Neb.**—Tracey *v.* State, 46 Neb. 361, 367, 64 N. W. 1069. **S. C.** State *v.* Reeder, 79 S. C. 139, 60 S. E. 434, 14 Ann. Cas. 968. **Eng.**—Queen *v.* Dignam, 7 Ad. & El. 593, 34 E. C. L. 316, 112 Eng. Reprint 593; King *v.* Burdett, 4 B. & Ald. 314, 6 E. C. L. 498, 106 Eng. Reprint 952. See also Rex *v.* Cox, 4 C. & P. 538, 19 E. C. L. 638.

[a] **But where the court has no discretion** to exercise in regard to the punishment, the urging of mitigating circumstances avails nothing. State *v.* Hoyt, 47 Conn. 518, 544, 36 Am. Rep. 89.

[b] **Time of Showing.**—The showing of mitigating circumstances must be made before the pronouncement of sentence. People *v.* Smith, 94 Mich. 644, 54 N. W. 487; People *v.* Hubbard, 86 Mich. 440, 49 N. W. 265; *In re* Hagerman, 3 City Hall Rec. (N. Y.) 73.

26. See the statutes and the following: **Ohio.**—Carper *v.* State, 27 Ohio St. 572, the defendant must move the court to hear testimony in mitigation. **P. I.**—Pen. Code, art. 77; United States *v.* Morada, 23 Phil. Isl. 477; United States *v.* Santos, 2 Phil. Isl. 669; United States *v.* Larion, 2 Phil. Isl. 476. **P. R.**—People *v.* Cristy, 9 Porto Rico 521; People *v.* De Thomas, 9 Porto Rico 510.

27. **Colo.**—Smith *v.* People, 32 Colo. 251, 75 Pac. 914; Arrano *v.* People, 24 Colo. 233, 49 Pac. 271. **Ill.**—People *v.* Pennington, 267 Ill. 45, 107 N. E. 871; People *v.* Wilmot, 254 Ill. 554, 98 N. E. 973. **Okla.**—See Walburn *v.* Territory, 9 Okla. 23, 59 Pac. 972. **Tex.**—Turner *v.* State, 17 Tex. App. 587.

[a] **Statute Is Mandatory.**—Smith *v.* People, 32 Colo. 251, 75 Pac. 914.

[b] **The fact that the court presided at the trial at which the perjured testimony was given does not excuse** it from hearing witnesses in aggravation or mitigation of the perjury charged. Smith *v.* People, 32 Colo. 251, 75 Pac. 914.

Although it has been held to be usual to hear the defendant without oath,[28] affidavits may be received both on the part of the prosecution,[29] and of the defendant,[30] and the presence of witnesses may be compelled by subpoena.[31] The court, may, however, determine the age of the prisoner without summoning witnesses.[32] And where affidavits are filed, the court may refuse to hear counsel.[33]

The accused must be present when evidence is received for this purpose.[34]

Scope of Inquiry. — The defendant cannot controvert facts upon which the verdict is based for the purpose of mitigating the punishment,[35] nor, on the other hand, can the court reopen the case and adduce further testimony to break down the defendant's defense.[36]

E. QUESTIONS AND REMARKS BY COURT. — The trial court, when about to impose sentence, is not limited to the sole question whether the defendant has anything to say why judgment should not be pronounced.[37] The judge may make any further inquiries he sees fit to make,[38] may give his reasons for the imposition of the sentence,[39] and when imposing the death sentence, he may, in his discretion, use the formula, "May God have mercy on your soul."[40]

V. FORM AND REQUISITES OF SENTENCE. — A. IN GENERAL. The sentence must be definite and certain.[41] It must be complete in

28. Respublica *v.* Askew, 2 Dall. (U. S.) 189, 11 L. ed. 343.

29. State *v.* Reeder, 79 S. C. 139, 60 S. E. 434.

30. State *v.* Reeder, 79 S. C. 139, 60 S. E. 434, 14 Ann. Cas. 968.

[a] **Order of Reading Affidavits.** (1) Where the accused pleads guilty, at common law, the rule is that the affidavits in aggravation should be read before those in mitigation. Queen *v.* Dignam, 7 Ad. & El. 593, 34 E. C. L. 316, 112 Eng. Reprint 593. (2) But where the defendant is convicted by a jury, his affidavits are first read. King *v.* Bunts, 2 T. R. 683, 100 Eng. Reprint 368.

31. United States *v.* Standard Oil Co., 155 Fed. 305.

32. People *ex rel.* Ziegler *v.* Justices of Special Sessions, 10 Hun (N. Y.) 224, whether prisoner can be required to answer, query.

33. Regina *v.* Gregory, 1 C. & K. 228, 47 E. C. L. 228.

34. In the Matter of Fowler, 49 Mich. 234, 13 N. W. 530.

35. *In re* Ball, 4 City Hall Rec. (N. Y.) 113; *In re* Rooney, 3 City Hall Rec. (N. Y.) 128.

36. Raymond *v.* United States, 25 App. Cas. (D. C.) 555.

37. Tracey *v.* State, 46 Neb. 361, 64 N. W. 1069.

38. Tracey *v.* State, 46 Neb. 361, 366, 64 N. W. 1069, but whether the court has authority to coerce an answer from the prisoner and whether it may consider the information obtained in fixing the punishment, query.

39. State *v.* Farrington, 141 N. C. 844, 53 S. E. 954.

40. People *v.* Rivera, 9 Porto Rico 454, 458.

41. **Ala.**—Armstrong *v.* State, 83 Ala. 49, 3 So. 431. **Cal.**—People *v.* King, 28 Cal. 265. **Ind.**—Morris *v.* State, 1 Blackf. 37. **Kan.**—*In re* Strickler, 51 Kan. 700, 33 Pac. 620. **Me.**—State *v.* Sturgis, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443. **Mich.**—Brownbridge *v.* People, 38 Mich. 751. **N. Y.**—People *ex rel.* Johnson *v.* Webster, 36 N. Y. Supp. 995. **N. C.** State *v.* Perkins, 82 N. C. 681. **Ohio.** *In re* Moore, 14 Ohio C. C. 237, 244. **P. I.**—United States *v.* Chong Ting, 23 Phil. Isl. 120.

[a] **The judgment should be so direct and certain** that it may constitute a bar to a further prosecution for the same offense. State *v.* Schuler, 109 Iowa 111, 113, 80 N. W. 213.

[b] **If when read in connection with the statute** under which it is imposed, the sentence is sufficiently definite, it will be sustained. State *ex rel.* Petcoff *v.* Reed, 138 Minn. 465, 163

itself as a rule,[42] and must not be dependent upon any contingency or condition.[43]

B. Against Joint Defendants. — Where several persons are jointly convicted of an offense, the sentence must be pronounced against each of them separately,[44] unless the agency of two or more is essential to the commission of the offense,[45] or unless the statute expressly provides that but one sentence shall be imposed upon all the defendants jointly.[46] The separate sentences against the defendants may, however, be entered in one judgment,[47] and the costs may be imposed upon all the defendants jointly.[48]

C. Where There Is a Single Count. — If distinct offenses, so intimately connected that they may be treated as a single offense, are charged in the same count, the court can impose only one sentence for the crime proved by the evidence.[49]

D. Where There Are Several Counts. — Where the jury renders a verdict of guilty on one of the counts only, the judgment and sentence must be imposed on that count and the defendant is deemed acquitted on the other counts.[50]

N. W. 984; People *ex rel.* Clark *v.* Warden of Sing Sing, 39 Misc. 113, 78 N. Y. Supp. 907.

42. *Ex parte* Harrison, 63 Cal. 299; People *v.* Forbes, 22 Cal. 135.

[a] **An exception to this rule exists** where cumulative sentences to commence at the expiration of sentences in other cases are imposed. People *v.* Forbes, 22 Cal. 135.

43. **Ga.**—Wallace *v.* State, 126 Ga. 749, 55 S. E. 1042. **Kan.**—*In re* Strickler, 51 Kan. 700, 33 Pac. 620. **Me.** State *v.* Sturgis, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443. **Mich.** Brownbridge *v.* People, 38 Mich. 751. **N. C.**—State *v.* Cathey, 170 N. C. 794, 87 S. E. 532.

44. **Ala.**—McLeod *v.* State, 35 Ala. 395. **Ark.**—Straughan *v.* State, 16 Ark. 37. **Ill.**—Miller *v.* People, 47 Ill. App. 472. **Ind.**—Sturgeon *v.* Gray, 96 Ind. 166. **Ia.**—State *v.* Hunter, 33 Ia. 361. **Ky.**—Curd *v.* Com., 14 B. Mon. 386. **Mich.**—People *v.* Kent, 151 Mich. 134, 114 N. W. 1012. **Miss.**—Gathings *v.* State, 44 Miss. 343. **Mo.**—State *v.* Johns, 259 Mo. 361, 168 S. W. 587; State *v.* Hollenscheit, 61 Mo. 302. **N. Y.** March *v.* People, 7 Barb. 391. **Tenn.** State *v.* White, 125 Tenn. 143, 140 S. W. 1059, Ann. Cas. 1913C, 74. **Tex.** Hays *v.* State, 30 Tex. App. 472, 17 S. W. 1063; Jones *v.* State, 14 Tex. App. 85. **Va.**—Com. *v.* Hamor, 8 Gratt. (49 Va.) 698.

Where separate trials are had, see the title **"Separate Trials."**

[a] **A fine cannot be imposed jointly** but the judgment must be several. Bosleys *v.* Com., 7 J. J. Marsh. (Ky.) 598; State *v.* Berry, 21 Mo. 504.

45. State *v.* White, 125 Tenn. 143, 140 S. W. 1059, Ann. Cas. 1913C, 74, as in conspiracy and riot.

46. Wiggins *v.* Henderson, 22 Nev. 103, 36 Pac. 459.

47. State *v.* Johns, 259 Mo. 361, 168 S. W. 587; State *v.* Hollenscheit, 61 Mo. 302; State *v.* White, 125 Tenn. 143, 140 S. W. 1059, Ann. Cas. 1913C, 74.

48. McLeod *v.* State, 35 Ala. 395; Grantham *v.* State (Ala. App.), 75 So. 183; Straughan *v.* State, 16 Ark. 37.

49. State *v.* Lewis, 129 La. 800, 56 So. 893; Benton *v.* Com., 91 Va. 782, 21 S. E. 495.

[a] **Illustration.** — If there is a charge of burglary and larceny in a single count, the whole being one transaction, and if there is a general verdict of guilty, the court can impose but one sentence, which must be for the highest offense. Anderson *v.* Moyer, 193 Fed. 499, 503; State *v.* Lewis, 129 La. 800, 56 So. 893.

[b] **The proper course** on a general verdict of guilty would seem to be for the district attorney to enter a nolle prosequi as to the charge of larceny and ask that the accused be sentenced for the burglary alone. State *v.* Lewis, 129 La. 800, 56 So. 893.

50. **U. S.** — Selvester *v.* United States, 170 U. S. 262, 18 Sup. Ct. 580,

Where Some Counts Are Bad. — As a general rule, a general verdict and sentence, upon an indictment containing good and bad counts, is valid if the sentence does not exceed that authorized by any good count.[51]

Where Same Offense or Different Offenses Arising Out of the Same Transaction Are Charged. — Where the same offense is charged in different counts, there can be but one sentence,[52] although the defendant is found guilty on each of the counts.[53] And where separate offenses, set up in different counts, are committed at the same time and are parts of a continuous criminal act or transaction, inspired by the same criminal intent which is an essential element of each offense, the more approved course is to pass one sentence imposing the penalty for the higher offense,[54] although, it has been held, since one offense does not include the other, it would hardly be considered reversible error, if the trial judge were to impose a cumulative sentence.[55]

42 L. ed. 1029. **Kan.**—State *v.* Fisher, 8 Kan. 208. **Mass.**—Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326. **Va.** Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Sledd *v.* Com., 19 Gratt. (60 Va.) 813.

51. **U. S.**—Claassen *v.* United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. ed. 966; Wroclawsky *v.* United States, 183 Fed. 312, 105 C. C. A. 524; Dimmick *v.* United States, 116 Fed. 825, 54 C. C. A. 329; *Ex parte* Gouyet, 175 Fed. 230. **Ala.**—Burrow *v.* State, 147 Ala. 114, 41 So. 987. **Me.**—State *v.* Tibbetts, 86 Me. 189, 29 Atl. 979. **Md.** Manly *v.* State, 7 Md. 135; Burk *v.* State, 2 Har. & J. 426. **N. J.**—State *v.* Dugan, 65 N. J. L. 65, 46 Atl. 566. **Ohio.**—Boose *v.* State, 10 Ohio St. 575. **Pa.**—Com. *v.* McDermott, 37 Pa. Super. 1; Com. *v.* Stahl, 1 Pa. Super. 496.

But *compare* Enwright *v.* State, 58 Ind. 567. See the title "**Verdict.**"

52. **Ga.**—Gailliard *v.* State, 16 Ga. App. 195, 84 S. E. 837. **Kan.**—*In re* Beck, 63 Kan. 57, 64 Pac. 971. **Mass.** Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326. **Neb.**—Yeoman *v.* State, 81 Neb. 244, 250, 115 N. W. 784; Barker *v.* State, 54 Neb. 53, 74 N. W. 427; *In re* Walsh, 37 Neb. 454, 55 N. W. 1075. **Ohio.**—Woodford *v.* State, 1 Ohio St. 427.

[a] **But the imposition of separate sentences to run concurrently** is not erroneous. Imboden *v.* People, 40 Colo. 142, 188, 90 Pac. 608.

[b] **Where an indictment charges in one count a misdemeanor under the common law and in the other a misdemeanor under statute and the former** is punishable by fine and imprisonment and the latter by fine only, the sentence cannot be for imprisonment as the statute is in mitigation of the common law. State *v.* Thompson, 2 Strob. (S. C.) 12, 47 Am. Dec. 588.

53. Barker *v.* State, 54 Neb. 53, 74 N. W. 427.

54. **U. S.**—Ulmer *v.* United States, 219 Fed. 641, 134 C. C. A. 127; O'Brien *v.* McClaughry, 209 Fed. 816, 126 C. C. A. 540; Stevens *v.* McClaughry, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390; Munson *v.* McClaughry, 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302; Halligan *v.* Wayne, 179 Fed. 112, 102 C. C. A. 410. **La.** State *v.* Lewis, 129 La. 800, 56 So. 893. **Me.**—State *v.* Hood, 51 Me. 363.

[a] **"The most familiar illustration of the rule is that burglary with intent to commit larceny and larceny committed at the same time and as one continued act do not subject the perpetrator to two punishments, one for the burglary and another for the larceny, because the same criminal intent is indispensable to each, and they are each parts of a continuing criminal act."** **U. S.**—Stevens *v.* McClaughry, 207 Fed. 18, 20, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390. **La.** State *v.* Lewis, 129 La. 800, 56 So. 893. **Mass.**—Com. *v.* Hope, 22 Pick. 1.

[b] **A sentence lighter than that imposed** for the higher crime will not be disturbed. State *v.* Lewis, 129 La. 800, 811, 56 So. 893.

55. Parker *v.* People, 97 Ill 32; State *v.* Lewis, 129 La. 800, 56 So. 893. **See also U. S.**—Anderson *v.* Moyer, 193

Where Different Degrees of Offense Are Charged in Separate Counts. When different degrees of an offense are charged in separate counts, there can be but one sentence upon a general verdict or plea of guilty,[56] which should impose the penalty for the highest degree of the offenses charged.[57]

Where Distinct Offenses Are Charged. — Upon a conviction of a defendant upon several counts charging distinct crimes, each complete in itself without reference to the other, the court may pass a separate and cumulative sentence on each count,[58] or it may treat the conviction as for one crime, the highest charged, and may impose one legally appropriate penalty.[59] A single sentence in such case. it has been held, is erroneous as to the excess over what may be imposed on a single count or offense,[60] although some courts hold that a single sen-

Fed. 499. **Mo.**—State *v.* Kelley, 206 Mo. 685, 105 S. W. 606, 12 Ann. Cas. 681. **Va.**—Benton *v.* Com., 91 Va. 782, 21 S. E. 495.

56. **Ark.**—Curtis *v.* State, 26 Ark. 439. **Fla.**—Cribb *v.* State, 9 Fla. 409. **Ga.**—Bulloch *v.* State, 10 Ga. 47, 54 Am. Dec. 369. **Me.**—State *v.* Hood, 51 Me. 363. **Md.**—Manly *v.* State, 7 Md. 135. **Mass.**—Com. *v.* Hope, 22 Pick. 1. **Mo.**—State *v.* Core, 70 Mo. 491. **N. J.**—State *v.* Dugan, 65 N. J. L. 684, 48 Atl. 1118. **Ohio.**—Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340. **Pa.**—Johnston *v.* Com., 85 Pa. 54, 27 Am. Rep. 622.

[a] **Where one count charges an assault and battery, and another charges a simple assault,** and where a general verdict of guilty is rendered, the sentence should be imposed upon the count containing the highest grade of offense. State *v.* Dugan, 65 N. J. L. 65, 46 Atl. 566.

[b] **Reason.**—"There is one penalty imposed by law for assault and battery; but there may be an assault without battery . . . and it would be inflicting double punishment to sentence for assault alone, and then to sentence for the same assault associated with battery." State *v.* Lewis, 129 La. 800, 810, 56 So. 893, paraphrasing 3 Wharton's Crim. Proc. (9th ed.), §1851.

57. **Ala.**—Hughes *v.* State, 11 Ala. App. 307, 66 So. 844. **Ill.**—People *v.* Stowers, 254 Ill. 588, 98 N. E. 986. **Me.**—State *v.* Hood, 51 Me. 363. **Md.** Manly *v.* State, 7 Md. 135. **N. J.** State *v.* Dugan, 65 N. J. L. 65, 46 Atl. 566.

58. **U. S.**—United States *v.* Peeke, 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314; Anderson *v.* Moyer, 193 Fed. 499. **Cal.**—People *v.* Forbes, 22 Cal. 135. **Colo.**—Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803. **Conn.**—Barnes *v.* State, 19 Conn. 398. **Fla.**—Washington *v.* State, 51 Fla. 137, 40 So. 765. **Ill.**—Fletcher *v.* People, 81 Ill. 116; Dachsenbuehler *v.* People, 89 Ill. App. 493. **Kan.**—El Dorado *v.* Beardsley, 53 Kan. 363, 36 Pac. 746. **Mo.**—State *v.* Kelley, 206 Mo. 685, 105 S. W. 606, 12 Ann. Cas. 681. **Neb.**—White *v.* State, 88 Neb. 177, 182, 129 N. W. 259; Hans *v.* State, 50 Neb. 150, 69 N. W. 838. **N. J.**—Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038. **Pa.**—Com. *v.* Birdsall, 69 Pa. 482, 8 Am. Rep. 283. **Eng.** Rex *v.* Robinson, 1 Moody 413.

But see People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Bennett *v.* State, 31 Tex. 303. See *infra*, V, E.

59. **U. S.**—Peters *v.* United States, 94 Fed. 127, 36 C. C. A. 105. **Cal.** People *v.* Shotwell, 27 Cal. 394. **Fla.** Washington *v.* State, 51 Fla. 137, 40 So. 765. **Ga.**—Brannon *v.* State, 21 Ga. App. 328, 94 S. E. 259. **Mass.**—Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326. **N. J.**—Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

[a] **Presumption.**—If the defendant was proved guilty of both offenses charged he cannot complain of a single sentence upon a general verdict. But if he was proved guilty of only one, it will be presumed that judgment was rendered for the offense proved. People *v.* Shotwell, 27 Cal. 394, 404; Crowley *v.* Com., 11 Metc. (Mass.) 575.

60. **U. S.**—Dimmick *v.* Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L.

tence is legal if it does not exceed the sum of the several offenses which might be awarded.[61]

Where Inconsistent Offenses Are Charged.— On a plea of guilty to an indictment charging inconsistent offenses growing out of a single transaction, the court may hear evidence and sentence the defendant for the crime of which he is shown to be guilty.[62] But if the accused pleads not guilty, a general verdict is invalid,[63] or at least is valid only as to the least offense,[64] and the sentence is void as to the excess.[65]

Suspension of Sentence As to Some Counts. — In the federal courts, a defendant convicted under several counts charging several offenses may be sentenced on one count, and the sentence suspended as to the others until the sentence on the one count is fully executed.[66]

Designation of Counts on Which Conviction Is Based. — A sentence and judgment upon an indictment containing several counts need not designate upon which count it is based,[67] unless statute requires it.[68]

E. CUMULATIVE SENTENCE. — The power to impose cumulative sentences does not necessarily depend upon an express statutory provision,[69] although such power is expressly conferred upon the courts by some statutes.[70] The imposition of cumulative sentences is

ed. 1110; United States *v.* Peeke, 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314. **Ill.**—People *v.* Brown, 273 Ill. 169, 112 N. E. 462, Ann. Cas. 1918D, 722. **Ia.**—State *v.* Schuler, 109 Iowa 111, 80 N. W. 213. **Ohio.**—Woodford *v.* State, 1 Ohio St. 427; Buck *v.* State, 1 Ohio St. 61. **Eng.**—Rex *v.* Robinson, 1 Moody 413.

61. *In re* Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. ed. 174; Blake *v.* Moyer, 208 Fed. 678, 125 C. C. A. 576; Howard *v.* Moyer, 206 Fed. 555 (the sentence, though erroneous, is not void); Com. *v.* King, 202 Mass. 379, 88 N. E. 454; Booth *v.* Com., 5 Metc. (Mass.) 535; Carlton *v.* Com., 5 Metc. (Mass.) 532. See Myers *v.* Morgan, 224 Fed. 413, 139 C. C. A. 641.

62. People *v.* Carr, 255 Ill. 203, 209, 99 N. E. 357, 41 L. R. A. (N. S.) 1209, Ann. Cas. 1913D, 864, where burglary and receiving stolen property is charged, the property being the same in each count.

63. Tobin *v.* People, 104 Ill. 565. See the title "**Verdict.**"

64. *In re* Franklin, 77 Mich. 615, 43 N. W. 997.

65. *In re* Franklin, 77 Mich. 615, 43 N. W. 997.

66. United States *v.* Blaisdell, 3 Ben. 132, 24 Fed. Cas. No. 14,608.

67. Com. *v.* Stahl, 1 Pa. Super. 496.

[a] **A judgment upon an indictment charging distinct misdemeanors** in separate counts need not show upon which count a conviction is had. Bivens *v.* State (Tex. Crim.), 97 S. W. 86.

68. Jacobs *v.* State, 42 Tex. Crim. 353, 59 S. W. 1111, holding that where several charges set forth in various counts of an indictment refer to the same transaction the judgment is required to show on which count the defendant was convicted.

69. *In re* Greenwald, 77 Fed. 590. *Contra, Ex parte* Hunt, 28 Tex. App. 361, 13 S. W. 145.

[a] See also James *v.* Ward, 2 Metc. (Ky.) 271, in which it was held that in all the cases where the prisoner was sentenced to several terms of imprisonment, one to commence after the conclusion of the other, the punishment was at the discretion of the court, and the court might impose successive sentences when it could inflict the same punishment in each case separately. When the extent of confinement is assessed by the jury, a sentence in conformity therewith must be rendered, and a sentence to commence after the expiration of a previous term cannot be imposed.

70. **Ala.**—Scott *v.* State, 150 Ala. 59, 43 So. 181. **Ia.**—Mieir *v.* McMillan, 51 Iowa 240, 1 N. W. 525. **Kan.** State *v.* Carlyle, 33 Kan. 716, 7 Pac. 623. **Ky.**—Evans *v.* Com., 11 Ky. L.

authorized where defendant is convicted either under separate indictments,[71] or under separate counts in the same indictment[72] of several offenses punishable by imprisonment. If terms of imprisonment imposed by a sentence are to run successively, it should be stated in the sentence, that each successive term shall commence from the expiration of the term next preceding,[73] unless statute expressly so provides.[74] Such sentences are not uncertain.[75]

Rep. 573, 12 S. W. 768, 769. **Mich.** People *v.* Huntley, 112 Mich. 569, 71 N. W. 178. **N. Y.**—People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211. **Tex.**—Smith *v.* State, 34 Tex. Crim. 123, 29 S. W. 774; *Ex parte* Hunt, 28 Tex. App. 361, 13 S. W. 145.

71. **U. S.**—Howard *v.* United States, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509. **Cal.**—People *v.* Forbes, 22 Cal. 135. **Colo.**—Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803. **Fla.**—Wallace *v.* State, 41 Fla. 547, 26 So. 713. **Ga.**—Simmons *v.* Georgia I. & C. Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739. **Ill.**—Fitzpatrick *v.* People, 98 Ill. 269. **Me.** *In re* Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335. **Md.**—Rigor *v.* State, 101 Md. 465, 61 Atl. 631. **Mass.** Kite *v.* Com., 11 Metc. 581. **Minn.** Mims *v.* State, 26 Minn. 498, 5 N. W. 374. **Neb.**—*In re* Walsh, 37 Neb. 454, 55 N. W. 1075. **N. J.**—State *v.* Mahaney, 73 N. J. L. 53, 62 Atl. 265. **N. C.**—*In re* Black, 162 N. C. 457, 78 S. E. 273; State *v.* Hamby, 126 N. C. 1066, 35 S. E. 614. **Pa.**—Russell *v.* Com., 7 Serg. & R. 489; Brown *v.* Com., 4 Rawle 259, 26 Am. Dec. 130. **Utah.** *In re* Wilson, 11 Utah 114, 39 Pac. 498. **Wis.**—*In re* McCormick's Petition, 24 Wis. 492, 1 Am. Rep. 197.

Compare James *v.* Ward, 2 Metc. (Ky.) 271.

72. **U. S.**—Blitz *v.* United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. ed. 725; *Ex parte* Peeke, 144 Fed. 1016. **D. C.**—*In re* Fry, 3 Mackey 135. **Haw.** *In re* Kim, 21 Hawaii 295. **Ill.**—Parker *v.* People, 97 Ill. 32. **Kan.**—*In re* Beck, 63 Kan. 57, 64 Pac. 971; State *v.* Hodges, 45 Kan. 389, 26 Pac. 676. **La.**—State *v.* Robinson, 40 La. Ann. 730, 5 So. 20. **Mass.**—Carlton *v.* Com., 5 Metc. 532. **Ohio.**—Williams *v.* State, 18 Ohio St. 46. **Tex.**—Bennett *v.* State, 31 Tex. 303. **Utah.**—United States *v.* West, 7 Utah 437, 27 Pac. 84. **Wis.** *In re* McCormick's Petition, 24 Wis. 492, 1 Am. Rep. 197. **Eng.**—Reg. *v.* Cutbush, 10 Cox C. C. 489.

Contra, People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211. See also *supra,* V, D.

73. **U. S.**—United States *v.* Patterson, 29 Fed. 775. **Fla.**—Wallace *v.* State, 41 Fla. 547, 26 So. 713. **Ga.** Fortson *v.* Elbert, 117 Ga. 149, 43 S. E. 492. **Haw.**—*In re* Kim, 21 Hawaii 295. **Ill.**—Johnson *v.* People, 83 Ill. 431. **Kan.**—State *v.* Lewis, 63 Kan. 268, 65 Pac. 257. **Me.**—*In re* Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335. **Mass.**—Kite *v.* Com., 11 Metc. 581. **Mo.**—*Ex parte* Jackson, 96 Mo. 116, 8 S. W. 800. **Nev.**—*Ex parte* Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568. **N. C.**—State *v.* Cathey, 170 N. C. 794, 87 S. E. 532; *In re* Black, 162 N. C. 457, 78 S. E. 273. **Ohio.**—Picket *v.* State, 22 Ohio St. 405. **Tex.**—*Ex parte* Hunt, 28 Tex. App. 361, 13 S. W. 145.

[a] **The date on which the subsequent term** is to begin should not be stated, but the sentence should merely direct that it is to commence after the expiration of the prior term as the latter term by pardon or good behavior may be shortened. **Ill.**—Johnson *v.* People, 83 Ill. 431. **Mich.**—*In re* Bloom, 53 Mich. 597, 19 N. W. 200. **Neb.**—*In re* Walsh, 37 Neb. 454, 55 N. W. 1075. **N. C.**—*In re* Black, 162 N. C. 457, 78 S. E. 273.

[b] **The order** in which the terms are to run need not be designated. Misir *v.* McMillan, 51 Iowa 240, 1 N. W. 525; *Ex parte* Durbin, 102 Mo. 100, 14 S. W. 821.

[c] **The sentence need not identify the other sentences** against the defendant, it being sufficient to state: "said term to commence at the expiration of previous sentences." People *v.* Forbes, 22 Cal. 135.

74. State *v.* Lewis, 63 Kan. 268, 65 Pac. 257.

75. **Cal.**—People *v.* Forbes, 22 Cal. 135. **Haw.**—*In re* Kim, 21 Hawaii 295.

F. CONFORMITY TO STATUTE. — The sentence or judgment must strictly conform to any statutory requirements.[76]

G. CONFORMITY TO INDICTMENT OR INFORMATION. — The court can sentence the defendant only for the offense with which he is charged,[77] even though the defendant pleads guilty to another crime.[78] But a defendant may be convicted of any offense necessarily included in that charged.[79]

H. CONFORMITY TO VERDICT. — The judgment and sentence must strictly conform to the verdict, if any.[80] But if the jury return a verdict for a higher offense than is warranted by the evidence, the

Ill.—Fitzpatrick *v.* People, 98 Ill. 269.

[a] **The judgment is not void for uncertainty** in that it depends upon the possible contingency that the first sentence may be remitted or shortened. **Kan.**—State *v.* Finch, 75 Kan. 582, 89 Pac. 922, 20 L. R. A. (N. S.) 273. **Mass.**—Kite *v.* Com., 11 Metc. 581. **N. C.**—State *v.* Cathey, 170 N. C. 794, 87 S. E. 532.

76. Harman *v.* United States, 50 Fed. 921; *Ex parte* Baldwin, 60 Cal. 432.

77. **Ala.**—Brown *v.* State, 74 Ala. 478. **Cal.**—People *v.* Eppinger, 114 Cal. 350, 46 Pac. 97. **Ill.**—People *v.* Lachota, 185 Ill. App. 201. **Mo.**—State *v.* Townley, 147 Mo. 205, 48 S. W. 833. **Nev.**—*Ex parte* Dickson, 36 Nev. 94, 133 Pac. 393; *Ex parte* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603. **P. I.**—United States *v.* Ayao, 4 Phil. Isl. 114.

78. *Ex parte* Dickson, 36 Nev. 94, 133 Pac. 393.

[a] **Where defendant is charged with grand larceny** the court is without jurisdiction to sentence the accused upon a plea of guilty of petit larceny. Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979.

79. See 12 STANDARD PROC. 568.

80. **U. S.**—*In re* Burns, 113 Fed. 987. **Ark.**—Baker *v.* State, 4 Ark. 56. **Dak.**—Territory *v.* Conrad, 1 Dak. 363, 46 N. W. 605. **Ill.**—Hoch *v.* People, 219 Ill. 265, 76 N. E. 356, 109 Am. St. Rep. 327. **Ind.**—Pritchett *v.* Cox, 154 Ind. 108, 56 N. E. 20; Moore *v.* State, 72 Ind. 358. **Kan.**—State *v.* Plowman, 28 Kan. 569. **Ky.**—Bordors *v.* Com., 164 Ky. 344, 175 S. W. 633. **La.**—State *v.* Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461. **Md.** See Goeller *v.* State, 119 Md. 61, 85 Atl. 954, punishment for second offense improper where verdict does not show conviction of a second offense. See also the title "**Verdict.**" **Miss.** Bedell *v.* State, 50 Miss. 492. **Mo.** State *v.* Duff, 253 Mo. 415, 161 S. W. 683. **Nev.**—*Ex parte* Booth, 39 Nev. 183, 154 Pac. 933, L. R. A. 1916F, 960. **N. Y.**—Hussy *v.* People, 47 Barb. 503. **Ohio.**—Holtz *v.* State, 30 Ohio St. 486. **Okla.**—Schriebar *v.* State, 6 Okla. Crim. 119, 116 Pac. 348; Wood *v.* State, 4 Okla. Crim. 436, 112 Pac. 11, 45 L. R. A. (N. S.) 673. **Tex.**—Baker *v.* State, 70 Tex. Crim. 618, 158 S. W. 998; Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456; Rivers *v.* State, 10 Tex. App. 177. **Va.**—Price *v.* Com., 33 Gratt. (74 Va.) 819, 36 Am. Rep. 797. **W. Va.** State *v.* Cottrell, 45 W. Va. 837, 32 S. E. 162.

[a] **The punishment fixed by the jury,** where the statute leaves it to the jury to assess the punishment, cannot be altered by the court (**Ala.**—*Ex parte* Hill, 122 Ala. 114, 26 So. 230. **Ill.**—Cole *v.* People, 84 Ill. 216; People *v.* Warfield, 172 Ill. App. 1. **Ind.** Clark *v.* State, 77 Ind. 399. **Ia.**—State *v.* Cole, 63 Iowa 695, 17 N. W. 183), unless (2) the punishment fixed by the jury does not conform to the statute. **Ala.**—See Freeman *v.* State, 151 Ala. 10, 44 So. 46. **Ind.**—Clark *v.* State, 77 Ind. 399. **Ky.**—See Pipes *v.* Com., 148 Ky. 174, 146 S. W. 38. **Mo.**—State *v.* Sears, 86 Mo. 169. **N. D.**—See State *v.* Barry, 14 N. D. 316, 103 N. W. 637. **Va.**—Nemo *v.* Com., 2 Gratt. (43 Va.) 558.

[b] **Judgment for a greater or more serious offense** than that which the jury by their verdict have convicted the defendant, is not authorized. Kidd *v.* Territory, 9 Okla. 450, 60 Pac. 114.

[c] **Sentence for a less severe offense** than that found by the verdict, is erroneous. Com. *v.* Roby, 12 Pick. (Mass.) 496; Thomas *v.* State, 73 Miss. 46, 19 So. 195.

court may, on the verdict as it stands, pronounce judgment for the offense proved.[81] A recommendation of the jury, however, is not binding upon the court,[82] unless the statute so provides.[83]

I. ALTERNATIVE SENTENCE. — Sentences in the alternative are void,[84] unless authorized by statute.[85] But a judgment imposing a fine and directing imprisonment until the payment of the fine is not an alternative judgment, the imprisonment being a measure to coerce payment of the fine and not as punishment at all.[86] Such judgments are authorized by the common law,[87] and by statutes.[88]

J. DIRECTIONS AS TO PUNISHMENT. — **1. Generally.** — The judgment or sentence must prescribe the punishment,[89] including the kind,[90] and the amount thereof,[91] without reference to the time when it shall be inflicted.[92]

2. Sentence of Fine. — A judgment and sentence imposing a fine

81. **U. S.**—United States *v.* Linnier, 125 Fed. 83. **Ia.**—State *v.* Fields, 70 Iowa 196, 30 N. W. 480; State *v.* Schele, 52 Iowa 608, 3 N. W. 632. **Wis.** State *v.* Blaedow, 45 Wis. 279.

82. Guthrie *v.* State, 125 Ga. 291, 54 S. E. 180; Coney *v.* State, 101 Ga. 582, 28 S. E. 918; Kidd *v.* Territory, 9 Okla. 450, 60 Pac. 114. See also Freeman *v.* State, 151 Ala. 10, 44 So. 46; Pipes *v.* Com., 148 Ky. 174, 146 S. W. 38.

83. See the statutes and the title "Verdict."

84. **Fla.**—*Ex parte* Martini, 23 Fla. 343, 2 So. 689. **Me.**—State *v.* Sturgis, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443. **Mich.**—Brownbridge *v.* People, 38 Mich. 751. **N. J.**—Miller *v.* Camden, 63 N. J. L. 501, 43 Atl. 1069. **N. C.**—State *v.* Cathey, 170 N. C. 794, 87 S. E. 532; State *v.* Hatley, 110 N. C. 522, 14 S. E. 751; Strickland *v.* Cox, 102 N. C. 411, 9 S. E. 414. **P. I.** United States *v.* Chong Ting, 23 Phil. Isl. 120. **P. R.**—People *v.* Miranda, 15 Porto Rico 448.

As to alternative or conditional judgments generally, see 15 STANDARD PROC. 32, et seq.

[a] **The sentence is void** for uncertainty, if in the alternative. *Ex parte* Martini, 23 Fla. 343, 2 So. 689.

[b] But the order for imprisonment may be eliminated without affecting the legality of the sentence. *In re* Sullivan, 3 Cal. App. 193, 84 Pac. 781.

85. *Ex parte* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872.

[a] **Only one of the punishments** named in the statute authorizing alternative sentences can be imposed upon a defendant. **Kan.**—*In re* McNeil, 68 Kan. 366, 74 Pac. 1110. **Mass.**—Feeley's Case, 12 Cush. 598. **Neb.**—*In re* Stewart, 16 Neb. 193, 20 N. W. 255. **N. C.** State *v.* Walters, 97 N. C. 489, 2 S. E. 539, 2 Am. St. Rep. 310.

86. Brownbridge *v.* People, 38 Mich. 751; Starry *v.* State, 115 Wis. 50, 90 N. W. 1014.

[a] **But if the imprisonment is ordered by way of alternative punishment,** (1) the sentence is bad. Brownbridge *v.* People, 38 Mich. 751. (2) A sentence to pay a fine of $40 and in default thereof be imprisoned thirty days is erroneous. *In re* Deaton, 105 N. C. 59, 11 S. E. 244.

[b] **If there is an uncertainty** as to whether imprisonment is ordered to coerce payment of the fine or as an alternative punishment, the ambiguity is error. Brownbridge *v.* People, 38 Mich. 751.

87. Dodge *v.* State, 24 N. J. L. 455; *In re* Groenvelt, 1 Ld. Raym. 213, 91 Eng. Reprint 1038.

88. **Ark.**—*Ex parte* Holdaway, 105 Ark. 1, 150 S. W. 123; *In re* Jones, 100 Ark. 226, 140 S. W. 22. **Cal.**—*Ex parte* Miller, 82 Cal. 454, 22 Pac. 1113; *Ex parte* Baldwin, 60 Cal. 432; *Ex parte* Robbins, 27 Cal. App. 677, 151 Pac. 14. **Fla.**—Enson *v.* State, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92, 18 Ann. Cas. 940. **Mass.**—See Harris *v.* Com., 23 Pick. 280.

89. State *v.* Horne, 52 Fla. 125, 135, 42 So. 388, 7 L. R. A. (N. S.) 719.

90. State *v.* Horn, 52 Fla. 125, 135, 42 So. 388, 7 L. R. A. (N. S.) 719.

91. State *v.* Horne, 52 Fla. 125, 135, 42 So. 388, 7 L. R. A. (N. S.) 719.

92. State *v.* Horne, 52 Fla. 125, 135, 42 So. 388, 7 L. R. A. (N. S.) 719.

should adjudge that the defendant pay a fine,[93] and specify the amount thereof,[94] and the amount of costs.[95] But it is unnecessary, in some states, that it contain a direction as to whom payment shall be made.[96] A sentence and judgment imposing a fine may direct the imprisonment of the defendant until the payment of the fine,[97] but need not do so.[98] In such case, the judgment must limit the imprisonment,[99] or, under some statutes, provide that the imprisonment shall satisfy the fine at a stated per diem rate.[1]

93. *Ex parte* Baldwin, 60 Cal. 432.

94. *Ex parte* Harrison, 63 Cal. 299; *Ex parte* Baldwin, 60 Cal. 432; Easterling *v.* State, 35 Miss. 210.

95. **Ala.**—Moore *v.* State, 149 Ala. 66, 42 So. 996. **Cal.**—*Ex parte* Harrison, 63 Cal. 299. **Wash.**—See Foster *v.* State, 1 Wash. 411, 25 Pac. 459.

[a] **But the omission** to designate the amount of the costs is not reversible error. Elbow Lake *v.* Holt, 69 Minn. 349, 72 N. W. 564.

96. Barth *v.* State, 18 Conn. 432, 442. *Contra,* Grim *v.* Reinbold, 3 Pa. Dist. 668.

97. **Ariz.**—In the Matter of Silvas, 16 Ariz. 41, 140 Pac. 988. **Mont.**—State *ex rel.* Poindexter *v.* District Ct., 51 Mont. 186, 149 Pac. 958. **Wis.**—Starry *v.* State, 115 Wis. 50, 90 N. W. 1014. See *supra,* V, I.

[a] **But if the judgment of imprisonment be rendered and also a judgment of fine,** there can be no imprisonment to satisfy the fine. People *v.* Brown, 113 Cal. 35, 45 Pac. 181; People *v.* Kerr, 15 Cal. App. 273, 114 Pac. 584. But see *In re* Groenvelt, 1 Ld. Raym. 213, 91 Eng. Reprint 1038.

[b] **The exact object** of the commitment, as being either by way of distinct punishment or by way of coercing payment of the fine should plainly appear. If the defendant is committed for the fine, it ought to be *until* he pay the fine; but if it is intended to punish him by both fine and imprisonment, there should be two distinct parts of the judgment, first condemning him to prison for so long, and from thence also until he should pay the fine. *In re* Groenvelt, 1 Ld. Raym. 213, 91 Eng. Reprint 1038.

98. *Ex parte* Harrison, 63 Cal. 299; Dodge *v.* State, 24 N. J. L. 455, 466.

[a] **But the omission of the direction as to imprisonment** does not (1) render the judgment void (*Ex parte* Holdaway, 105 Ark. 1, 150 S. W. 123; *In re* Jones, 100 Ark. 226, 140 S. W. 22), and (2) may be corrected upon motion of either party. *Ex parte* Campbell (Mo. App.), 197 S. W. 1058.

[b] **If the money is paid,** the direction may be omitted, and the judgment may state that fact. Dodge *v.* State, 24 N. J. L. 455.

[c] **If the prisoner is absent** when the sentence is pronounced, he cannot be ordered to be committed to custody. Dodge *v.* State, 24 N. J. L. 455, 466.

99. **Ia.**—*Ex parte* Tuichner, 69 Iowa 393, 28 N. W. 655; Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734. **La.**—State *v.* Prince, 42 La. Ann. 817, 8 So. 591. **Mich.**—Brownbridge *v.* People, 38 Mich. 751. **Wis.**—Starry *v.* State, 115 Wis. 50, 90 N. W. 1014, under express statute.

[a] **The number of days need not be specifically stated** where the amount of the fine and the rate at which the imprisonment shall discharge the debt are stated. State *ex rel.* Poindexter *v.* District Ct., 51 Mont. 186, 149 Pac. 958.

1. **Cal.**—*Ex parte* Robbins, 27 Cal. App. 677, 151 Pac. 14. **Mich.**—Brownbridge *v.* People, 38 Mich. 751. **Ohio.** Hamilton *v.* State, 78 Ohio St. 76, 84 N. E. 601. **Wash.**—*Contra,* Foster *v.* State, 1 Wash. 411, 25 Pac. 459.

[a] **A sentence imposing imprisonment for thirty days whether the fine be sooner paid or not** (1) is bad. Brownbridge *v.* People, 38 Mich. 751. (2) A judgment that defendant pay a fine of fifty dollars or be imprisoned fifty days is erroneous. *Ex parte* Baldwin, 60 Cal. 432.

[b] **The form of the judgment** should be "that the defendant pay a fine of fifty dollars, and in case said fine be not paid by the ———— day of ————, that the defendant be imprisoned until the fine be duly satisfied, in the proportion of one day's imprisonment for every dollar of the

3. Sentence of Imprisonment. —**Time.** — A sentence to imprisonment must, except under the indeterminate sentence act,[2] definitely state the duration of the imprisonment.[3] But the time at which the sentence shall be carried into execution is no part of the judgment of the court,[4] and the sentence need not specify the time for the commencement and the expiration of the imprisonment.[5]

Place of Confinement. — At common law, the sentence never specified the place of imprisonment.[6] But under the modern practice,[7] the

fine, and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that the defendant be discharged from custody." *Ex parte* Baldwin, 60 Cal. 432. See also Brownbridge *v.* People, 38 Mich. 751.

[c] **A judgment or sentence is sufficient** which states "It is ordered and adjudged that, for said offense, the said John Robbins pay a fine of $150 and be imprisoned in the county jail of Tehama county until said fine is paid, not exceeding 150 days." *Ex parte* Robbins, 27 Cal. App. 677, 151 Pac. 14, to same effect, *Ex parte* Riley, 142 Cal. 124, 75 Pac. 665.

[d] **The court may allow a larger credit** per day than that specified in the statute. In the Matter of Silvas, 16 Ariz. 41, 140 Pac. 988; *Ex parte* Soto, 88 Cal. 624, 26 Pac. 530.

2. **Ill.**—Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242. **Mich.**—*In re* Cummins, 138 Mich. 39, 100 N. W. 1008. **Tex.**—Guyton *v.* State, 76 Tex. Crim. 508, 175 S. W. 1063; Orange *v.* State, 76 Tex. Crim. 194, 173 S. W. 297.

[a] **The court must fix the maximum and minimum** period. **Ia.**—State *v.* Haines, 152 Iowa 394, 132 N. W. 821. **Mich.**—*In re* Richards, 150 Mich. 421, 114 N. W. 348; *In re* Manaca, 146 Mich. 697, 110 N. W. 75. **Mont.**—See *Ex parte* Collins, 51 Mont. 215, 152 Pac. 40. **Nev.**—*Ex parte* Melosevich, 36 Nev. 67, 133 Pac. 57. **Tex.**—Simmons *v.* State, 73 Tex. Crim. 288, 164 S. W. 843. But see State *v.* Miller, 95 Kan. 310, 147 Pac. 844.

3. **Cal.**—*Ex parte* Harrison, 63 Cal. 299. **Fla.**—Wallace *v.* State, 41 Fla. 547, 26 So. 713. **Kan.**—*Ex parte* Howard, 72 Kan. 273, 83 Pac. 1032. **Miss.** Braxton *v.* State, 103 Miss. 127, 60 So. 66.

4. **U. S.**—*In re* Cross, 146 U. S. 271, 277, 13 Sup. Ct. 109, 36 L. ed. 969. **Cal.**—*In re* Collins, 8 Cal. App. 367, 97 Pac. 188. **Fla.**—State *v.* Horne, 52 Fla. 125, 135, 42 So. 388, 7 L. R. A. (N. S.) 719.

[a] **It Is in the Nature of an Award of Execution.**—*In re* Collins, 8 Cal. App. 367, 97 Pac. 188.

5. **Ala.**—Perkins *v.* State, 10 Ala. App. 671, 63 So. 692; Chaney *v.* State, 9 Ala. App. 45, 63 So. 693. **Cal.**—People *v.* King, 28 Cal. 265. **Fla.**—State *v.* Horne, 52 Fla. 125, 42 So. 388, 7 L. R. A. (N. S.) 719. **Ill.**—Johnson *v.* People, 83 Ill. 431. **Md.**—Clifford *v.* State, 30 Md. 575. **Miss.**—Braxton *v.* State, 103 Miss. 127, 60 So. 66, *overruling* Kelly *v.* State, 3 Smed. & M. 518. **Nev.**—*Ex parte* Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568. **N. C.**—State *v.* Gaskins, 65 N. C. 320. **Ohio.**—Picket *v.* State, 22 Ohio St. 405. **Okla.**—Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072; *Ex parte* Oliver, 11 Okla. Crim. 536, 149 Pac. 117.

But see Kelly *v.* State, 3 Smed. & M. (Miss.) 518.

[a] **A judgment** of imprisonment "for the term of three years from the date of his incarceration" is sufficiently certain. People *v.* King, 28 Cal. 265, *followed* in People *v.* Burgess, 35 Cal. 115; *Ex parte* Gibson, 31 Cal. 619, 91 Am. Dec. 546; People *v.* Hughes, 29 Cal. 257.

6. Dodge *v.* State, 24 N. J. L. 455.

7. **U. S.**—See *Ex parte* Waterman, 33 Fed. 29. **Cal.**—People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670. **Fla.**—Potsdamer *v.* State, 17 Fla. 895. **Ill.**—Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242, holding slight variance as to name immaterial. **Kan.**—*In re* Rex, 70 Kan. 221, 78 Pac. 404. **Miss.**—Braxton *v.* State, 103 Miss. 127, 60 So. 66. **Tenn.**—Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525. **Wyo.**—Kingen *v.* Kelley, 3 Wyo. 566, 586, 28 Pac. 36, 15 L. R. A. 177.

[a] **The Designation of the Place of Confinement Is No Part of the**

place is frequently designated, and sometimes it is necessary to do so.[8]

Hard Labor. — According to some authorities, where under the statute an imprisonment in a penitentiary necessarily includes a confinement at hard labor, the sentence need not specify that the defendant be put at hard labor.[9] But in some jurisdictions when hard labor is part of the punishment, it is imperative upon the court to include that in the sentence.[10] On the other hand, when the statute requires imprisonment alone, the addition of the words "hard labor" does not render the sentence a nullity.[11]

Solitary Confinement. — Statutes sometimes require the judgment or sentence of imprisonment to direct that the convict be punished by solitary confinement for such term as the court shall direct.[12] But in the absence of such a requirement, a direction that the prisoner be

Judgment.—*Ex parte* Waterman, 35 Fed. 29.

[b] **Although not stated in the verdict,** the place may be stated in the sentence. Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525.

[c] **The particular prison** (1) need not be designated. **U. S.**—Myers *v.* Morgan, 224 Fed. 413, 139 C. C. A. 641. **Ia.**—O'Brien *v.* Barr, 83 Iowa 51, 49 N. W. 68. **N. Y.**—Weed *v.* People, 31 N. Y. 465. (2) The insertion of the location of the prison binds no one and is of no effect other than to indicate where the penitentiary is located at the date of the sentence. Kingen *v.* Kelley, 3 Wyo. 566, 586, 28 Pac. 36, 15 L. R. A. 177.

8. See *infra,* this note.

[a] **When a sentence for a period longer than six months** is imposed, it is necessary to specify whether the imprisonment shall be in the state prison or the county jail. But when the term is less than six months, the place of confinement is of necessity in the county jail, and need not be stated. Dodge *v.* State, 24 N. J. L. 455, 465.

9. **Ala.**—Brown *v.* State, 74 Ala. 478. **Ind.**—O'Herrin *v.* State, 14 Ind. 420. **Minn.**—State *v.* Wolfer, 68 Minn. 465, 71 N. W. 681. **Miss.**—Murrah *v.* State, 51 Miss. 675. **Nev.**—*Ex parte* Maher, 25 Nev. 422, 62 Pac. 1. **N. J.** Gibbs *v.* State, 45 N. J. L. 379, 46 Am. Rep. 782.

[a] **The words "at hard labor"** in a sentence are surplusage. *Ex parte* Maher, 25 Nev. 422, 62 Pac. 1.

10. **U. S.**—*Ex parte* Karstendick, 93 U. S. 396, 23 L. ed. 889; Harman *v.* United States, 50 Fed. 921. **Mass.** Lane *v.* Com., 161 Mass. 120, 36 N. E. 755. **Wis.**—Peglow *v.* State, 12 Wis. 534; Benedict *v.* State, 12 Wis. 313.

[a] **The Omission Is Fatal.**—Harman *v.* United States, 50 Fed. 921; Benedict *v.* State, 12 Wis. 313.

[b] **For Costs.**—(1) In Alabama, the statute requires the court to determine the time required to work out the costs at the rate of thirty cents a day. Tolbert *v.* State, 87 Ala. 27, 6 So. 284. (2) The judgment must indicate the amount of the costs (Moore *v.* State, 149 Ala. 66, 42 So. 996; Tolbert *v.* State, 87 Ala. 27, 6 So. 284), and (3) show the determination by the court of the number of days required to work them out, not to exceed ten months. Taylor *v.* State, 167 Ala. 91, 52 So. 736; Freeman *v.* State, 151 Ala. 10, 44 So. 46; Moore *v.* State, 149 Ala. 66, 42 So. 996; Linnehan *v.* State, 120 Ala. 293, 25 So. 6; Ellis *v.* State, 11 Ala. App. 300, 66 So. 913.

11. United States *v.* Pridgeon, 153 U. S. 48, 60, 14 Sup. Ct. 746, 38 L. ed. 631; Jackson *v.* United States, 102 Fed. 473, 42 C. C. A. 452; Flowers *v.* State, 4 Ala. App. 221, 59 So. 238. See also Fields *v.* United States, 27 App. Cas. (D. C.) 433.

[a] **The court may sentence the defendant to imprisonment in a penitentiary where "hard labor"** is a part of the usual discipline, although the statute makes no provision for hard labor. United States *v.* Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. ed. 631.

12. Lane *v.* Com., 161 Mass. 120, 36 N. E. 755; Benedict *v.* State, 12 Wis. 313.

imprisoned in solitary confinement will be rejected as superfluous.[13]

Disabilities. — The disabilities of the defendant consequent upon conviction are frequently made part of the sentence,[14] but a failure to include them is not prejudicial error.[15]

As to Parole. — The mode and manner of the application of the statute with reference to the parole and discharge of prisoners need not be set forth in the judgment.[16]

4. Sentence of Death. — Although sometimes done,[17] it is not necessary either at common law,[18] or under the modern practice,[19] that a sentence of death designate the time,[20] or the place,[21] or the mode[22] of the execution, unless statute requires it.[23]

5. Invalid or Irregular Sentence. — A sentence pronounced by a court having no jurisdiction to do so is void,[24] as is also one of a different character than that prescribed by law.[25]

13. Dodge *v.* State, 24 N. J. L. 455, 467.

14. Dodge *v.* State, 24 N. J. L. 455, query as to whether English practice should be followed in New Jersey.

15. Milter *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; Dodge *v.* State, 24 N. J. L. 455, 464.

16. People *ex rel.* Miller *v.* Murphy, 185 Ill. 623, 57 N. E. 820.

17. *In re* Cross, 146 U. S. 271, 13 Sup. Ct. 109, 36 L. ed. 969.

[a] **Origin of Practice.**—The practice of setting forth the time and place of execution seems to have arisen from the statute of 25 Geo. II., c. 37, 7 St. at L. 440, which enacted that persons found guilty of wilful murder should be executed on the next day but one after sentence passed, unless the same should happen to be Sunday, and in that case on the Monday following, "in which sentence shall be expressed not only the usual judgment of death, but also the time appointed hereby for the execution thereof." State *v.* Tomassi, 75 N. J. L. 739, 745, 69 Atl. 214.

18. State *v.* Tomassi, 75 N. J. L. 739, 745, 69 Atl. 214; Clifford *v.* Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312.

19. State *v.* Tomassi, 75 N. J. L. 739, 69 Atl. 214.

20. **U. S.**—Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218. **Cal.**—People *v.* Murphy, 45 Cal. 137; People *v.* Bonilla, 38 Cal. 699. **Kan.**—Hollon *v.* Hopkins, 21 Kan. 638. **La.**—State *ex rel.* Pringle *v.* Lake, 34 La. Ann. 1069; State *v.* Oscar, 13 La. Ann. 297. **Mass.**—Webster *v.* Com., 5 Cush. 386. **N. J.**—State *v.* Tomassi, 75 N. J. L. 739, 745, 69 Atl. 214. **Okla.** *Ex parte* Eldridge, 3 Okla. Crim. 499, 106 Pac. 980, 139 Am. St. Rep. 967, 27 L. R. A. (N. S.) 625. **Pa.**—Cathcart *v.* Com., 37 Pa. 108.

21. Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. ed. 218; Lovett *v.* State, 29 Fla. 356, 11 So. 172.

22. **Ky.**—Puckett *v.* Com., 13 Ky. L. Rep. 466, 17 S. W. 335. **N. Y.** People *ex rel.* Trezza *v.* Brush, 60 Hun 399, 15 N. Y. Supp. 512. **Tex.**—Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771.

[a] **Form.**—A sentence that execution be carried out in the mode, manner and way provided by law is sufficient. People *ex rel.* Trezza *v.* Brush, 60 Hun 399, 15 N. Y. Supp. 512.

23. See the statutes and the following: Aaron *v.* State, 40 Ala. 307; Bullitt *v.* Sturgeon, 127 Ky. 332, 105 S. W. 468, 14 L. R. A. (N. S.) 268.

24. **U. S.**—*In re* Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. ed. 107. **Ala.**—*Ex parte* Montgomery, 79 Ala. 275. **Cal.**—*Ex parte* Kelly, 65 Cal. 154, 3 Pac. 673. **Idaho.**—*Ex parte* Cox, 3 Idaho 530, 32 Pac. 197, 95 Am. St. Rep. 29. **Ind.**—Lefforge *v.* State, 129 Ind. 551, 29 N. E. 34. **Kan.**—*In re* Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505. **Mo.**—*Ex parte* Jilz, 64 Mo. 205, 27 Am. Rep. 218; *Ex parte* Page, 49 Mo. 291. **Neb.**—*In re* Stewart, 16 Neb. 193, 20 N. W. 255. **N. Y.**—People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211. **Pa.**—Com. *v.* Gaylburd, 23 Pa. Dist. 1009. **Tex.**—*Ex parte* McGrew, 40 Tex. 472.

25. **U. S.**—United States *v.* Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L.

A sentence which is lighter than the prescribed punishment is not wholly void,[26] but is merely irregular,[27] and does not authorize the discharge of the prisoner on habeas corpus;[28] according to some authorities, such an error justifies a reversal,[29] but according to others the error is held to be in the defendant's favor, so that he is not aggrieved thereby.[30]

A sentence which imposes a punishment greater than that authorized by law, is irregular,[31] but, according to the weight of authority, is valid as to the part which the court has power to impose, and void as to the excess only, if the excess is separable.[32] When in such case the defendant has suffered that portion of the sentence which the

ed. 631. **Cal.**—*Ex parte* Sylvester, 81 Cal. 199, 22 Pac. 550. **Miss.**—*Ex parte* Burden, 92 Miss. 14, 45 So. 1, 131 Am. St. Rep. 511. **Mont.**—State *v.* District Ct., 35 Mont. 321, 89 Pac. 63. **Neb.** *In re* Fanton, 55 Neb. 703, 76 N. W. 447, 70 Am. St. Rep. 418. **N. Y.**—People *ex rel.* Devoe *v.* Kelly, 97 N. Y. 212; People *ex rel.* Kane *v.* Sloane, 98 App. Div. 450, 90 N. Y. Supp. 762. **Okla.**—*In re* Comstock, 10 Okla. 299, 61 Pac. 921.

As to the right to resort to habeas corpus in case of excessive sentence, see 10 STANDARD PROC. 945, et seq.

26. *In re* Reed, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138.

27. **Ill.**—Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893. **La.**—State *v.* Evans, 23 La. Ann. 525. **Mich.**—*In re* Evans, 173 Mich. 25, 138 N. W. 276; People *v.* Rouse, 72 Mich. 59, 40 N. W. 57. **Nev.**—*Ex parte* Melosevich, 36 Nev. 67, 133 Pac. 57. **N. Y.**—People *v.* Bauer, 37 Hun 407. **Tenn.**—Wattingham *v.* State, 5 Sneed 64.

28. *In re* Reed, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138.

29. Benedict *v.* State, 12 Wis. 313.

[a] **Disposition of Cause.**—(1) The appellate court may pronounce the proper judgment (Benedict *v.* State, 12 Wis. 313), or (2) it may remand the cause to the trial court with directions to enter proper judgment. Peglow *v.* State, 12 Wis. 534; Benedict *v.* State, 12 Wis. 313.

30. **Cal.**—*In re* Reed, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138. **Ind.**—Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. **N. J.** Dodge *v.* State, 24 N. J. L. 455. **N. Y.** Kane *v.* People, 8 Wend. 203. **Eng.** State *v.* Price, 11 N. J. L. 203, 218.

31. **Mich.**—*In re* Vitali, 153 Mich. 514, 116 N. W. 1066, 126 Am. St. Rep. 535. **N. Y.**—People *v.* Quartararo, 76 Misc. 55, 133 N. Y. Supp. 985. **Ohio.** *Ex parte* Van Hagan, 25 Ohio St. 426. **S. D.**—*In re* Taylor, 7 S. D. 382, 64 N. W. 253, 58 Am. St. Rep. 843, 45 L. R. A. 136. **Wyo.**—Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979.

[a] **A new trial** cannot be based on such irregularity. **U. S.**—Jackson *v.* United States, 102 Fed. 473, 42 C. C. A. 452. **Fla.**—Roberts *v.* State, 30 Fla. 82, 11 So. 536. **Ga.**—Beaudrot *v.* State, 126 Ga. 579, 55 S. E. 592; Screen *v.* State, 107 Ga. 715, 33 S. E. 393. **N. C.** State *v.* Black, 150 N. C. 866, 64 S. E. 778; State *v.* Crowell, 116 N. C. 1052, 21 S. E. 502.

32. **U. S.**—*In re* Welty, 123 Fed. 122. **Cal.**—*In re* Smith, 152 Cal. 566, 93 Pac. 191; People *v.* Kerr, 15 Cal. App. 273, 114 Pac. 584. *Contra, Ex parte* Kelley, 65 Cal. 154, 3 Pac. 154. **Colo.**—Martin *v.* District Court, 37 Colo. 110, 86 Pac. 82, 119 Am. St. Rep. 262. **Ga.**—Brown *v.* Atlanta, 123 Ga. 497, 51 S. E. 507. **Idaho.**—*In re* Chase, 18 Idaho 561, 110 Pac. 1036. **Ill.**—Shields *v.* People, 132 Ill. App. 109. **Ind.**—Perry *v.* Pernet, 165 Ind. 67, 74 N. E. 609. **Kan.**—*In re* Paschal, 56 Kan. 123, 42 Pac. 373. **La.**—State *v.* Brannon, 34 La. Ann. 942. **Minn.**—State *ex rel.* Petcoff *v.* Reed, 138 Minn. 465, 163 N. W. 984. **Mont.**—State *v.* Stone, 40 Mont. 88, 105 Pac. 89. **Neb.**—*In re* Fanton, 55 Neb. 703, 76 N. W. 447, 70 Am. St. Rep. 418. **N. J.**—Dodge *v.* State, 24 N. J. L. 455, 467. **N. M.**—*In re* Cica, 18 N. M. 452, 137 Pac. 598, 51 L. R. A. (N. S.) 373. **S. D.**—*In re* Taylor, 7 S. D. 382, 64 N. W. 253, 58 Am. St. Rep. 843, 45 L. R. A. 136. **Utah.**—Reese *v.* Olsen, 44 Utah 318, 139 Pac. 941. **Va.** Hall *v.* Com., 6 Leigh (33 Va.) 615, 29 Am. Dec. 236. **Wash.**—State *v.* Feilen, 70 Wash. 65, 126 Pac. 75, Ann. Cas. 1914B, 512, 41 L. R. A. (N. S.) 418.

court had power to impose,[33] but not before,[34] he is entitled to discharge on habeas corpus.

VI. MODIFYING AND VACATING SENTENCE. — A. In General. — During the term and before the sentence is put into execution, it may be modified[35] or vacated[36] by the court. But no power to

W. Va.—*Ex parte* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

Contra, Ex parte Page, 49 Mo. 291, discharging the prisoner, and *citing* King *v.* Bourne, 7 Ad. & El. 58, 34 E. C. L. 55, 112 Eng. Reprint 393; King *v.* Ellis, 5 Barn. & C. 395, 11 E. C. L. 512, 8 D. & R. 173, 108 Eng. Reprint 147.

33. **U. S.**—Stevens *v.* McClaughry, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390. **Ala.**—*Ex parte* Haley, 1 Ala. App. 528, 56 So. 245. **Cal.**—*Ex parte* Morton, 132 Cal. 346, 64 Pac. 469. **Mich.**—*In re* Bolden, 159 Mich. 629, 124 N. W. 548. **Okla.**—*Ex parte* McClure, 6 Okla. Crim. 241, 118 Pac. 591. **P. I.**—Cruz *v.* Director of Prisons, 17 Phil. Isl. 269.

34. **U. S.**—*In re* Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. ed. 1207; *Ex parte* Davis, 112 Fed. 139. **Colo.** Martin *v.* District Court, 37 Colo. 119, 86 Pac. 85. **Idaho.**—*In re* Chase, 18 Idaho 561, 110 Pac. 1036. **Ill.**—People *v.* Green, 281 Ill. 52, 117 N. E. 764. **Kan.**—*In re* Groves, 83 Kan. 238, 109 Pac. 1087. **Mich.**—*In re* Richards, 150 Mich. 421, 114 N. W. 348. **N. M.**—*In re* Cica, 18 N. M. 452, 137 Pac. 598, 51 L. R. A. (N. S.) 373. **N. Y.**—People *ex rel.* Devoe *v.* Kelly, 97 N. Y. 212; People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460. **Ohio.**—*Ex parte* Van Hagan, 25 Ohio St. 426. **Ore.**—*Ex parte* Foster, 69 Ore. 319, 138 Pac. 849. **Pa.** Halderman's Case, 53 Pa. Super. 554. **Tex.**—*Ex parte* Ellerd, 71 Tex. Crim. 285, 158 S. W. 1145, Ann. Cas. 1915D, 361. **Utah.**—Reese *v.* Olsen, 44 Utah 318, 139 Pac. 941. **Wash.**—*In re* Blystone, 75 Wash. 286, 134 Pac. 827. **W. Va.**—*Ex parte* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

Contra, Ex parte Page, 49 Mo. 291. See 10 Standard Proc. 945.

35. **U. S.**—*Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872; *Ex parte* Casey, 18 Fed. 86. **Fla.**—Tillman *v.* State, 58 Fla. 113, 50 So. 675, 138 Am. St. Rep. 100, 19 Ann. Cas. 91. **Ga.**—Meaders *v.* State, 96 Ga. 299, 22 S. E. 527; Jobe *v.* State, 28 Ga. 235. **Ia.**—State *v.* Daugherty, 70 Iowa 439, 30 N. W. 685. **Kan.**—*In re* Black, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331; State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195. **Mass.**—Com. *v.* Foster, 122 Mass. 317, 323, 23 Am. Rep. 326; Com. *v.* Weymouth, 2 Allen 144, 79 Am. Dec. 776. **N. C.**—*In re* Brittain, 93 N. C. 587; State *v.* Warren, 92 N. C. 825. **Ohio.**—Lee *v.* State, 32 Ohio St. 113. **Ore.**—State *v.* Feister, 32 Ore. 254, 267, 50 Pac. 561. **Pa.**—Com. *v.* Pennsylvania R. Co., 41 Pa. Super. 29; Commonwealth *v.* Brown, 12 Phila. 600.

As to the power of courts to amend judgments generally, see 15 Standard Proc. 98, et seq.

As to amendment of judgments on court's own motion generally, see 15 Standard Proc. 132, et seq.

[a] **Punishment Increased.—U. S.** *Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872; *In re* Johnson, 46 Fed. 477. **Colo.**—Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013. **Ill.**—People *v.* Whitson, 74 Ill. 20. **Mich.**—People *v.* Kelley, 79 Mich. 320, 44 N. W. 615. **Miss.**—Parker *v.* State, 51 Miss. 535. **Neb.**—*In re* Jones, 35 Neb. 499, 53 N. W. 468. **N. Y.**—People *v.* Sullivan, 54 Misc. 489, 106 N. Y. Supp. 143. **Ohio.**—*In re* Habeas Corpus, 5 Ohio Dec. 571. **Ore.**—State *v.* Cannon, 11 Ore. 312, 2 Pac. 191. **Tex.**—Grisham *v.* State, 19 Tex. App. 504.

36. **U. S.**—Basset *v.* United States, 9 Wall. 38, 19 L. ed. 548; Whitworth *v.* United States, 114 Fed. 302, 52 C. C. A. 214. **Kan.**—State *v.* Langmade, 101 Kan. 814, 168 Pac. 847. **Md.** State *v.* Butler, 72 Md. 98, 18 Atl. 1105. **Va.**—Price *v.* Com., 33 Gratt. (74 Va.) 819, 36 Am. Rep. 797.

[a] **A justice of the peace likewise** may before issuance of the commitment vacate a judgment improperly rendered and enter a valid judgment. In Matter of Robbins, 27 Cal. App. 677, 151 Pac. 14; Commonwealth *v.* Egler, 24 Pa. Dist. 939.

[b] **Where a plea of guilty is entered** upon a suggestion made by the court as to the effect of such plea upon the punishment to be imposed a motion to set aside the judgment

modify or set aside the sentence exists after it has become final by lapse of time,[37] or after the term has expired,[38] or the sentence gone into effect.[39] Some authorities hold, however, that the court may shorten the sentence after it has been partly executed,[40] and if the prisoner escapes and is not recaptured before the day fixed for execution, the court may, at a subsequent term, direct the sentence be carried into effect.[41]

Where the sentence is void the court may correct it notwithstanding it has been partially executed.[42]

should be granted. People *v.* Brown, 54 Mich. 15, 19 N. W. 571.

37. United States *v.* Court of First Instance, 24 Phil. Isl. 321.

38. **U. S.**—United States *v.* Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. ed. 129; Sibbald *v.* United States, 12 Pet. 488, 9 L. ed. 1167; *Ex parte* Friday, 43 Fed. 916. **Fla.**—Tanner *v.* Wiggins, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718. **Ill.**—People *v.* Whitson, 74 Ill. 20. **Mass.**—Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326. **Miss.**—McCarthy *v.* State, 56 Miss. 294. **Mo.**—*Ex parte* Cornwall, 223 Mo. 259, 122 S. W. 666, 135 Am. St. Rep. 507. **Pa.**—Com. *v.* Mayloy, 57 Pa. 291. **Va.**—Pifer *v.* Com., 14 Gratt. (55 Va.) 710. **Wyo.** Kingen *v.* Kelley, 3 Wyo. 566, 586, 28 Pac. 36, 15 L. R. A. 177.

39. **U. S.**—*Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872; Nichols *v.* United States, 106 Fed. 672, 46 C. C. A. 405; United States *v.* Patterson, 29 Fed. 775. **Colo.**—Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013. **Ga.**—Jobe *v.* State, 28 Ga. 235. **Ill.**—People *v.* Whitson, 74 Ill. 20. **Ia.**—State *v.* Daugherty, 70 Iowa 439, 30 N. W. 685. **Kan.** *In re* Beck, 63 Kan. 57, 64 Pac. 971; State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195; State *v.* McBee, 10 Kan. App. 450, 61 Pac. 1093. **La.** State *v.* Davis, 31 La. Ann. 249. **Me.** Brown *v.* Rice, 57 Me. 55, 2 Am. Rep. 11. **Mass.**—Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326. **Mich.**—People *v.* Kelley, 79 Mich. 320, 44 N. W. 615; People *v.* Meservey, 76 Mich. 223, 42 N. W. 1133. **Miss.**—McCarthy *v.* State, 56 Miss. 294. **Mo.**—*Ex parte* Cornwall, 223 Mo. 259, 122 S. W. 666, 135 Am. St. Rep. 507. **Neb.**—*In re* Jones, 35 Neb. 499, 53 N. W. 468. **N. J.**—State *v.* Gray, 37 N. J. L. 368. **N. Y.**—People *v.* Brown, 23 Wend. 47; People *v.* Sullivan, 54 Misc. 489, 106 N. Y. Supp. 143; People *v.* Davis, 64 Hun 636, 19 N. Y. Supp. 781. **N. C.**—State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260; State *v.* Warren, 92 N. C. 825. **Ohio.**—Lee *v.* State, 32 Ohio St. 113. **Ore.**—State *v.* Cannon, 11 Ore. 312, 2 Pac. 191. **Pa.**—Com. *v.* Brown, 12 Phila. 600. But see Com. *v.* Pennsylvania R. Co., 41 Pa. Super. 29. **Tenn.** Whitney *v.* State, 6 Lea 247. **Tex.** Purcelly *v.* State, 29 Tex. App. 1, 13 S. W. 993; Grisham *v.* State, 19 Tex. App. 504.

But see *In re* Graves, 117 Fed. 798; State *v.* Whitt, 117 N. C. 804, 23 S. E. 452.

[a] **Vacation of Sentence. — Cal.** People *v.* Conley, 27 Cal. App. 362, 150 Pac. 412; *In re* Sullivan, 3 Cal. App. 193, 84 Pac. 781. **Me.**—Brown *v.* Rice, 57 Me. 55, 2 Am. Rep. 11. **Mich.**—People *v.* Meservey, 76 Mich. 223, 42 N. W. 1133. **N. Y.**—People *v.* Parsons, 91 Misc. 649, 155 N. Y. Supp. 820.

[b] **A commitment to an industrial school** cannot be changed to imprisonment although during the same term of court it is made to appear that the defendant is of age. *In re* Jones, 35 Neb. 499, 53 N. W. 468; State *v.* Cannon, 11 Ore. 312, 2 Pac. 191.

40. *In re* Graves, 117 Fed. 798; Plain *v.* State, 60 Ga. 284.

[a] **The doctrine applies as well where the original sentence is in excess** of the court's jurisdiction. **U. S.**—*In re* Graves, 117 Fed. 798. **Ky.**—*In re* Channels, 131 Ky. 737, 100 S. W. 214. **Mich.**—*Ex parte* Vitali, 153 Mich. 514, 116 N. W. 1066, 126 Am. St. Rep. 535.

[b] Where the court erroneously sentences the defendant to twenty years' imprisonment on a verdict fixing ten years as the penalty, the error may be corrected by motion made after the expiration of the ten year sentence. *In re* Channels, 131 Ky. 737, 100 S. W. 214.

41. State *v.* Cardwell, 95 N. C. 643.

42. **Ala.**—Minto *v.* State, 9 Ala. App. 95, 64 So. 369. **Mass.**—Com. *v.* Mur-

The presence of the prisoner is not required when modifying directions in the judgment which are not a part thereof strictly speaking.[43]

Notice is not required if the amendment is made during the term,[44] but must be given if the amendment is attempted afterwards.[45]

B. WRIT OF ERROR CORAM NOBIS. — Under some statutes, a writ coram nobis may be issued where it is made to appear that the defendant was prevented from presenting a defense which would have prevented his conviction,[46] providing the facts upon which the application is based were known or should have been known to the defendant before the trial of the cause,[47] and no adequate remedy by motion for a new trial or by appeal exists.[48] The affidavit upon which an application for such writ is based must contain a statement of facts justifying its issuance,[49] and notice of the application for a writ coram nobis must be given to the prosecution.[50]

VII. RECORD OF JUDGMENT AND SENTENCE. — A. NECESSITY OF ENTRY. — When a judgment of conviction is rendered,[51] the

phy, 174 Mass. 369, 54 N. E. 860, 75 Am. St. Rep. 353, 48 L. R. A. 393. **Mich.**—People *v.* Farrell, 146 Mich. 264, 109 N. W. 440. **Neb.**—McCormick *v.* State, 71 Neb. 505, 99 N. W. 237.

[a] **The court may, at a subsequent term, correct** its sentence when the defendant has obtained his discharge on habeas corpus. Bryant *v.* United States, 214 Fed. 51, 130 C. C. A. 491. See *In re* Harris, 68 Vt. 243, 35 Atl. 55.

43. *Ex parte* Waterman, 33 Fed. 29, where the place of confinement is changed.

44. State *v.* Feister, 32 Ore. 254, 50 Pac. 561.

45. State *v.* Feister, 32 Ore. 254, 50 Pac. 561.

46. Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; State *v.* Asbell, 62 Kan. 209, 61 Pac. 690. But see State *v.* Hayslip, 90 Ohio St. 199, 107 N. E. 335.

47. **Ark.**—Howard *v.* State, 58 Ark. 229, 24 S. W. 8. **Ind.**—Wheeler *v.* State, 158 Ind. 687, 696, 63 N. E. 975. **Kan.**—State *v.* Asbell, 62 Kan. 209, 61 Pac. 690.

[a] **Rule Stated.**—The "relief afforded by a proceeding in the nature of a writ coram nobis will not be granted in a criminal case after trial and conviction except where it clearly appears that the petitioner had a valid defense in the facts of the case, but which, without negligence on his part, was not made because of duress, fraud, or excusable mistake; or that he was prevented from asserting and enjoying some legal right through duress, or fraud, or excusable mistake, these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment in question." Wheeler *v.* State, 158 Ind. 687, 696, 63 N. E. 975.

[b] **Disqualification of juror** not ground for the writ. Fugitt *v.* State, 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268; Holt *v.* State, 78 Miss. 631, 29 So. 527; State *v.* Armstrong, 41 Wash. 601, 84 Pac. 584.

[c] **False testimony** of prosecuting witness not sufficient. State *v.* Superior Court, 15 Wash. 339, 46 Pac. 399.

48. Hamlin *v.* State, 67 Kan. 724, 74 Pac. 242.

[a] **Newly discovered evidence** on a material issue affords no ground for the issuance of a writ coram nobis. State *v.* Asbell, 62 Kan. 209, 61 Pac. 690.

49. Holt *v.* State, 78 Miss. 631, 29 So. 527.

50. Dobbs *v.* State, 62 Kan. 108, 61 Pac. 408.

51. **Cal.**—Pen. Code, §1207; People *v.* Johnson, 71 Cal. 384, 12 Pac. 261. **Ia.**—Jones *v.* McClaughry, 169 Iowa 281, 151 N. W. 210. **Okla.**—Schriebar *v.* State, 6 Okla. Crim. 119, 116 Pac. 348. **Ore.**—Long *v.* Minto, 81 Ore. 281, 158 Pac. 805.

[a] **Where the defendant is charged on several counts** and is acquitted on some of them it is not essential that the judgment should recite the fact of acquittal on some of the counts. West

clerk must enter it of record. And it is better practice to enter a judgment of acquittal.[52]

B. Time of Entry. — In some states, the judgment is usually entered on the verdict when the latter is recorded on the minutes,[53] unless a motion for new trial is made.[54] But it may be entered of record at a subsequent term nunc pro tunc,[55] provided there is some evidence of the fact that the judgment was previously rendered.[56]

C. Place of Entry. — The entry of the judgment in the wrong book does not invalidate it.[57]

D. Form and Sufficiency of Record. — 1. **In General.** — There

v. State, 22 N. J. L. 212.

[b] **An omission to show prior conviction** in the judgment does not render it void but constitutes error. People *v.* Kelly, 120 Cal. 271, 52 Pac. 587.

[c] **An adjudication of defendant's guilt** need not be contained in the judgment but it is sufficient if it discloses the sentence imposed after verdict. **Ala.**—Talbert *v.* State, 140 Ala. 96, 37 So. 78. **Ill.**—People *v.* Murphy, 188 Ill. 144, 58 N. E. 984. **Ia.**—State *v.* Cook, 92 Iowa 483, 61 N. W. 185.

[d] **The minutes on the judge's calendar** form no part of the record and do not constitute a judgment. People *v.* Lee, 185 Ill. App. 452; Jones *v.* McClaughry, 169 Iowa 281, 151 N. W. 210.

[e] **Signature of judge** (1) not necessary (State *ex rel.* Pringle *v.* Lake, 34 La. Ann. 1069; State *v.* Bliss, 21 Minn. 458); unless (2) such signature is expressly required by the statute. Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349.

52. State *v.* Hart, 88 N. J. L. 48, 95 Atl. 756.

53. Dunn *v.* State, 127 Tenn. 267, 154 S. W. 969.

[a] **But in courts of limited or inferior jurisdiction** the entry of a judgment upon the docket at a later date does not invalidate the judgment. **Ind.** Wright *v.* Fansler, 90 Ind. 492. **Miss.** Holley *v.* State, 74 Miss. 878, 21 So. 923. **Tex.**—*Ex parte* Quong Lee, 34 Tex. Crim. 511, 31 S. W. 391.

54. Dunn *v.* State, 127 Tenn. 267, 154 S. W. 969.

55. **Ala.**—Thomason *v.* State, 70 Ala. 20; Palmer *v.* State, 2 Ala. App. 265, 56 So. 50. **Ga.**—Merritt *v.* State, 122 Ga. 752, 50 S. E. 925. **Ind.**—Smith *v.* State, 71 Ind. 250. **Mo.**—State *v.* Gordon, 196 Mo. 185, 95 S. W. 420. **N. D.** *Ex parte* Schantz, 26 N. D. 380, 144 N. W. 445. **Okla.**—*Ex parte* Riggert, 33 Okla. 303, 125 Pac. 485; *Ex parte* Howland, 3 Okla. Crim. 142, 104 Pac. 927, Ann. Cas. 1912A, 840. **Ore.**—State *v.* Donahue, 75 Ore. 409, 144 Pac. 755, 147 Pac. 548. **Tenn.**—Dunn *v.* State, 127 Tenn. 267, 154 S. W. 969; State *v.* Miller, 6 Baxt. 513. **Tex.** *Ex parte* Beard, 41 Tex. 234; State *v.* Womack, 17 Tex. 237.

[a] **Power Is Inherent.**—Palmer *v.* State, 2 Ala. App. 265, 56 So. 50.

[b] **On proper motion** by the state or defendant, the court can enter in the minutes nunc pro tunc the judgment actually rendered in the case. Palmer *v.* State, 2 Ala. App. 265, 56 So. 50.

[c] **Not after death** of defendant. O'Sullivan *v.* People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

[d] **Though Appeal Is Pending.** State *v.* Gordon, 196 Mo. 185, 95 S. W. 420; *Ex parte* Beard, 41 Tex. 234.

[e] **Presence of defendant** (1) required. Baker *v.* State, 39 Ark. 180; Gordon *v.* State, 13 Tex. App. 196; Mapes *v.* State, 13 Tex. App. 85. (2) Not required. People *v.* Lenon, 79 Cal. 625, 631, 21 Pac. 967; State *v.* Primm, 61 Mo. 166.

[f] **Notice to interested parties** necessary. Merritt *v.* State, 122 Ga. 752, 50 S. E. 925.

56. **Ala.**—Palmer *v.* State, 2 Ala. App. 265, 56 So. 50. **Ga.**—Merritt *v.* State, 122 Ga. 752, 50 S. E. 925. **Ore.** State *v.* Donahoe, 75 Ore. 409, 144 Pac. 755, 147 Pac. 548. **Tex.**—Gonzales *v.* State, 35 Tex. Crim. 339, 33 S. W. 363, 60 Am. St. Rep. 51.

[a] **An entry or memorandum** on record necessary. State *v.* Jeffors, 64 Mo. 376.

57. State *v.* Blair, 63 W. Va. 635, 60 S. E. 795, where it was entered in a book for the entry of chancery orders.

is considerable variance as to the contents of the record in the different jurisdictions, and oftentimes the requisites of the record are prescribed by statute.[58] In some states the record of entry of judgment should show jurisdiction in the court and disclose facts from which it appears that proper proceedings were had in the case to sustain the judgment and sentence.[59] In others, the judgment need contain no recital of the facts upon which it is based, it being sufficient if it sufficiently express that which is adjudged.[60] In some states it is not necessary that the judgment in the minutes repeat the entries that have already been made in the cause,[61] or repeat anything contained in the papers preceding it, as they go into the record and constitute part of it.[62] In determining the sufficiency of the record all parts thereof are to be construed together,[63] though in the absence of a statute no particular form of entry is required.[64]

The judgment entry in all criminal cases where there is a conviction should recite in express words that the defendant is adjudged guilty as found by the jury.[65] The formal expression commonly used in commencing the judgment of the court is "it is considered

58. See the statutes and *Ex parte* Williams, 89 Cal. 421, 26 Pac. 887; Anschincks *v.* State, 43 Tex. 587; Mayfield *v.* State, 40 Tex. 289.

[a] **In California,** the only material parts of a judgment are the statement of the offense, omitting all that is contained in the previous papers, and the sentence of the court. *Ex parte* Williams, 89 Cal. 421, 427, 26 Pac. 887.

59. **Ala.**—Wright *v.* State, 103 Ala. 95, 15 So. 506. **N. J.**—Kolbe *v.* Boonton, 64 N. J. L. 163, 44 Atl. 873; Miller *v.* Camden, 63 N. J. L. 501, 43 Atl. 1069; Keeler *v.* Milledge, 24 N. J. L. 142. **N. Y.**—People *v.* Nash, 38 Misc. 283, 77 N. Y. Supp. 944. **Pa.** Philadelphia *v.* Campbell, 11 Phila. 163. **Wash. Ter.**—Regan *v.* Territory, 1 Wash. Ter. 31. **Wis.**—Benedict *v.* State, 12 Wis. 313.

[a] **In courts of limited and special jurisdiction** all the facts which give the court jurisdiction to impose sentence must appear on the face of the proceedings. Scroggins *v.* State, 55 Ga. 380; Gilbert *v.* State, 17 Ga. App. 143, 86 S. E. 415; Com. *v.* Clauss, 5 Pa. Dist. 658.

[b] **The record of a summary conviction** should show everything necessary to constitute a legal conviction. "It should set out the offense charged and show what ordinance or section of an ordinance, was alleged to have been violated. It should show not only legal notice given, but also whether the defendant was present or absent; and if present, that the complaint was read to him, and his answer to it. It should set out not only the names of the witnesses examined, but at least the substance of the testimony, that the court above may judge of its sufficiency to convict. . . . And it should appear with precision, by the record, of what offense the defendant is convicted." Keeler *v.* Milledge 24 N. J. L. 142.

60. People *v.* Kelly, 120 Cal. 271, 52 Pac. 587. See also Smith *v.* State, 60 Ga. 430; *Ex parte* Salge, 1 Nev. 449.

61. *Ex parte* Williams, 89 Cal. 421, 26 Pac. 887.

62. *Ex parte* Williams, 89 Cal. 421, 26 Pac. 887.

63. People *v.* Barnnovich, 16 Cal. App. 427, 117 Pac. 572; People *v.* Murphy, 188 Ill. 144, 58 N. E. 984; People *v.* Hummel, 170 Ill. App. 571.

64. **Ala.**—Marks *v.* State, 131 Ala. 44, 31 So. 18. **Cal.**—People *v.* Noll, 20 Cal. 164. **Conn.**—Knowles *v.* State, 2 Root 282. **N. D.**—Matter of Schantz, 26 N. D. 380, 144 N. W. 445. **Ore.** Long *v.* Minto, 81 Ore. 281, 158 Pac. 805. **Tex.**—Harris *v.* Stewart, 91 Tex. 133, 41 S. W. 650.

65. Driggers *v.* State, 123 Ala. 46, 26 So. 512. See Walker *v.* State, 12 Ala. App. 229, 67 So. 719.

by the court.''[66] The reasons upon which the judgment is founded need not be stated.[67] And the judgment need not be signed, as a rule.[68]

2. Particular Recitals. — In addition to the sentence,[69] the record should show the offense of which the defendant was convicted,[70] but the elements of the crime,[71] and the particular acts by which the crime was consummated,[72] need not be set forth in the record. In some states it should also appear that the grand jury,[73] and the trial jury[74] were properly impaneled and sworn; that the indictment was returned into open court,[75] that defendant was arraigned and entered his plea;[76]

66. **Ala.**—Roberson *v.* State, 123 Ala. 55, 26 So. 645; Stanfield *v.* State, 3 Ala. App. 54, 57 So. 402. **Fla.** Lovett *v.* State, 29 Fla. 356, 11 So. 172. **La.**—State *ex rel.* Pringle *v.* Lake, 34 La. Ann. 1069.

[a] **But these words need not be used** necessarily. State *ex rel.* Pringle *v.* Lake, 34 La. Ann. 1069.

67. State *ex rel.* Pringle *v.* Lake, 34 La. Ann. 1069.

68. **La.**—State *ex rel.* Pringle *v.* Lake, 34 La. Ann. 1069. **N. J.**—Board of Health *v.* Dickstein (N. J. L.), 67 Atl. 89. **Ore.**—Long *v.* Minto, 81 Ore. 281, 158 Pac. 805.

But see Weed *v.* People, 31 N. Y. 465.

69. *Ex parte* Williams, 89 Cal. 421, 26 Pac. 887; Mayfield *v.* State, 40 Tex. 289. See *supra*, V.

70. **Cal.**—*Ex parte* Bagshaw, 152 Cal. 701, 93 Pac. 864; People *v.* Douglass, 87 Cal. 281, 25 Pac. 417; *Ex parte* Murray, 43 Cal. 455. **Ia.**—Jones *v.* McClaughry, 169 Iowa 281, 151 N. W. 210. **Nev.**—*Ex parte* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603. **N. J.**—Leek *v.* Kreps, 70 N. J. L. 120, 56 Atl. 167. **Pa.**—Com. *ex rel.* Fagan *v.* Francies, 53 Pa. Super. 278. **Tex.** Kiefel *v.* State, 49 Tex. Crim. 308, 94 S. W. 463.

[a] **It need not specifically designate** the offense if the nature thereof appears. Pointer *v.* United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; Demolli *v.* United States, 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424; People *v.* Murphy, 188 Ill. 144, 58 N. E. 984.

71. *Ex parte* Turner, 75 Cal. 226, 16 Pac. 898.

[a] **The place** where (1) the offense was committed need not be stated in the judgment if the place is properly designated in the information. People *v.* Johnson, 88 Cal. 171, 25 Pac. 1116. (2) But a judgment rendered by a justice of the peace which does not show the place of commission of the crime is fatally defective as not showing the jurisdiction of the justice. Thayer *v.* Com., 12 Metc. (Mass.) 9.

72. *In re* Siegel, 263 Mo. 375, 173 S. W. 1, Ann. Cas. 1917C, 684.

73. **Ill.**—People *v.* Gray, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215; Sullivan *v.* People, 156 Ill. 94, 40 N. E. 288. **Mo.**—State *v.* Hurst, 123 Mo. App. 39, 99 S. W. 820. **Miss.** Hardy *v.* State, 96 Miss. 844, 51 So. 460.

[a] **A recital of the form of the oath** is not required. Bruen *v.* People, 206 Ill. 417, 69 N. E. 24.

[b] **That swearing of jury presumed** where record silent, see Holloway *v.* State, 53 Ind. 554; State *v.* Broussard, 133 La. 884, 63 So. 390.

74. Gaston *v.* State, 179 Ala. 1, 60 So. 805; State *v.* King, 28 La. Ann. 425.

[a] **That the trial jurors were good and lawful men** need not be stated. West *v.* State, 22 N. J. L. 212, 229.

75. People *v.* Gray, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215.

76. People *v.* Gray, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215; People *v.* Ezell, 155 Ill. App. 298; State *v.* Hull, 73 Mo. App. 300. See Martinez *v.* State, 69 Tex. Crim. 280, 153 S. W. 886; Wood *v.* State, 37 Tex. Crim. 89, 38 S. W. 623.

[a] **In prosecutions for misdemeanors** where a plea of not guilty may be entered without arraignment it is essential that an entry of such plea appear of record. People *v.* Ezell, 155 Ill. App. 298.

[b] **Upon a plea of guilty** the record should show that the court examined witnesses in order to determine the punishment. Arrano *v.* People, 24 Colo. 233, 49 Pac. 271.

and that he was present whenever his presence was required.[77] The verdict must be recited in some states.[78] The record should show the ceremony of allocution or demand of the defendant what he has to say why judgment should not be pronounced against him, when such ceremony or demand is required,[79] and when upon a plea of guilty the court is required to hear witnesses in aggravation or mitigation of the offense, the record must show a compliance with the statute in some jurisdictions.[80] Some statutes require the fact of a prior conviction, if any, be stated.[81] But the record need not show the evidence taken in order to ascertain the age of the defendant for the purpose of determining the punishment to be imposed,[82] or the place where the trial was had.[83]

E. AMENDMENT OF RECORD. — The right of the courts to amend

77. **Ala.**—Harris *v.* State, 177 Ala. 17, 59 So. 205; Gibson *v.* State, 39 Ala. 693. **Ark.**—Cole *v.* State, 10 Ark. 318, 325. **Cal.**—People *v.* Walker, 132 Cal. 137, 64 Pac. 133. **Ill.**—People *v.* Gray, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215; Harris *v.* People, 130 Ill. 457, 22 N. E. 826. **La.**—State *v.* Davenport, 33 La. Ann. 231. **Miss.** Dyson *v.* State, 26 Miss. 362. **Mo.** State *v.* McClain, 156 Mo. 99, 56 S. W. 731. **Ore.**—State *v.* McDaniel, 70 Ore. 232, 140 Pac. 993. **Pa.**—Dougherty *v.* Com., 69 Pa. 286; Jewell *v.* Com., 22 Pa. 94. **Wis.**—French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

[a] **In prosecutions for a felony** the record must show that the defendant was present at the time of the entry of his plea. State *v.* Moore, 57 W. Va. 146, 49 S. E. 1015.

[b] **Presence at rendition of verdict** should appear. Wells *v.* State, 147 Ala. 140, 41 So. 630; Dougherty *v.* Com., 69 Pa. 286.

[c] **At the time of pronouncing sentence** in felony cases the record must show defendant present. State *v.* McClain, 156 Mo. 99, 56 S. W. 731.

[d] **That defendant was present at every step** of the proceedings need not appear but where the record shows the presence of the defendant at any time of the proceedings his presence will be presumed during the whole of the proceedings. **U. S.**—Peters *v.* United States, 94 Fed. 127, 36 C. C. A. 105. **Ala.**—Dix *v.* State, 147 Ala. 70, 41 So. 924. **Fla.**—Williams *v.* State, 42 Fla. 210, 27 So. 869. **Mich.**—People *v.* Fisher, 144 Mich. 570, 108 N. W. 280.

78. Mills *v.* State, 4 Tex. App. 263; Alexander *v.* State, 4 Tex. App. 261.

79. **Ala.**—Crim *v.* State, 43 Ala. 53; Bryant *v.* State, 13 Ala. App. 206, 68 So. 704. **Fla.**—Mathis *v.* State, 67 Fla. 277, 64 So. 944. **Ind.**—Lillard *v.* State, 151 Ind. 322, 327, 50 N. E. 383. **Md.** Dutton *v.* State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89. **Mo.**—State *v.* Ball, 27 Mo. 324. **Pa.**—Com. *v.* Preston, 188 Pa. 429, 41 Atl. 534.

[a] **Omission Constitutes Reversible Error.**—Territory *v.* Herrera, 11 N. M. 129, 66 Pac. 523.

[b] **Omission Does Not Constitute Reversible Error.**—Lillard *v.* State, 151 Ind. 322, 50 N. E. 383. The omission is not of itself fatal and a ground for reversal in a non-capital case. State *v.* Ball, 27 Mo. 324.

[c] **Presumption on Appeal.**—Where the record does not show that the question was asked, it will be presumed, on appeal, in the absence of a bill of exceptions showing otherwise, that the trial court did all that was required. **Ind.**—Lillard *v.* State, 151 Ind. 322, 50 N. E. 383. **Ohio.**—Carper *v.* State, 27 Ohio St. 572, 579, *following* Bond *v.* State, 23 Ohio St. 349. **Tex.** Johnson *v.* State, 14 Tex. App. 306. But see cases cited *supra*, this note.

80. Arrano *v.* People, 24 Colo. 233, 49 Pac. 271; Turner *v.* State, 17 Tex. App. 587. *Contra*, People *v.* Pennington, 267 Ill. 45, 107 N. E. 871.

81. People *v.* Kelly, 120 Cal. 271, 52 Pac. 587.

[a] **Omission Does Not Render Judgment Void.**—People *v.* Kelly, 120 Cal. 271, 52 Pac. 587.

82. Marx *v.* People, 204 Ill. 248, 68 N. E. 436.

83. West *v.* State, 22 N. J. L. 212.

records in criminal cases by correcting clerical errors and omissions is unquestioned.[84] Accordingly, a record may be amended so as to show the fact of arraignment and entry of plea,[85] the rulings of the court on the plea,[86] the presence of all the jurors at the time of rendition of verdict[87] the presence of the defendant during the trial,[88] or the presence of the defendant at the time of making an order denying a new trial.[89] And a judgment not signed at the term of its rendition may be signed at the succeeding term.[90]

The presence of the defendant at the time of such correction is not necessary.[91]

Time of.— The power of courts to correct clerical errors or omissions generally obtains even after the expiration of the term at which the judgment was rendered.[92] But there is authority to the effect that no correction in the record of a criminal case can be made after the expiration of the term unless the correction is based upon the record itself or a memorandum of the proceedings.[93]

84. **U. S.**—*In re* Welty, 123 Fed. 122. **Ala.**—*Ex parte* Jones, 61 Ala. 399. **Ark.**—Goddard *v.* State, 78 Ark. 226, 95 S. W. 476. **Cal.**—People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61. **Colo.**—Benedict *v.* People, 23 Colo. 126, 46 Pac. 637. **Fla.**—Cooper *v.* State, 47 Fla. 21, 36 So. 53. **Ga.**—Tyler *v.* State, 125 Ga. 46, 53 S. E. 818; Harris *v.* State, 18 Ga. App. 502, 89 S. E. 589. **Idaho.**—State *v.* Watkins, 7 Idaho 35, 59 Pac. 1106. **Ill.**—Knefel *v.* People, 187 Ill. 212, 58 N. E. 388, 79 Am. St. Rep. 217. **Kan.**—State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195. **La.**—State *v.* Valere, 39 La. Ann. 1060, 3 So. 186. **Md.**—Weighorst *v.* State, 7 Md. 442. **Mass.**—Com. *v.* Taylor, 113 Mass. 1. **Miss.**—Williams *v.* State, 4 So. 550. **N. M.**—Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349. **N. Y.**—People *v.* Manganaro, 76 Misc. 293, 137 N. Y. Supp. 82. **N. C.**—State *v.* Craton, 28 N. C. 164. **Ohio.**—Young *v.* State, 6 Ohio 435. **Ore.**—State *v.* Feister, 32 Ore. 254, 50 Pac. 561. **Pa.** Com. *v.* Mayloy, 57 Pa. 291. **Tex.** Collins *v.* State, 39 Tex. Crim. 30, 44 S. W. 846. **Utah.**—People *v.* Calton, 5 Utah 451, 16 Pac. 902. **Va.**—Price *v.* Com., 33 Gratt. (74 Va.) 819, 36 Am. Rep. 797. **Wash.**—State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

85. Knight *v.* State, 70 Ind. 375.

86. Powers *v.* State, 83 Miss. 691, 36 So. 6.

87. Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

88. State *v.* Monceaux, 48 La. Ann. 101, 18 So. 896.

[a] **Even though a motion in arrest** of judgment based upon the error sought to be corrected is made. State *v.* Williams, 28 La. Ann. 310.

89. Olive *v.* State, 34 Fla. 203, 15 So. 925.

90. State *v.* Wyatt, 6 La. Ann. 701.

91. State *v.* Thomas, 111 La. 804, 35 So. 914. But see Cooper *v.* State, 47 Fla. 21, 36 So. 53.

92. **U. S.**—*In re* Welty, 123 Fed. 122. **Ark.**—Hydrick *v.* State, 103 Ark. 4, 145 S. W. 542. **Cal.**—People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61, pending an appeal. **Fla.**—Olive *v.* State, 34 Fla. 203, 15 So. 925. **Idaho.** State *v.* Watkins, 7 Idaho 35, 59 Pac. 1106. **Kan.**—State *v.* Langmade, 101 Kan. 814, 168 Pac. 847; *In re* Black, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331. **La.**—State *v.* Harris, 39 La. Ann. 1105, 3 So. 344. **Mont.**—Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293. **Tex.**—Bennett *v.* State, 80 Tex. Crim. 652, 194 S. W. 145, 148.

93. **Ala.**—Story *v.* State, 178 Ala. 98, 59 So. 480. **Ill.**—People *v.* Miller, 256 Ill. 88, 99 N. E. 873. **Miss.**—McCarthy *v.* State, 56 Miss. 294.

[a] **Thus,** after the expiration of the term at which a case is tried the record cannot be amended so as to show the venue. Belcher *v.* State, 35 Tex. Crim. 168, 32 S. W. 770.

[b] **But where the commitment is omitted,** the record may be amended at a subsequent term by adding the commitment from the minutes of the clerk. State *v.* Taylor, 188 Mo. App. 271, 175 S. W. 130.

Nunc Pro Tunc. — Where a judgment is rendered and the statute directs what it shall contain an omission may be corrected at any time by a nunc pro tunc order supplementing it in accordance with the requirements of the statute.[94]

VIII. ENFORCEMENT OF SENTENCE AND COMMITMENT.

A. NECESSITY OF WARRANT OR MITTIMUS. — It has been held that a mittimus is not necessary when the record shows the order to commit is made in open court.[95]

B. FORM OF COMMITMENT. — **1. On Judgment of Imprisonment.** In some states, judgment or sentence of imprisonment is carried into effect by a mittimus, or warrant of commitment,[96] in other jurisdictions by a certified copy of the entry of the judgment,[97] or by a certificate of conviction.[98]

The commitment should describe the offense[99] of which the defend-

94. State *v.* Taylor, 188 Mo. App. 271, 175 S. W. 130.

95. State *v.* Heathman, Wright (Ohio) 690. See *In re* Richards, 150 Mich. 421, 114 N. W. 348.

96. **Conn.**—Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262. **Mich.**—*In re* Forscutt, 167 Mich. 438, 133 N. W. 315. **Miss.**—*Ex parte* Moody, 104 Miss. 836, 61 So. 741. **N. Y.**—People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460; People *ex rel.* Farley *v.* Crane, 94 App. Div. 397, 88 N. Y. Supp. 343.

[a] **Nature of.**—"A mittimus after conviction is, in criminal cases, similar to an execution after judgment in a civil case. It is final process. It is the carrying into effect the judgment of the court." Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262.

[b] **The warrant or order of commitment** is (1) simply an authority and direction to the marshal to take the prisoner to the penitentiary. Howard *v.* United States, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509; People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460. (2) "That needs not necessarily to be left with the keeper. If he has no other evidence of his authority to detain the prisoner he should have that. But if the officer who brings a prisoner to the penitentiary furnished the keeper with a certified copy of the judgment of the court, then that is sufficient evidence of the keeper's authority, and he needs to have no other." People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460.

[c] **If the prisoner is safely in proper custody,** there is no office for a mittimus to perform. People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460.

[d] **A commitment signed by the judge is sufficient although it is not entered** in the order book. Lee *v.* McClelland, 157 Ind. 84, 60 N. E. 692.

97. **Cal.**—*Ex parte* Gibson, 31 Cal. 619, 91 Am. Dec. 546; *Ex parte* Dobson, 31 Cal. 497; *In re* Nakanishi, 19 Cal. App. 552, 126 Pac. 508. **Kan.** State *v.* Hollon, 22 Kan. 580. **Nev.** State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080. **Ore.**—Long *v.* Minto, 81 Ore. 281, 158 Pac. 805. **Wash.**—State *v.* Hatfield, 66 Wash. 9, 118 Pac. 893, 38 L. R. A. (N. S.) 609.

[a] **An entry of judge on the minute book** signed by the judge is not a record on which the sentence can be executed. Johnson *v.* Com., 4 Ky. L. Rep. 210.

[b] **The judge need not sign** the journal or the certified copy. Long *v.* Minto, 81 Ore. 281, 158 Pac. 805.

98. People *v.* Chamberlain, 92 Misc. 720, 157 N. Y. Supp. 535; People *ex rel.* Snyder *v.* Whitney, 22 Misc. 226, 49 N. Y. Supp. 591.

[a] **The statute prescribes the form** of a certificate of conviction. People *ex rel.* Cook *v.* Pitts, 111 App. Div. 321, 97 N. Y. Supp. 511.

[b] **A certificate of conviction which does not contain** a statement of the magistrate showing his jurisdiction to render judgment and is not certified by him or the clerk of the county cannot operate as a commitment. People *ex rel.* Snyder *v.* Whitney, 22 Misc. 226, 49 N. Y. Supp. 591.

99. **Ark.**—*Ex parte* Rohe, 5 Ark. 104. **La.**—State *v.* Collins, 130 La. 993, 58 So. 855. **Mich.**—Brownell *v.* People, 38

ant has been convicted, and set forth the term of imprisonment.[1]

Seal. — Where the commitment is issued by a magistrate his omission to affix his seal to the commitment does not render it void.[2]

Defects and Their Cure. — A prisoner who has been properly and legally sentenced to prison cannot be released simply because of defects in the mittimus.[3] Defects of form may be cured by amendment,[4] and sometimes resort may be had to the record itself to ascertain what the sentence of the court was.[5]

2. On Sentence of Death. — When a sentence or judgment of death is rendered, a warrant signed by the judge,[6] designating the date of the execution,[7] and requiring the sheriff to deliver the defendant to the warden for execution,[8] must, in some states, be delivered to the

Mich. 732. **Minn.**—State *v.* Hoolihan, 104 Minn. 63, 115 N. W. 1037. **Nev.** *Ex parte* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603. **N. Y.**—People *ex rel.* Cooney *v.* Wood, 66 N. Y. Supp. 1123. **Vt.**—*In re* Rogers, 75 Vt. 329, 55 Atl. 661; *In re* Thayer, 69 Vt. 314, 37 Atl. 1042, under statute.

[a] **Where the defendant is sentenced for several offenses** the order of commitment should state each sentence separately. *In re* McLaughlin, 58 Vt. 136, 4 Atl. 862.

[b] **A description of the offense in general terms** (1) is sufficient. People *ex rel.* Cooney *v.* Wood, 66 N. Y. Supp. 1123; *In re* Thayer, 69 Vt. 314, 37 Atl. 1042. (2) Misdemeanor of petty larceny is a sufficient description of the offense. People *ex rel.* Loughlin *v.* Finn, 87 N. Y. 533.

[c] **A certificate of judgment should specify the date of the commission** of the crime for which defendant is convicted. *In re* Brown, 19 Misc. 692, 44 N. Y. Supp. 1096.

1. **U. S.**—Erwin *v.* United States, 37 Fed. 470, 2 L. R. A. 229. **Kan.**—*In re* Howard, 72 Kan. 273, 83 Pac. 1032. **R. I.**—Kenney *v.* State, 5 R. I. 385.

[a] **Certainty Required.**—An order of commitment reciting that the defendant shall be confined to the penitentiary until discharged in due course of law is void for uncertainty. *Ex parte* Howard, 72 Kan. 273, 83 Pac. 1032.

[b] **But the date on which the imprisonment should terminate** should not be stated. Gordon *v.* Wolfe, 6 Phil. Isl. 76.

2. Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533.

3. **U. S.**—Howard *v.* United States, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509. **La.**—State *v.* Collins, 130 La. 993, 58 So. 855. **Mass.**—Sennott *v.* Swan, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344. **N. Y.**—People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460.

[a] **The reason** is the imprisonment rests upon the judgment, not the mittimus. Sennott *v.* Swan, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344.

4. **Conn.**—Scott *v.* Spiegel, 67 Conn. 349, 360, 35 Atl. 262. **Mich.**—*In re* Forscutt, 167 Mich. 438, 133 N. W. 315. **Vt.**—*In re* Thayer, 69 Vt. 314, 37 Atl. 1042.

5. *In re* Rhodus, 6 Hawaii 343.

6. Cal. Pen. Code, §1217.

[a] **Where the statute prescribes the manner of execution,** a warrant directing that the defendant be executed in the manner prescribed by law is sufficient. People *v.* Trezza, 128 N. Y. 529, 28 N. E. 533.

[b] **A direction to the warden** to execute the defendant does not render the warrant void. People *v.* Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88.

[c] **The warrant is issued by the governor** in some states. State *v.* Hollingsworth, 132 Iowa 471, 109 N. W. 1003; State *v.* Holong, 38 Minn. 368, 37 N. W. 587.

7. People *v.* Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88.

[a] **Where the power to fix the day of execution in case of a death sentence is conferred by the statute on the governor,** the day of execution cannot be fixed in the warrant of commitment. Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. 202.

[b] **And where the governor refuses to fix the day of execution** the court has no power to do so. *In re* Dyer, 56 Kan. 489, 43 Pac. 783.

8. People *v.* Chew Lan Ong, 141

sheriff. If, for any reason, the judgment of death is not executed at the time designated, the court is authorized to make another order of execution, fixing another date.[9]

3. On Judgment for a Fine. — If the judgment is for a fine, some statutes provide that execution may be issued thereon, as on a judgment in a civil action.[10]

C. ISSUANCE. — The mittimus or warrant of commitment may be issued by the clerk.[11] It need not be issued on the day of rendition of judgment,[12] and may be issued even after the expiration of the term.[13] But it cannot issue while a motion for a new trial is pending.[14]

It is not necessary that at the time of making the order of commitment the defendant should be in actual custody of the sheriff.[15] Nor is the presence of the defendant required at the time of the issuance of the commitment,[16] or of the death warrant.[17]

If the prisoner escapes before the expiration of the term of imprisonment, a new award of execution is not necessary or proper.[18]

D. STAYING OR SUSPENDING ENFORCEMENT. — The right to a stay of enforcement of the sentence is elsewhere discussed in this work.[19]

E. REVIEW. — The issuance of a warrant of execution is not a

Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88.

9. **Ariz.**—Rodriguez *v.* Sims, 18 Ariz. 74, 156 Pac. 94. **Cal.**—People *v.* Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88; People *v.* Durrant, 119 Cal. 201, 51 Pac. 185. **N. Y.** Haggerty *v.* People, 53 N. Y. 476; People *ex rel.* Patrick *v.* Frost, 135 App. Div. 701, 119 N. Y. Supp. 857.

See also the title "**Review.**"

[a] **The statute requires the defendant's presence** (1) when a new date is fixed. People *v.* Sing Lum, 61 Cal. 538; People *v.* Sprague, 54 Cal. 92. (2) But where the record does not show that he was absent, he will be presumed to have been present. People *v.* Sing Lum, 61 Cal. 538.

10. See Cal. Pen Code, §1214, and the title "**Penalties, Forfeitures and Fines.**"

11. **Conn.**—Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262. **Me.**—Tuttle *v.* Lang, 100 Me. 123, 60 Atl. 892. **Vt.** State *v.* Webb, 89 Vt. 326, 95 Atl. 892.

[a] **The justice of the peace, as clerk of his own court, may issue a mittimus.** Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262.

12. Mann *v.* People, 16 Colo. App. 475, 66 Pac. 452.

[a] **A commitment consisting only of a certified copy of the judgment** may be issued immediately upon pronouncing judgment. In Matter of Robbins, 27 Cal. App. 677, 151 Pac. 14.

[b] **While it is the duty of a justice of the peace, if a defendant does not immediately** pay a fine, adjudged against him, to commit him to jail, he may do so thereafter. Pritchett *v.* Cox, 154 Ind. 108, 56 N. E. 20.

13. Morgan *v.* Adams, 226 Fed. 719, 141 C. C. A. 475; Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262.

[a] **Issuance Nunc Pro Tunc.**—*In re* Richards, 150 Mich. 421, 114 N. W. 348.

14. *Ex parte* Huffman, 181 Ind. 241, 104 N. E. 511.

15. Turner *v.* Wilson, 49 Ind. 581; *In re* Moore, 14 Ohio C. C. 237.

16. People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670.

17. People *v.* Flannelly, 128 Cal. 83, 94, 60 Pac. 670.

Otherwise where new date is fixed, see *supra*, VIII, B, 2.

18. Haggerty *v.* People, 53 N. Y. 476. *Compare* VIII, B, 2, where time for execution of the sentence of death passes without execution.

19. See the title "**Supersedeas and Stay of Proceedings.**"

As to staying imposition of sentence, see *supra*, III, B.

judicial order from which an appeal may be taken.[20]

20. People *v.* Flannelly, 128 Cal. 83, 89, 60 Pac. 670, *overruling* People *v.* Ebanks, 117 Cal. 652, 666, 49 Pac. 1049, 40 L. R. A. 269.

SEPARATE MAINTENANCE. — See **Husband and Wife.**

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CROSS-REFERENCES:

Accessories and Accomplices;	Severance;
Consolidation of Actions;	Successive Suits;
Joinder of Actions;	Trial.

Separate verdicts, where there is no severance, see the title "Verdict."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. IN CRIMINAL PROSECUTIONS. — A. UNDER SINGLE INDICTMENT OR INFORMATION. — 1. **Generally.** — Unless the statute otherwise provides,[1] granting or refusing separate trial to defendants jointly charged with the commission of an offense is discretionary with the court,[2] unless it be shown that a joint trial will so clearly be seriously prejudicial to one of the parties as to require a separate trial as to him to prevent injustice.[3] Prima facie, joint defendants should be tried jointly.[4]

Misdemeanors and Felonies. — In some states, a severance is a matter of right in felony cases, but a matter of discretion as to misdemeanors,[5] although in other states, the granting or refusing of the motion for severance is discretionary with the court even in capital cases.[6]

Waiver. — The right to a separate trial is one that may be waived.[7]

1. See generally the statutes and **Ark.**—McDonald *v.* State, 104 Ark. 317, 149 S. W. 95. **Colo.**—Cook *v.* People, 56 Colo. 477, 483, 138 Pac. 756. **Ky.** Hoffman *v.* Com., 134 Ky. 726, 121 S. W. 690. **Tex.**—Crawford *v.* State (Tex. Crim.), 74 S. W. 552; Teiman *v.* State, 28 Tex. App. 144, 12 S. W. 742. **Wash.**—State *v.* Moran, 66 Wash. 588, 120 Pac. 86.

[a] **A statute providing for separate trial of defendants jointly indicted** does not include a case where joint defendants are proceeded against by information. Lawrence *v.* State, 10 Ind. 453.

[b] **But after one severance has been allowed,** any further severance is within the discretion of the court. Felder *v.* State, 9 Ala. App. 48, 64 So. 162.

2. **U. S.**—Heike *v.* United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. ed. 450, Ann. Cas. 1914C, 128; Schwartzberg *v.* United States, 241 Fed. 348, 154 C. C. A. 228; United States *v.* Gibert, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. **Ala.**—Burkett *v.* State, 154 Ala. 19, 45 So. 682; Parmer *v.* State, 41 Ala. 416. **Conn.**—State *v.* Brauneis, 84 Conn. 222, 79 Atl. 70. **Fla.**—Ballard *v.* State, 31 Fla. 266, 12 So. 865. **Haw.**—Territory *v.* Robello, 20 Hawaii 7. **Idaho.**—State *v.* Smith, 30 Idaho 337, 164 Pac. 519; State *v.* Allen, 23 Idaho 772, 131 Pac. 1112. **Ill.**—Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 398, 3 Am. St. Rep. 320. **La.**—State *v.* Johnson, 116 La. 856, 41 So. 117; State *v.* Adam, 105 La. 737, 30 So. 101; State *v.* Lee, 46 La. Ann. 623, 628, 15 So. 159. **Mass.**—Com. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; Com. *v.* Thompson, 108 Mass. 461. **Miss.**—Mask *v.* State, 32 Miss. 405. **Mo.**—Fitzgerald *v.* State, 14 Mo. 413. **N. J.**—Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408. **N. M.**—Territory *v.* Clark, 15 N. M. 35, 99 Pac. 697. **N. C.**—State *v.* Kirkland, 175 N. C. 770, 94 S. E. 725; State *v.* Carrawan, 142 N. C. 575, 54 S. E. 1002; State *v.* Moore, 120 N. C. 570, 26 S. E. 697. **Pa.**—Com. *v.* Mulcahy, 24 Pa. Dist. 699. **R. I.**—State *v.* Ballou, 20 R. I. 607, 40 Atl. 861; Anthony *v.* State, 2 R. I. 305. **S. C.**—State *v.* Mitchell, 49 S. C. 410, 27 S. E. 424. **Vt.**—State *v.* Meaker, 54 Vt. 112. **Wis.** Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

[a] **This discretion is not an arbitrary** discretion. Caldwell *v.* State, 34 Ga. 10.

3. Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

4. Com. *v.* James, 99 Mass. 438; Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

5. **Ia.**—State *v.* Jamison, 110 Iowa 337, 81 N. W. 594. **Kan.**—State *v.* Davis, 67 Kan. 545, 73 Pac. 87. **Neb.** Reed *v.* State, 93 Neb. 163, 139 N. W. 1015. **Okla.**—Payne *v.* State, 10 Okla. Crim. 314, 136 Pac. 201; Irvine *v.* State, 10 Okla. Crim. 4, 133 Pac. 259; Bates *v.* State, 8 Okla. Crim. 436, 128 Pac. 163, Ann. Cas. 1914C, 400.

6. Anthony *v.* State, 2 R. I. 305.

7. State *v.* Madden, 90 Kan. 736, 136 Pac. 327, Ann. Cas. 1915B, 800; Hullinger *v.* State, 25 Ohio St. 441.

The waiver may be implied from the conduct of the parties,[8] as by failing to request a severance,[9] or by a failure to exercise the right in time.[10]

2. Grounds for Separate Trials. — Where from the nature of the case it appears that a joint trial will probably be prejudicial to the rights of one or more of the parties, a request for a separate trial should be granted.[11] Accordingly, a separate trial may be allowed, in the discretion of the court, when the defenses of the different parties are antagonistic,[12] or where evidence introduceable against one is not admissible against others.[13] But a severance will not be granted because one of the defendants is not ready for trial.[14]

Where one of several codefendants makes a confession, which the prosecution intends to offer on the trial, the court may, in its discretion, grant a separate trial.[15]

Where the defendants sever in their pleas, a severance may be allowed in the discretion of the court,[16] but it is not a matter of right.[17]

Testimony of Codefendant. — The court in its discretion may award

8. Hullinger *v.* State, 25 Ohio St. 441.

9. McDonald *v.* State, 104 Ark. 317, 149 S. W. 95; State *v.* Johns, 259 Mo. 361, 168 S. W. 587.

10. Miller *v.* State, 130 Ala. 1, 30 So. 379.

Waiver by tardy application, see *supra,* I, A, 4.

[a] **The right is not waived by failing to exercise it until** (1) the day of the trial (Reed *v.* State, 93 Neb. 163, 139 N. W. 1015; Nichols *v.* Territory, 3 Okla. 622, 41 Pac. 108), (2) although it has been held a waiver will be implied from the exercise of the right of challenge during the impaneling of the jury. Hullinger *v.* State, 25 Ohio St. 441.

11. State *v.* Brauneis, 84 Conn. 222, 79 Atl. 70; Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

12. **Conn.**—State *v.* Brauneis, 84 Conn. 222, 79 Atl. 70. **Fla.**—Ballard *v.* State, 31 Fla. 266, 278, 12 So. 865. **La.**—State *v.* Taylor, 45 La. Ann. 605, 12 So. 927. **Okla.**—Frazee *v.* State, 12 Okla. Crim. 134, 152 Pac. 462. **Wis.** Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

[a] **But the mere fact that the defendants have antagonistic defenses** does not show that the court abused its discretion in denying the application for a severance. State *v.* Johnson, 116 La. 856, 41 So. 117.

13. **Colo.**—Cook *v.* People, 56 Colo. 477, 483, 138 Pac. 756; Moore *v.* People, 31 Colo. 336, 73 Pac. 30; Davis *v.* People, 22 Colo. 1, 43 Pac. 122, statute so provides. **Conn.**—State *v.* Brauneis, 84 Conn. 222, 79 Atl. 70. **Ill.**—Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250. **Okla.**—Gonzalus *v.* State, 7 Okla. Crim. 444, 123 Pac. 705. **Tenn.** Watson *v.* State, 16 Lea 604. **Wis.** Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

14. Ballard *v.* State, 31 Fla. 266, 12 So. 865.

15. **D. C.**—Maxey *v.* United States, 30 App. Cas. 63, 71. **La.**—State *v.* Taylor, 45 La. Ann. 605, 12 So. 927. *Compare* State *v.* Johnson, 116 La. 856, 41 So. 117, holding the reason of the rule seems to have been removed by Act 185, p. 355 of 1902. **Mass.**—Com. *v.* Borasky, 214 Mass. 313, 101 N. E. 377.

[a] **Where the court limits the evidence to one of the defendants,** a denial of the motion for separate trials is not an abuse of discretion. People *v.* Hotz, 261 Ill. 239, 255, 103 N. E. 1007.

[b] **If the confession be competent evidence** against the defendant in case he is tried separately, the application may be denied. Novkovic *v.* State, 149 Wis. 665, 135 N. W. 465.

16. Thompson *v.* State, 25 Ala. 41; State *v.* Taylor, 45 La. Ann. 605, 12 So. 927.

Compare Calloway *v.* State, 103 Ala. 27, 15 So. 821, a plea of guilty by one defendant when the others plead not guilty operates as a severance.

17. State *v.* Taylor, 45 La. Ann. 605, 12 So. 927.

separate trials to enable the applicant to avail himself of his co-defendant as a witness,[18] but where the codefendants may be called as witnesses on behalf of each other, a severance may be denied.[19]

Testimony of Wife. — When the testimony of the wife of one defendant is material to the defense of a codefendant, a severance may be granted on the motion of the person seeking the benefit of such testimony,[20] but some courts hold that a severance should not be granted on this ground.[21]

The failure to arrest one of the defendants jointly indicted authorizes a separate trial of the others.[22]

If one of the defendants has been committed to an insane asylum, a severance may be ordered.[23]

The fact that one defendant would prefer to accept jurors another would challenge is not sufficient to authorize a severance.[24]

3. Who May Apply for. — At common law the prosecution could ask for separate trials of those jointly indicted,[25] subject to the discretion of the court,[26] and it may do so under the modern practice, although the statute is silent as to the right.[27] The defendants, of course, may request a severance.[28]

18. **U. S.**—United States *v.* Davis, 25 Fed. Cas. No. 14,931. But see United States *v.* Gibert, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. **Idaho.**—State *v.* Allen, 23 Idaho 772, 131 Pac 1112, discretion not abused in denying motion. **Mich.**—People *v.* McCullough, 81 Mich. 25, 34, 45 N. W. 515. **R. I.** Anthony *v.* State, 2 R. I. 305. **Tex.** See Sewall *v.* State, 67 Tex. Crim. 105, 148 S. W. 569.

[a] **Where the principal and his accessories** are jointly indicted. State *v.* Leonard, 6 La. Ann. 420.

Competency of co-defendants as witnesses when separately tried, see 3 ENCY. OF EV. 211.

19. State *v.* Phenix, 134 La. 329, 64 So. 129.

20. Com. *v.* Easland, 1 Mass. 15; Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

[a] **But a denial of a separate trial** on this ground is not the subject of exception. Com. *v.* Robinson, 1 Gray (Mass.) 555.

21. State *v.* Smith, 5 Penne. (Del.) 1, 57 Atl. 368.

22. **Ala.**—Wright *v.* State, 108 Ala. 60, 18 So. 941. **Pa.**—Com. *v.* Stambaugh, 22 Pa. Super. 386. **Wash.**—State *v.* Merchant, 48 Wash. 69, 92 Pac. 890.

23. Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

24. Ballard *v.* State, 31 Fla. 266, 278, 12 So. 865; State *v.* Johnson, 116 La. 856, 41 So. 117.

25. Payne *v.* State, 10 Okla. Crim. 314, 136 Pac. 201.

26. Hoffman *v.* Com., 134 Ky. 726, 121 S. W. 690. See *supra*, I, A, 1.

27. **Ala.**—Wilkins *v.* State, 112 Ala. 55, 21 So. 56; Felder *v.* State, 9 Ala. App. 48, 64 So. 162. **Ind.**—Woodsmall *v.* State, 181 Ind. 613, 105 N. E. 155, 809. **Ky.**—Jenkins *v.* Com., 167 Ky. 544, 180 S. W. 961; Hoffman *v.* Com., 134 Ky. 726, 121 S. W. 690. **Okla.** Payne *v.* State, 10 Okla. Crim. 314, 136 Pac. 201. **W. Va.**—State *v.* Barrick, 60 W. Va. 576, 55 S. E. 652; State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

28. **Fla.**—Ballard *v.* State, 31 Fla. 266, 12 So. 865. **Ky.**—Jenkins *v.* Com., 167 Ky. 544, 180 S. W. 961. **Tex.** Berry *v.* State, 4 Tex. App. 492. **Wash.** State *v.* Mason, 19 Wash. 94, 52 Pac. 525.

[a] *Compare* Payne *v.* State, 10 Okla. Crim. 314, 136 Pac. 201, where under a statute which provides that, in cases other than felonies, "defendants jointly prosecuted may be tried separately or jointly, in the discretion of the court"—the court adds—"where the state asks it," and holds that otherwise the court may not order a severance.

[b] **At common law,** parties jointly indicted might sever. Forcey *v.* State, 29 Tex. App. 408, 16 S. W. 261.

The court, of its own motion, may order a separate trial,[29] but will not do so when the severance is based upon facts required to be shown by affidavit.[30]

4. When Application Made. — Generally the statutes do not limit the time within which the application for a severance must be made.[31] The application need not necessarily be made before the cause is assigned for trial.[32] But the application may be denied in the discretion of the court,[33] if it is not made before the trial is begun,[34] before the jury is impanelled,[35] and sworn,[36] or before the introduction of any evidence.[37] The matter is sometimes regulated by rules of court.[38]

5. General Requisites of Application. — As a general rule, an application for a severance must be supported by an affidavit showing the facts upon which the application is based.[39]

29. **Ind.**—Shular *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211. **Ky.**—Hoffman *v.* Com., 134 Ky. 726, 734, 121 S. W. 690. **N. J.**—Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

30. Cook *v.* People, 56 Colo. 477, 483, 138 Pac. 756.

31. See the statutes and the following: **Kan.**—State *v.* Madden, 90 Kan. 736, 136 Pac. 327, Ann. Cas. 1915B, 800. **Neb.**—Reed *v.* State, 93 Neb. 163, 139 N. W. 1015. **Wash.**—State *v.* Moran, 66 Wash. 588, 120 Pac. 86.

32. State *v.* Moran, 66 Wash. 588, 120 Pac. 86, limiting State *v.* Mason, 19 Wash. 94, 52 Pac. 525. See Hill *v.* State, 2 Yerg. (Tenn.) 246, if made after plea, the defendant must show a good cause for separate trial intervening between the time of pleading and the trial.

33. State *v.* Madden, 90 Kan. 736, 136 Pac. 327, Ann. Cas. 1915B, 800; Marta *v.* State (Tex. Crim.), 193 S. W. 323.

34. **Ind.**—McJunkins *v.* State, 10 Ind. 140. **Kan.**—State *v.* Madden, 90 Kan. 736, 136 Pac. 327, Ann. Cas. 1915B, 800. **Tex.**—Hooper *v.* State, 72 Tex. Crim. 82, 160 S. W. 1187.

[a] **The trial commences,** within the rule, from the time the parties have announced ready for trial and the work of empaneling the jury begins. Nichols *v.* Territory, 3 Okla. 622, 41 Pac. 108.

35. **Ga.**—Trowbridge *v.* State, 74 Ga. 431. **Ky.**—Radley *v.* Com., 121 Ky. 506, 89 S. W. 519. **Nev.**—State *v.* Johnny, 29 Nev. 203, 217, 87 Pac. 3; State *v.* McLane, 15 Nev. 345. **Okla.** Nichols *v.* Territory, 3 Okla. 622, 41 Pac. 108. **Tex.**—Crawford *v.* State (Tex. Crim.), 74 S. W. 552. **Wash.** State *v.* Bush, 41 Wash. 13, 82 Pac. 1024; State *v.* Mason, 19 Wash. 94, 52 Pac. 525.

[a] **After the impaneling of the jury has been begun,** the application should not be entertained. Steen *v.* State, 4 Okla. Crim. 309, 111 Pac. 1097; State *v.* McLane, 15 Nev. 345.

[b] **After a juror has been challenged,** an application comes too late. Hullinger *v.* State, 25 Ohio St. 441.

36. **Ill.**—People *v.* Anderson, 239 Ill. 168, 87 N. E. 917, unless it is based upon something which came to the knowledge of the party afterwards. **Tex.**—Hooper *v.* State, 72 Tex. Crim. 82, 160 S. W. 1187. **Wash.**—State *v.* Bush, 41 Wash. 13, 82 Pac. 1024.

But see Babcock *v.* People, 15 Hun (N. Y.) 347.

37. McJunkins *v.* State, 10 Ind. 140.

38. See *infra*, this note.

[a] **In Alabama,** the rules of court require the application to be made in capital cases before the defendants have been arraigned and pleaded, or at the latest, when the court sets a day for the trial and makes an order to summon a special venire. Rogers *v.* State, 166 Ala. 10, 52 So. 33; Hudson *v.* State, 137 Ala. 60, 34 So. 854; Miller *v.* State, 130 Ala. 1, 30 So. 379; Givens *v.* State, 109 Ala. 39, 19 So. 974.

39. **Colo.**—Moore *v.* People, 31 Colo. 336, 73 Pac. 30. **La.**—State *v.* Simon, 115 La. 732, 39 So. 971. **Tenn.**—Mitchell *v.* State, 92 Tenn. 668, 23 S. W. 68.

[a] But see Ryan *v.* State, 64 Tex. Crim. 628, 142 S. W. 878, holding that

A motion by one of two persons jointly indicted for a change of venue as to him alone, necessarily involves and includes a motion for a separate trial.[40]

6. The Order Granting or Refusing. — Failure to make and enter a formal order directing a severance will not vitiate the proceedings.[41]

7. Proceedings After Severance and Order of Trial. — Separate trials having been granted, the order thereof is ordinarily in the discretion of the state's attorney,[42] or of the court.[43]

The records of the several cases after the separation, are to be kept separate and distinct.[44] If a separate trial has been granted after witnesses or jurors have been sworn, they must be resworn.[45]

8. Review. — Where there is no statute making a severance a matter of right, it has been held that a denial of the application of a defendant is not assignable as error.[46] Other courts hold that the discretion of the court is not reviewable except in case of gross abuse.[47] There is no error in a separate trial of a defendant, simply because the record does not show that the state asked a separate trial.[48]

B. CONSOLIDATING PROSECUTIONS. — **1. Several Prosecutions Against a Single Defendant.** — As a general rule, a court may in the exercise of its discretion,[49] when the just administration of criminal justice will be thereby subserved, consolidate or try together several indictments against the same defendant charging offenses which

under Art. 707 which specifies no grounds upon which a severance may be granted, no affidavit is required.

[b] **That the evidence is of the character** specified in the statute must be shown. Moore *v.* People, 31 Colo. 336, 73 Pac. 30.

[c] **Wherein the defenses are antagonistic** must be stated. State *v.* Simon, 115 La. 732, 39 So. 971.

40. Jones *v.* State, 152 Ind. 318, 53 N. E. 222; Shular *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Brown *v.* State, 18 Ohio St. 496, 509.

41. State *v.* Thaden, 43 Minn. 325, 45 N. W. 614.

42. **Ga.**—Winkle *v.* State, 20 Ga. 666; Dixon *v.* State, 12 Ga. App. 17, 76 S. E. 794. **Ia.**—State *v.* Hudson, 50 Iowa 157. **Pa.**—Shay *v.* Com., 36 Pa. 305.

[a] **The election of the state is not final,** and may be withdrawn. Dixon *v.* State, 12 Ga. App. 17, 76 S. E. 794.

Agreement of defendants separately indicted as to order of trial, see the title "Trial."

43. Anderson *v.* State, 8 Okla. Crim. 90, 126 Pac. 840, Ann. Cas. 1914C, 314; Ryan *v.* State, 64 Tex. Crim. 628, 142 S. W. 878, under Art. 706 of the code.

44. Noland *v.* State, 19 Ohio 131.

45. Babcock *v.* People, 15 Hun (N. Y.) 347.

46. **Ala.**—Thompson *v.* State, 25 Ala. 41, 46. **Ill.**—Maton *v.* People, 15 Ill. 536. **Mass.**—Com. *v.* Robinson, 1 Gray 555.

47. **U. S.**—Heike *v.* United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. ed. 450, Ann. Cas. 1914C, 128. **Ga.** Caldwell *v.* State, 34 Ga. 10. **N. C.** State *v.* Carrawon, 142 N. C. 575, 54 S. E. 1002. **Tenn.**—Watson *v.* State, 16 Lea 604. **Wis.**—Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

48. State *v.* Barrick, 60 W. Va. 576, 55 S. E. 652.

49. Brown *v.* United States, 143 Fed. 60, 74 C. C. A. 214; Withers *v.* Com., 5 Serg. & R. (Pa.) 59.

[a] **The power shall be exercised with caution** lest the defendant be confounded in his defense or otherwise prejudiced thereby, and if at any time in the course of such a trial it is discovered that it tends to prejudice any substantial right of the defendant the court should compel the prosecutor to elect upon which indictment he will

may be joined in the same indictment.[50] It may do so in the absence of statute so providing,[51] and, it has been held, over the defendant's objection.[52] This rule has been recognized by statutes in some jurisdictions, which, after providing what offenses may be joined,[53] expressly provide that if two or more indictments or informations are filed in such cases, the court may order them to be consolidated.[54] This proceeding is not permitted in some states, over the objection of the defendant,[55] but it is permissible if he requests or expressly consents to the consolidation.[56]

The consolidation has the effect of placing all indictments in the same category as if they were separate counts of one indictment;[57] and it

proceed. Brown *v.* United States, 143 Fed. 60, 74 C. C. A. 214.

50. **Ill.**—People *v.* Jacobson, 247 Ill. 394, 93 N. E. 417. **Mass.**—Com. *v.* Rosenthal, 211 Mass. 50, 97 N. E. 609, Ann. Cas. 1913A, 1003, 47 L. R. A. (N. S.) 955. **N. C.**—State *v.* Stephens, 170 N. C. 745, 87 S. E. 131; State *v.* McNeill, 93 N. C. 552. **Pa.**—Withers *v.* Com., 5 Serg. & R. 59.

[a] **Where the two indictments are founded upon substantially one transaction** and are provable largely by the same evidence, they may be tried together, over the protest of the defendant. The rule in Com. *v.* Bickum, 153 Mass. 386, 26 N. E. 1003, that a defendant against his objection cannot be tried at one time upon two separate indictments charging two distinct crimes committed at different times, will not be extended beyond cases exactly covered by it. Com. *v.* Rosenthal, 211 Mass. 50, 97 N. E. 609, Ann. Cas. 1913A, 1003, 47 L. R. A. (N. S.) 955.

Offenses which may be joined, see 12 STANDARD PROC. 519.

51. **U. S.**—Brown *v.* United States, 143 Fed. 60, 74 C. C. A. 214. **Colo.** See Cummins *v.* People, 4 Colo. App. 71, 34 Pac. 734. **Pa.**—Withers *v.* Com., 5 Serg. & R. 59.

52. State *v.* Stephens, 170 N. C. 745, 87 S. E. 131; State *v.* McNeill, 93 N. C. 552.

53. **Offenses which may be joined,** see 12 STANDARD PROC. 519.

54. See the statutes and **U. S.**—Williams *v.* United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. ed. 509; McElroy *v.* United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 355; Ryan *v.* United States, 216 Fed. 13, 132 C. C. A. 257; Brown *v.* United States, 143 Fed. 60, 74 C. C. A. 214. **Colo.**—Wood *v.* People, 60 Colo. 211, 151 Pac. 941; Trozzo *v.* People, 51 Colo. 323, 117 Pac. 150; Cummins *v.* People, 4 Colo. App. 71, 34 Pac. 734. **D. C.**—Miller *v.* United States, 38 App. Cas. 361, 40 L. R. A. (N. S.) 973.

[a] **The Statute Is But an Embodiment of a Well Established Principle of the Common Law.**—Cummins *v.* People, 4 Colo. App. 71, 74, 34 Pac. 734.

[b] **The court has a sound discretion** as to the consolidation under the statute. Lemon *v.* United States, 164 Fed. 953, 958, 90 C. C. A. 617; Dolan *v.* United States, 133 Fed. 440, 69 C. C. A. 274.

55. Davis *v.* State, 118 Ark. 31, 175 S. W. 1168; McClellan *v.* State, 32 Ark. 609.

56. Lucas *v.* State, 144 Ala. 63, 39 So. 821, 3 L. R. A. (N. S.) 412; Setzer *v.* State, 110 Ark. 226, 161 S. W. 190; Halley *v.* State, 108 Ark. 224, 158 S. W. 121. But see McClellan *v.* State, 32 Ark. 609, disapproving the practice even though defendant consents.

[a] **Implied Consent.**—Where the record is silent as to the consent or objection of the defendant, he must be held to have waived the irregularity, and where the record does not disclose prejudice he cannot complain. Silvie *v.* State, 117 Ark. 108, 173 S. W. 857.

57. McElroy *v.* United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 355; Porter *v.* United States, 91 Fed. 494, 33 C. C. A. 652; Miller *v.* United States, 38 App. Cas. (D. C.) 361, 40 L. R. A. (N. S.) 973.

[a] **One Sentence.**—The trial together of two indictments with or without an order of consolidation does not make them one indictment charging a single offense, and therefore subject the defendant to only one sentence on both. *In re* Haynes, 30 Fed. 767.

is subject to the right of the defendant to move to quash in the case of inconsistent counts,[58] and the power of the court to compel the prosecution to elect which count or indictment it will insist upon.[59]

2. Prosecution Against Several Defendants. — Under the statutes in some jurisdictions, defendants separately indicted for offenses arising from the same transaction may be tried jointly.[60] This procedure has been approved without reference to statutes,[61] especially where the defendants expressly consent thereto.[62] But if the defendants object, it has been held that the consolidation cannot be ordered.[63]

C. ISSUE OF INSANITY. — The necessity or propriety of a separate trial to determine the issue of sanity is treated elsewhere in this work.[64]

II. IN CIVIL ACTIONS. — A. OF DIFFERENT DEFENDANTS. — **1. Power and Discretion of the Court.** — Trial courts have the power,[65] in the exercise of their discretion,[66] to direct separate trials between the plaintiff and any or all of several defendants in a civil action, whenever justice will be thereby promoted. This power is sometimes recognized by statute.[67]

2. Grounds for Separate Trials. — Separate trials may be awarded, in the discretion of the court, where the defendants have filed separate defenses,[68] when one of the defendants desires to avail himself of the

58. State *v.* McNeill, 93 N. C. 552. See generally 12 STANDARD PROC. 67.

59. Brown *v.* United States, 143 Fed. 60, 74 C. C. A. 214; State *v.* McNeill, 93 N. C. 552. See generally 12 STANDARD PROC. 670, and 687.

60. Haynes *v.* United States, 101 Fed. 817, 42 C. C. A. 34.

61. Com. *v.* Seeley, 167 Mass. 163, 45 N. E. 91; Com. *v.* Hartman, 31 Pa. Super. 364. See also McAnear *v.* State, 43 Tex. Crim. 518, 67 S. W. 117.

62. McDonald *v.* State, 104 Ark. 317, 149 S. W. 95.

[a] **The defendants cannot complain,** if the consolidation is ordered on their motion. Halley *v.* State, 108 Ark. 224, 158 S. W. 121; Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

63. Halley *v.* State, 108 Ark. 224, 158 S. W. 121.

64. See the title "**Insane Persons,**" and particularly 13 STANDARD PROC. 549, 624.

65. Bell *v.* Woodward, 32 N. H. 64.

66. **Colo.**—Saint *v.* Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320. **Ga.**—See Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52. **Ia.**—Pearse *v.* Balm, 152 Iowa 422, 132 N. W. 821; Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; Kilbourne, Jenkins & Co. *v.* Jennings & Co., 40 Iowa 473. **Kan.**—Hoskinson *v.* Bagby, 46 Kan. 758, 27 Pac. 110; Gregg *v.* Berkshire, 10 Kan. App. 579, 62 Pac. 550. **La.**—Clement *v.* Wafer, 12 La. Ann. 599. **Mont.**—Haupt *v.* Simington, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839. **N. H.**—Meloon *v.* Read, 73 N. H. 153, 59 Atl. 946; Story *v.* Concord & M. R. R., 70 N. H. 364, 48 Atl. 288. **N. Y.**—National Exchange Bank *v.* McFarlan, 59 Hun 618, 13 N. Y. Supp. 202, 36 N. Y. St. 703; Hill *v.* Alvord, 19 Hun 77. **N. C.**—Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510. **Okla.**—Herbert *v.* Wagg, 27 Okla. 674, 117 Pac. 209.

67. See the statutes and the following: **Ia.**—Pearse *v.* Balm, 152 Iowa 422, 132 N. W. 821. **Kan.**—Hoskinson *v.* Bagby, 46 Kan. 758, 27 Pac. 110; Gregg *v.* Berkshire, 10 Kan. App. 579, 62 Pac. 550. **N. Y.**—George *v.* Grant, 56 How. Pr. 244; Burnee *v.* Hoxie, 29 Barb. 547. **Okla.**—Herbert *v.* Wagg, 27 Okla. 674, 117 Pac. 209. **Wis.**—Nichols *v.* Crittenden, 74 Wis. 459, 43 N. W. 105.

68. Bell *v.* Woodward, 32 N. H. 64; Eames *v.* Stevens, 26 N. H. 117; Gurnee *v.* Hoxie, 29 Barb. (N. Y.) 547.

[a] **But the mere fact that a defendant sets up a different defense** from that set up by other defendants does not entitle him to a separate

testimony of his codefendant who is incompetent to testify on a joint trial,[69] when evidence admissible against one defendant is not admissible as against the other, and would prejudice the latter on a joint trial,[70] and when of the codefendants goes into insolvency.[71]

In ejectment, trespass to try title, or similar action against a number of persons in possession of separate parts of a tract of land, who claim under distinct sources of title, and have no common interest, the court may order separate trials.[72]

3. Application for Separate Trials. — An application for a separate trial may be made by motion,[73] presented at a proper time,[74] or the court may order separate trials on its own motion in a proper case.[75]

4. Effect of Order Granting Separate Trials and Proceedings Thereafter. — It has been held that the effect of granting separate trials as to different defendants is to sever the action, and divide it into a number of distinct actions,[76] each of which must thereafter proceed as an independent action,[77] and be followed by its own judgment.[78] Another service of summons is not necessary.[79]

trial, as a matter of right. Haupt *v.* Simington, 27 Mont. 480 71 Pac. 672, 94 Am. St. Rep. 839. See Williams *v.* Soutter, 7 Iowa 435, 441.

[b] **But if the cause of action is joint,** a separate trial cannot be ordered. Nichols *v.* Crittenden, 74 Wis. 459, 43 N. W. 105.

[c] **But demurrers** by different defendants should be tried together. George *v.* Grant, 56 How. Pr. (N. Y.) 244.

69. Bell *v.* Woodward, 32 N. H. 64.

[a] **But if the codefendant is a competent witness,** separate trials should not be directed. Dougherty *v.* Dorsey, 4 Bibb (Ky.) 207; Hill *v.* Alvord, 19 Hun (N. Y.) 77.

70. National Exchange Bank *v.* McFarlan, 59 Hun 618, 13 N. Y. Supp. 202, 36 N. Y. St. 703.

71. Kennedy *v.* Doyle, 10 Allen (Mass.) 161.

72. **Cal.**—Judson *v.* Malloy, 40 Cal. 299. **N. C.**—Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510. **Okla.**—Mullen *v.* Carter, 173 Pac. 512. **Tex.**—Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531; Ballard *v.* Perry's Admr., 28 Tex. 347. **Wis.**—See Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

73. Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510.

[a] **The defendants or any of them** may make the motion. Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510.

74. See *infra*, this note.

[a] **After the close of the adverse party's case** it is too late to move for a separate trial. Williams *v.* Soutter, 7 Iowa 435.

75. See *infra*, this note.

[a] **In Ejectment.**—Judson *v.* Malloy, 40 Cal. 299; Mullen *v.* Carter (Okla.), 173 Pac. 512.

76. Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510. See the title "**Severance.**"

77. Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510.

[a] **Pending an appeal** by one defendant from the judgment against him, the court may proceed with the trial of the others. Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

[b] **Security for Costs.** — "It is proper that every defendant should be required to proceed in the same way, or to make the same provision as to securing the costs of trying the issues involving his own title and possession as if he had been the sole defendant." Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510.

[c] **Separate records** should thereafter be kept. Eikenberry *v.* Edwards, 71 Iowa 82, 32 N. W. 183.

78. Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

79. Hodges *v.* Wilmington & W. R. Co., 105 N. C. 170, 10 S. E. 917.

B. Of Separate Issues in Same Action. — **1. Generally.**[80] — Although the general rule is that the parties must present all their evidence on all the issues pending and cannot as of right have a trial divided,[81] the trial court has discretionary power to direct separate trials as to different issues, where the nature of the issues on the pleadings require them.[82] This rule is sometimes incorporated into statutes.[83] As a general rule, however, issues of law should be tried

80. **New trial as to part of the cause,** see 20 Standard Proc. 406.

81. **Conn.**—Ladany *v.* Assad, 91 Conn. 316, 99 Atl. 762. **Mass.**—Langley *v.* Conlan, 212 Mass. 135, 98 N. E. 1064, Ann. Cas. 1913C, 421. **Minn.** Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207.

[a] **The action, including a counterclaim, should be tried as an entirety,** not as separate suits. Miller *v.* McGannon, 79 Neb. 609, 113 N. W. 170.

[b] **Where the parties consent,** separate trials of the issues are permissible. Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207.

82. **U. S.**—Lebensberger *v.* Scofield, 139 Fed. 380, 71 C. C. A. 476. **Mo.** Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717; Estes *v.* Fry, 166 Mo. 70, 65 S. W. 741; McFarland *v.* Missouri Pac. Ry. Co., 125 Mo. 253, 28 S. W. 590 (under §1971 of Rev. St. 1909); Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630. **N. H.**—Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547. **N. C.**—McAuley *v.* Sloan, 173 N. C. 80, 91 S. E. 701. **S. C.** Du Bose *v.* Kell, 76 S. C. 313, 56 S. E. 968. **Tex.**—Nixon *v.* Jacobs, 22 Tex. Civ. App. 97, 53 S. W. 595. **Wis.**—See Charron *v.* Northwestern Fuel Co., 143 Wis. 437, 128 N. W. 75.

[a] **The court's discretion should be judicially,** and perhaps sparingly exercised. McGurty *v.* Delaware, L. & W. R. Co., 172 App. Div. 46, 158 N. Y. Supp. 285; Smith *v.* Western Pacific Ry. Co., 144 App. Div. 180, 128 N. Y. Supp. 966.

[b] **The litigants must be given an opportunity to fully present their cause** of action or defense. Sliney *v.* Davis, 11 Colo. App. 480, 53 Pac. 686.

[c] **An issue as to the question of partnership** may be tried before the trial of the main case in the discretion of the court. Franklin *v.* Leiter, 149 App. Div. 678, 134 N. Y. Supp. 399; Dixon Livery Co. *v.* Bond, 117 Va. 656, 86 S. E. 106, L. R. A. 1916A, 1211.

[d] **The question as to a release** of damages may be tried first and separately. Charron *v.* Northwestern Fuel Co., 143 Wis. 437, 128 N. W. 75. See also Linker *v.* Jamison, 173 App. Div. 349, 159 N. Y. Supp. 469; Arbutina *v.* Pittsburg Contr. Co., 168 App. Div. 280, 153 N. Y. Supp. 1027.

[e] **On subsequent trials,** a separate trial of issues may be granted, although no severance on previous trials was had. Franklin *v.* Leiter, 149 App. Div. 678, 134 N. Y. Supp. 399.

83. Mann *v.* Doerr, 222 Mo. 1, 121 S. W. 86; McFarland *v.* Missouri Pac. Ry. Co., 125 Mo. 253, 28 S. W. 590; Needles *v.* Burk, 98 Mo. 474, 11 S. W. 1008 (separate trials may be directed when there are several causes of action united in the petition, or when there are several issues); N. Y. Code Civ. Proc., §973; Smith *v.* Western Pac. R. Co., 203 N. Y. 499, 96 N. E. 1130, Ann. Cas. 1913B, 264, 40 L. R. A. (N. S.) 137; McGurty *v.* Delaware, L. & W. R. Co., 172 App. Div. 46, 158 N. Y. Supp. 285; Reich *v.* Cochran, 171 App. Div. 113, 157 N. Y. Supp. 130; Cohen *v.* Rothschild, 162 App. Div. 611, 147 N. Y. Supp. 915.

[a] "**In general,** the application of the statute will doubtless be found to be most useful and beneficial if confined to the trial of pleas in bar such as the statute of limitations, pleas to the jurisdiction and in some cases to pleas of a former adjudication. In short, the section can be most usefully applied to the case of an issue which if determined in one way will end the litigation and render a trial upon the merits unnecessary. It should also appear that the plea to be tried is one which has a reasonable basis to rest upon, and is not interposed merely for delay, and it should also be one which can be tried and disposed of without involving the trial of the merits." Smith *v.* Western Pacific R. Co., 144 App. Div. 180, 128 N. Y. Supp. 996, *affirmed,* 203 N. Y. 499, 96 N. E. 1106, Ann. Cas. 1913B,

before issues of fact,[84] and matters in abatement should be heard before the cause is tried on the merits.[85]

Where legal and equitable causes of action are joined,[86] or where legal and equitable defenses are interposed,[87] if a jury trial as to the legal issues is not waived,[88] there should be separate trials of the legal and equitable issues, subject to the rules and principles elsewhere discussed,[89] unless the right to a separate trial is waived by failure to request it.[90] The order of trial in such case is discretionary with the court, to be determined by the exigencies of the particular case.[91] But the equitable issue should be tried first when it consists of a claim for affirmative equitable relief set up in the answer or reply,[92]

264, 40 L. R. A. (N. S.) 137, *quoted* in Reich *v.* Cochran, 171 App. Div. 113, 157 N. Y. Supp. 130, and in Commercial Trust Co. *v.* Columbia Trust Co., 183 App. Div. 106, 170 N. Y. Supp. 552.

84. **Cal.**—Brooks *v.* Douglass, 32 Cal. 208. **Colo.**—Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303. **La.**—Minden *v.* Stewart, 142 La. 467, 77 So. 118. **Me.**—Stewart *v.* Smith, 98 Me. 104, 56 Atl. 401. **N. Y.**—Pittstown Overseers of Poor *v.* Plattsburgh Overseers of Poor, 15 Johns. 398. **Tex.**—Zacharie *v.* Bryan, 2 Tex. 276. **Vt.**—Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

[a] **But in the discretion of the court,** a plea of privilege may be submitted to the jury with the main case. Caswell *v.* Hopson (Tex. Civ. App.), 47 S. W. 54.

Waiver of demurrer by participating in a trial on the merits, see 6 STANDARD PROC. 1011.

Effect of ruling on demurrer, where issues joined on other parts of the pleading remain, see 6 STANDARD PROC. 993.

85. See 1 STANDARD PROC. 68.

86. Mann *v.* Doerr, 222 Mo. 1, 121 S. W. 86; Crowe *v.* Peters, 63 Mo. 429; McHoney *v.* German Ins. Co., 44 Mo. App. 426.

But where an equitable issue incidental to the main issue is involved, the action is triable by jury. See 16 STANDARD PROC. 882.

87. Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660.

Where legal and equitable defenses are pleaded, see 16 STANDARD PROC. 888.

88. See 16 STANDARD PROC. 913, 925.

89. See 16 STANDARD PROC. 882.

90. Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660.

91. **Minn.**—Crosby *v.* Scott-Graff Lumb. Co., 93 Minn. 475, 101 N. W. 610. **N. Y.**—See Thomas *v.* Bronx Realty Co., 60 App. Div. 365, 70 N. Y. Supp. 206. **S. C.**—McCreery Land & Inv. Co. *v.* Myers, 70 S. C. 282, 49 S. E. 848; Knox *v.* Campbell, 52 S. C. 461, 30 S. E. 485. **Wis.**—Haubner *v.* Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578. **Wyo.**—See Wolbol *v.* Steinhoff, 25 Wyo. 227, 168 Pac. 251, 170 Pac. 381.

Compare 16 STANDARD PROC. 888.

92. **U. S.**—Union Pacific R. Co. *v.* Syas, 246 Fed. 561, 158 C. C. A. 531. **Cal.**—Swasey *v.* Adair, 88 Cal. 179, 25 Pac. 1119. **Mo.**—Martin *v.* Turnbaugh, 153 Mo. 172, 186, 54 S. W. 515. **N. Y.** Johnson *v.* Johnson, 157 App. Div. 289, 142 N. Y. Supp. 416; Brody, Adler & Koch Co. *v.* Hochstader, 150 App. Div. 527, 135 N. Y. Supp. 550. **N. D.**—Cotton *v.* Butterfield, 14 N. D. 465, 105 N. W. 236. **Wash.**—Nolan *v.* Pacific Warehouse Co., 67 Wash. 173, 121 Pac. 451, Ann. Cas. 1913D, 167.

[a] **The equitable defense which** must be first tried "is properly an equitable right of action existing in behalf of the defendant which he might have asserted in an independent suit brought by him against the plaintiff for the purpose of enforcing such right, but which under our system he can also rely upon as a defense in an action involving the same subject-matter brought against him by the plaintiff." Swasey *v.* Adair, 88 Cal. 179, 182, 25 Pac. 1119.

[b] **Thus if the answer asks a reformation** of the instrument sued on, that issue should be first tried. Winn *v.* Farmers' Mut. Fire Ins. Co., 83 Mo. App. 123; Ward *v.* Union Trust Co., 166 App. Div. 762, 152 N. Y. Supp. 237.

[c] **Characterizing a defense as an**

or when the trial of the equitable issue would dispose of the case.[93]

2. Application for Separate Trials. — A party desiring separate trials of different issues should move, in advance of the trial,[94] for an order directing separate trials of the separate issues in the appropriate forum.[95]

3. Proceedings After Separate Trials Ordered. — When there are separate trials of different causes of action or issues in a case, there must be separate findings,[96] but only one judgment can be rendered.[97]

equitable counterclaim does not entitle the defendant to have the issues thereon tried in advance of the other issues, if it is not in fact a counterclaim. Deiches *v.* Western Development Co., 157 App. Div. 674, 142 N. Y. Supp. 932.

[d] **If the counterclaim is in fact legal** rather than equitable it need not be tried first. White *v.* Shonts, 154 App. Div. 428, 139 N. Y. Supp. 169.

[e] **But a Failure To Try the Equitable Issue First Is Mere Irregularity.**—American Nat. Bank *v.* Donnellan, 170 Cal. 9, 148 Pac. 188, Ann. Cas. 1917C, 744.

93. Cal.—Swasey *v.* Adair, 88 Cal. 179, 25 Pac. 1119; Martin *v.* Zellerbach, 38 Cal. 300, 319, 99 Am. Dec. 365; Weber *v.* Marshall, 19 Cal. 447. **Ia.**—Morris *v.* Merritt, 52 Iowa 496, 3 N. W. 504. **N. Y.**—Rubenstein *v.* Radt, 133 App. Div. 57, 117 N. Y. Supp. 893. **N. D.**—See Cotton *v.* Butterfield, 14 N. D. 465, 105 N. W. 236, limiting Arnett *v.* Smith, 11 N. D. 55, 88 N. W. 1037. **S. C.**—Oliver *v.* McWhirter, 96 S. E. 140; Du Bose *v.* Kell, 76 S. C. 313, 56 S. E. 968; Greig *v.* Rice, 66 S. C. 171, 44 S. E. 729. **Utah.**—Kimball *v.* McIntyre, 3 Utah 77, 1 Pac. 167.

94. New York *v.* Matthews, 156 App. Div. 490, 141 N. Y. Supp. 432.

95. Wasserman *v.* Taubin, 129 App. Div. 691, 114 N. Y. Supp. 447.

96. McHoney *v.* German Ins. Co., 44 Mo. App. 426.

97. Mann *v.* Doerr, 222 Mo. 1, 121 S. W. 86; McHoney *v.* German Ins. Co., 44 Mo. App. 426.

[a] "**The judgment** on each separate finding shall await the trial of all the issues." Mann *v.* Doerr, 222 Mo. 1, 121 S. W. 86, quoting the statute.

[b] **Legal and equitable causes of action,** when joined in the complaint, must be separately stated and separately tried. There must be separate findings and presumably separate judgments, although it would seem that the decree in equity is interlocutory, since but one final judgment in a case is allowed. McHoney *v.* German Ins. Co., 44 Mo. App. 426.

As to plurality of judgments, see 14 STANDARD PROC. 1015; 15 STANDARD PROC. 88.

SEPARATION. — See **Divorce; Husband and Wife; Marriage.**

SEQUESTRATION

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CROSS-REFERENCES:

Attachment;
Garnishment;
Judgments and Decrees, Enforcement of;
Receivers.

For forms see 9 STANDARD PROC. 1122.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. NATURE, PURPOSE AND SCOPE. — A. GENERALLY. — Sequestration is a process for the taking of property to secure the enforcement of orders and judgments.[1] It is used either for the purpose of preserving the property in controversy during the pendency of an action,[2] being similar in this aspect to an attachment,[3] or receivership,[4] or it is a means to enforce execution of judgments and decrees.[5] It may be used also as a mesne process against a party in contempt of court for the purpose of compelling obedience.[6] The process originated in the English equity practice,[7] and may be issued by

1. **U. S.**—Baldwin *v.* Black, 119 U. S. 643, 7 Sup. Ct. 326, 30 L. ed. 530. **Ga.** Ryan *v.* Kingsberry, 88 Ga. 361, 14 S. E. 596. **La.**—Pitot *v.* Elmes, 1 Mart. O. S. 78. **Mo.**—Roberts *v.* Stoner, 18 Mo. 481. **N. Y.**—Farmers' L. & T. Co. *v.* Baker, 20 Misc. 387, 46 N. Y. Supp. 266. **Pa.**—Reid *v.* Northwestern R. Co., 32 Pa. 257. **Tex.**—Fowler *v.* Stonum, 6 Tex. 60.

2. **U. S.**—Baldwin *v.* Black, 119 U. S. 643, 7 Sup. Ct. 326, 30 L. ed. 530; Shufeldt *v.* Jenkins, 22 Fed. 359; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138. **Ga.**—Claflin *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108. **Ia.** Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978. **La.**—Young *v.* Guess, 115 La. 230, 38 So. 975; Gay & Co. *v.* Eaton, 27 La. Ann. 166; Breed *v.* Repsher, 4 Mart. O. S. 187. **Md.**—Keighler *v.* Ward, 8 Md. 254. **Miss.**—Dean *v.* Boyd, 86 Miss. 204, 38 So. 297; Day *v.* Hartman, 74 Miss. 489, 21 So. 302. **N. C.**—Parker *v.* Grammer, 62 N. C. 28; McDaniel *v.* Stoker, 40 N. C. 274. **Pa.**—Cornelius *v.* Lincoln Nat. Bank, 15 Pa. Super. 82. **Tex.**—Blum *v.* Gaines, 57 Tex. 135; Bullock *v.* Traweek (Tex. Civ. App.), 20 S. W. 724. **Va.**—Perkins' Trustee *v.* Dickinson, 3 Gratt. (44 Va.) 335. **Wis.**—Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

3. **U. S.**—Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 23. **La.** American Furniture Co. *v.* Grant-Jung Furn. Co., 50 La. Ann. 931, 24 So. 182; Fink *v.* Martin, 10 Rob. 147. **N. Y.** Farmers' L. & T. Co. *v.* Baker, 20 Misc. 387, 46 N. Y. Supp. 266. **Tex.**—Fowler *v.* Stonum, 6 Tex. 60.

[a] The writ of sequestration is an "attachment to create a lien." Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 583, 21 Blatchf. 138.

4. Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547. See the title "Receivers."

5. **U. S.**—Tompkins *v.* Little Rock & Ft. S. R. Co., 15 Fed. 6. **Md.**—Keighler *v.* Ward, 8 Md. 254. **Mass.**—Grew *v.* Breed, 12 Metc. 363, 46 Am. Dec. 687. **Mo.**—Roberts *v.* Stoner, 18 Mo. 481. **N. H.**—Raynes *v.* Raynes, 54 N. H. 201. **N. Y.**—Geery *v.* Geery, 63 N. Y. 252. **Pa.**—Holliday *v.* Bruner, 153 Pa. 262, 25 Atl. 1128; Reid *v.* Northwestern R. Co., 32 Pa. 257; Gordon *v.* Ingraham, 32 Pa. 214, 1 Grant Cas. 152. **Wis.** Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Enforcement of decrees, see 6 STANDARD PROC. 788; decrees for alimony, see 7 STANDARD PROC. 836, et seq.

[a] **Sequestration of corporate property to satisfy fine** for contempt. Franklin Union No. 4 *v.* People, 220 Ill. 355, 370, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001.

[b] **Sequestration more effective than execution** and binds from the time of awarding the commission and not from the time of executing it. Wood *v.* Price, 79 N. J. Eq. 620, 81 Atl. 983, Ann. Cas. 1913A, 1210, 38 L. R. A. (N. S.) 772.

6. **Md.**—Keighler *v.* Ward, 8 Md. 254. **Mass.**—McCann *v.* Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666. **N. M.**—*In re* Jaramillo, 8 N. M. 598, 45 Pac. 1110. **Va.**—Ross *v.* Colville, 3 Call (7 Va.) 382.

Compare Manning *v.* Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725.

[a] **Jurisdiction of the Person Essential.**—McCann *v.* Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666.

7. See Manning *v.* Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725; Keighler *v.* Ward, 8 Md. 254.

[a] **As to sequestration in England,** see Hulbert *v.* Cathcart, [1896] A. C. 470, 75 L. T. N. S. 302, 65 L. J. Q. B. 644, 24 Eng. Rul. Cas. 33, and note.

courts of equity independent of an express statute authorizing it.[8]

Statutes sometimes provide for the issuance of a writ of sequestration pendente lite,[9] or as mesne process to compel appearance,[10] or after judgment upon return of an execution against a corporation unsatisfied,[11] or in order to apply its earnings to the satisfaction of a judgment where its property is essential to the exercise of its public franchise and is therefore exempt from execution.[12]

Statutes authorizing the issuance of writs of sequestration must be strictly construed.[13] But wherever such writ is authorized by a state statute it may be issued by federal courts in such state.[14]

B. PROPERTY SUBJECT TO. — Although it has sometimes been questioned whether choses in action are liable to sequestration[15] unless

8. U. S.—Shufeldt *v.* Jenkins, 22 Fed. 359; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138. **Ala.**—Steele *v.* Walker, 115 Ala. 485, 21 So. 942, 67 Am. St. Rep. 62. **Ga.** Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108. **Ia.**—Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978. **Md.**—See Keighler *v.* Ward, 8 Md. 254. **Miss.** Dean *v.* Boyd, 86 Miss. 204, 38 So. 297; Day *v.* Hartman, 74 Miss. 489, 21 So. 302. **N. C.**—Parker *v.* Grammer, 62 N. C. 28; McDaniel *v.* Stoker, 40 N. C. 274. **Pa.**—Cornelius *v.* Lincoln Nat. Bank, 15 Pa. Super. 82. **Va.**—Perkins' Trustee *v.* Dickinson, 3 Gratt. (44 Va.) 335.

Compare Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, holding that sequestration does not lie independent of statute.

9. State *ex rel.* Des Allemands Co. *v.* Allen, 110 La. 853, 34 So. 804; Gay & Co. *v.* Eaton, 27 La. Ann. 166; Coats *v.* Elliott, 23 Tex. 606. See *infra*, III.

10. Wood *v.* Price, 79 N. J. Eq. 620, 81 Atl. 983, Ann. Cas. 1913A, 1210, 38 L. R. A. (N. S.) 772.

11. Mass.—Atlas Bank *v.* Nahant Bank, 23 Pick. 480. **Mich.**—Miner *v.* Michigan Mut. Ben. Assn., 65 Mich. 84, 31 N. W. 763. **Minn.**—McKusick *v.* Seymour, S. & Co., 48 Minn. 172, 50 N. W. 1116; Arthur *v.* Willius, 44 Minn. 409, 46 N. W. 851. **N. Y.**—Hunting *v.* Blun, 143 N. Y. 511, 38 N. E. 716; Whittlesey *v.* Frantz, 74 N. Y. 456; Geery *v.* Geery, 63 N. Y. 252. **Pa.** Reid *v.* Northwestern R. Co., 32 Pa. 257. **Wis.**—Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185.

[a] **Stockholders' liability** may be enforced in the same proceeding in addition to the sequestration of the corporate assets. McKusick *v.* Seymour, S. & Co., 48 Minn. 158, 50 N. W. 1114.

12. U. S.—Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687. **Mich.**—Cook *v.* Detroit & M. R. Co., 45 Mich. 453, 8 N. W. 74. **N. J.**—Spear *v.* Locust W. Cemetery Co., 72 N. J. Eq. 821, 66 Atl. 1068. **Pa.**—Penrose *v.* Erie Canal Co., 56 Pa. 46, 93 Am. Dec. 778.

[a] **Turnpike Road.**—Winchester & L. Tp. Road Co. *v.* Vimont, 5 B. Mon. (Ky.) 1.

[b] **Bridge Company.** — Overton Bridge Co. *v.* Means, 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514.

[c] **Cemetery Lands.**—Spear *v.* Locust W. Cem. Co., 72 N. J. Eq. 821, 66 Atl. 1068.

[d] **Rule held not applicable** to unfinished railroad. Muncy Ry. Co. *v.* Hill, 84 Pa. 459.

13. Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; Pasley *v.* McConnell, 37 La. Ann. 552; Catlett *v.* Heffner, 23 La. Ann. 577; Vela *v.* Guena, 75 Tex. 595, 12 S. W. 1127; Houston *v.* Booth (Tex. Civ. App.), 107 S. W. 887; Bullock *v.* Traweek (Tex. Civ. App.), 20 S. W. 724.

14. Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138; Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8; 20 Blatchf. 23.

15. Gordon *v.* Inghram, 32 Pa. 214, 1 Grant Cas. 152; Miller *v.* Huddlestone, 22 Ch. Div. 231, 52 L. J. Ch. 208, 47 L. T. N. S. 570, 31 Wkly. Rep. 138; M'Carthy *v.* Goold, 1 Ball & B. (Eng.) 387; Johnson *v.* Chippindall, 2 Sim. 55, 57 Eng. Reprint 711.

the party holding them consents,[16] there can be no objection to it on principle,[17] and they,[18] as well as all other kinds of property of every description,[19] may properly be sequestered.

C. THIRD PARTY CLAIMS. — The remedy where property of a third party is seized upon sequestration process is by an examination pro interesse suo,[20] which is had upon proper application by petition or motion[21] of the third party himself,[22] or of the one seeking the sequestration.[23]

II. PROCEDURE IN EQUITY. — A. APPLICATION. — **1. How Made.** — The writ of sequestration in equity is procured upon application to the court by petition[24] or motion[25] of the parties entitled to the process.

2. Form and Contents. — Such application must disclose a proper ground for the issuance of the writ,[26] stating with certainty[27] the facts upon which the applicant relies.[28]

Verification and Affidavits. — A petition for sequestration should be duly verified,[29] and where the application for the process is made by motion, it is usually necessary to accompany the same by supporting affidavits.[30]

16. Gordon *v.* Inghram, 32 Pa. 214, 1 Grant Cas. 152.

17. White *v.* Geraerdt, 1 Edw. Ch. (N. Y.) 336.

18. **Del.**—Hayes *v.* Hayes, 4 Del. Ch. 20. **Mass.**—Grew *v.* Breed, 12 Metc. 363, 46 Am. Dec. 687. **N. Y.**—Devoe *v.* Ithaca & O. R. Co., 5 Paige 521; White *v.* Geraerdt, 1 Edw. Ch. 336.

19. Foster *v.* Townshend, 68 N. Y. 203, 2 Abb. N. C. 29; Coulston *v.* Gardiner, 3 Swanst. 279n, 36 Eng. Reprint 863; Hide *v.* Petit, 1 Ch. Cas. 91, 2 Freem. 125, 168, 22 Eng. Reprint 1101, 1135; Hyde *v.* Greenhill, Dick. 106, 21 Eng. Reprint 208.

[a] **Only the rents and profits of real estate** may be sequestered. Foster *v.* Townshend, 68 N. Y. 203, 2 Abb. N. C. 29; Sutton *v.* Stone, Dick. 107, 21 Eng. Reprint 209.

20. **N. Y.**—Foster *v.* Townshend, 68 N. Y. 203, 2 Abb. N. C. 29. **Pa.**—Gordon *v.* Inghram, 32 Pa. 214, 1 Grant Cas. 152. **Eng.**—Pelham *v.* Newcastle, 3 Swanst. 284n, 36 Eng. Reprint 865, 867, 868, 869.

21. Gordon *v.* Inghram, 32 Pa. 214, 1 Grant Cas. 152; Angel *v.* Smith, 9 Ves. Jr. 335, 32 Eng. Reprint 632; Hunt *v.* Priest, Dick. 540, 21 Eng. Reprint 380.

22. **N. Y.**—Foster *v.* Townshend, 68 N. Y. 203, 2 Abb. N. C. 29. **Pa.**—Gordon *v.* Inghram, 32 Pa. 214, 1 Grant Cas. 152. **Eng.**—Dixon *v.* Smith, 1 Swanst. 457, 36 Eng. Reprint 464; Hunt *v.* Priest, Dick. 540, 21 Eng. Reprint 380.

23. Foster *v.* Townshend, 68 N. Y. 203, 2 Abb. N. C. 29; Hamblyn *v.* Ley, 3 Swanst. 301n, 36 Eng. Reprint 872.

24. **N. Y.**—Devoe *v.* Ithaca & O. R. Co., 5 Paige 521; Corning *v.* Mohawk Valley Ins. Co., 11 How. Pr. 190. **N. C.** Howell *v.* Howell, 38 N. C. 522. **Pa.** Lewis's Estate, 170 Pa. 376, 32 Atl. 1046. **Vt.**—French *v.* Winsor, 36 Vt. 412.

25. Hayes *v.* Hayes, 4 Del. Ch. 20; Snow *v.* Bolton, 17 Ch. Div. (Eng.) 433.

26. Mercer *v.* Byrd, 57 N. C. 358; Clagon *v.* Veasey, 42 N. C. 173; Howell *v.* Howell, 38 N. C. 522.

27. See generally the title **"Certainty in Pleading."**

[a] **It should state positively** "the existence of the facts on which the application was grounded, or if only matter of *belief*, the grounds of the belief, that the court might judge whether it was a rational and well founded belief or an idle and vain one." Edwards *v.* Massey, 8 N. C. 359.

28. Devoe *v.* Ithaca & O. R. Co., 5 Paige (N. Y.) 521; Edwards *v.* Massey, 8 N. C. 359.

29. Devoe *v.* Ithaca & O. R. Co., 5 Paige (N. Y.) 521.

30. Hayes *v.* Hayes, 4 Del. Ch. 20. See generally, 20 STANDARD PROC. 29.

B. NOTICE. — As in other applications for orders,[31] proper notice of the petition or motion should be given to the adversary.[32] The court is not justified in issuing the writ upon an ex parte application.[34]

III. SEQUESTRATION PENDENTE LITE UNDER STATUTE.

A. GENERALLY. — By the statutes of Louisiana and Texas, sequestration pendente lite is provided for.[35]

B. WHEN AVAILABLE. — The remedy of sequestration so provided for is available only under the conditions specified in the statute.[36]

Ownership, Lien, or Privilege. — The writ may be issued only where a party claims ownership[37] or possession[38] of property, or a specific lien thereon.[39] Where ownership is relied on, the title must be in the applicant for the writ at the time of filing such application and a subsequently acquired title will not validate the proceedings.[40] The asserted lien may be based upon a tort,[41] or upon a debt which has not yet matured.[42]

Danger of Loss. — It is essential to the issuance of a writ of sequestration pendente lite that there be danger of a violation of a property right.[43] Hence there must be an apprehension either of loss,[44]

31. See the title "**Notice,**" and see 20 STANDARD PROC. 20.

32. Devoe *v.* Ithaca & O. R. Co., 5 Paige (N. Y.) 521.

34. Devoe *v.* Ithaca & O. R. Co., 5 Paige (N. Y.) 521.

35. See *infra*, this section.

36. See the statutes and *infra*, this section.

37. Lannes *v.* Courege, 31 La. Ann. 74; Blum *v.* Gaines, 57 Tex. 135; Nunn *v.* Raby (Tex. Civ. App.), 158 S. W. 187; Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

[a] **Ownership of an undivided interest** in property. Lannes *v.* Courege, 31 La. Ann. 74; Segur *v.* Sorel, 11 La. 439.

[b] **Consignee of Goods.**—Sonia Cotton Oil Co. *v.* Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

38. Baldwin Lumber Co. *v.* Delfares, 130 La. 712, 58 So. 519; Lannes *v.* Courege, 31 La. Ann. 74.

39. **Ia.**—Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978. **La.**—American Nat. Bank *v.* Childs, 49 La. Ann. 1359, 22 So. 384; Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97; Welton *v.* Burton, 27 La. Ann. 448; Baer *v.* Kopfler, 19 La. Ann. 194. **Tex.** Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638; Simpson *v.* Lee (Tex. Civ. App.), 34 S. W. 1053.

[a] **Vendor of Personal Property.** Wall *v.* Hardwood Mfg. Co., 127 La. 959, 54 So. 300; Daugherty *v.* Vance's Exrx., 30 La. Ann. 1246.

[b] **But a vendee prior to payment** of purchase price has no right to sequestration. Farr *v.* Davis, 5 La. Ann. 28.

[c] **Common carrier** under statute giving him a lien for freight charges. Mississippi Valley Transp. Co. *v.* Fosdick & Co., Man. Unrep. Cas. (La.) 3.

[d] **Farm manager** having privilege on crop. Smith *v.* Smith, 2 La. Ann. 447.

[e] **Funds of a creditor in hands of a third party** cannot be sequestered where the creditor has no lien on the funds. Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978.

[f] **Funds of a city on deposit** in a bank cannot be sequestered on a claim against the city. Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97.

40. Yale, J. & Co. *v.* Stevenson, 23 La. Ann. 143.

41. Blum *v.* Gaines, 57 Tex. 135.

[a] **Property purchased with money stolen** from plaintiff. Pirtle *v.* Price, 31 La. Ann. 357.

42. Catlett *v.* Heffner, 23 La. Ann. 577.

43. Young *v.* Guess, 115 La. 230, 38 So. 975; Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547; Gumbel & Co. *v.* Beer, 36 La. Ann. 484.

44. Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

[a] **The selling of the property by**

waste,[45] or removal[46] of the property from the jurisdiction of the court, and such apprehension must be based upon reasonable grounds.[47] Mere grounds of suspicion will not authorize the issuance of such writ.[48]

C. Parties Entitled to Writ. — A writ of sequestration may be applied for by plaintiff,[49] cross-complainant,[50] or intervenor.[51] The fact that the party entitled to the writ is a non-resident,[52] or a foreign corporation,[53] does not affect the right to sequestration.

D. Property Subject to Sequestration. — Both real[54] and personal[55] property may be sequestered.[56] Partnership property may be sequestered where a partner sues for a settlement of the partnership.[57] Where a corporation is dissolved, its property may be sequestered pendente lite.[58]

E. Proceedings for Issuance of Writ. — **1. Jurisdiction and Venue.** — The court issuing the writ must have jurisdiction over the subject matter.[59] The writ may be issued in the county wherein the

the defendants, though in due course of business, affords a basis for the issuance of a writ of sequestration. Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881.

45. Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Benton's Succession, 106 La. 494, 31 So. 123; Duncan *v.* Jouett (Tex. Civ. App.), 111 S. W. 981; Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

46. Sonia Cotton Oil Co. *v.* Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293; Boatner *v.* Wade, 14 La. Ann. 695; Anderson *v.* Stille, 12 La. Ann. 669; Sellick *v.* Kelly, 11 Rob. (La.) 145; Bledsoe *v.* Palmer (Tex. Civ. App.), 81 S. W. 97.

47. American Hoist & D. Co. *v.* Frey, 127 La. 183, 53 So. 486; Adeline Sugar F. Co. *v.* Theriot, 126 La. 471, 52 So. 667; Gumbel & Co. *v.* Beer, 36 La. Ann. 484; Copley *v.* Bonner, 7 La. Ann. 578; Halff Co. *v.* Waugh (Tex. Civ. App.), 183 S. W. 839; Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 S. W. 372.

[a] **The question is not what the defendant intended** to do but whether their conduct was calculated to cause plaintiff to fear that he might lose the vendor's privilege by some disposition of the property. Suttle *v.* Biles, 130 La. 448, 58 So. 144.

48. Pirtle *v.* Price, 31 La. Ann. 357; Stetson *v.* Le Blanc, 6 La. 266.

49. Allen, Nugent & Co. *v.* Champlin, 32 La. Ann. 511; Hawley *v.* Tarbe, 14 La. 92; Hunter *v.* Adoue, 38 Tex. Civ. App. 542, 86 S. W. 622.

50. Mitchell *v.* Robinson (Tex. Civ. App.), 162 S. W. 443.

[a] **Where defendant files a cross-complaint claiming title** to a tract of land, a writ of sequestration may properly be issued on the whole tract although plaintiff sued defendant for only a half interest. Mitchell *v.* Robinson (Tex. Civ. App.), 162 S. W. 443.

51. Viguerie *v.* Viguerie, 133 La. 406, 63 So. 89.

52. Johnson *v.* Imboden, 7 La. Ann. 110; Ohio Ins. Co. *v.* Edmondson, 5 La. 295.

53. Peters *v.* Anheuser-Busch Brewing Assn. (Tex. Civ. App.), 55 S. W. 516.

54. Pasley *v.* McConnell, 36 La. Ann 703.

55. Segur *v.* Sorel, 11 La. 439.

56. *Compare supra,* I, B.

57. Blanchard *v.* Luce, 19 La. Ann. 46.

[a] **But an action by a partner to compel his partners to account** for and pay over profits of the partnership business, sequestration is not proper. Shropshire *v.* Russell, 2 La. Ann. 961.

58. Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547.

59. Lemann *v.* Truxillo, 32 La. Ann. 65; Gay & Co. *v.* Eaton, 27 La. Ann. 166; Overton *v.* Overton, 10 La. 466; Endel *v.* Norris (Tex. Civ. App.), 57 S. W. 687.

[a] **Consent of the parties** cannot confer such jurisdiction. Gay & Co. *v.* Eaton, 27 La. Ann. 166. See the title "**Jurisdiction.**"

[b] **Justice Court.**—But where the amount sued for is not in excess of the jurisdictional amount, a justices'

defendant resides,[60] or wherein the property to be sequestered is located,[61] but in the latter case the jurisdiction of the court is merely in rem.[62]

2. Time of Issuance. — A writ of sequestration pendente lite may be issued at any time,[63] even after the taking of an appeal,[64] and notwithstanding a stay of proceedings.[65]

3. Application for Writ. — The application for the writ may be made either upon a separate affidavit,[66] or upon a verified declaration or complaint.[67] The affidavit must be made by the party applying for the writ,[68] or by its agent.[69] Where the action is brought by several plaintiffs, an affidavit made in behalf of some of the plaintiffs only is not sufficient.[70]

A party applying for the writ must stand or fall upon the grounds alleged in the application.[71] It must appear therefrom that the prerequisites to the issuance of the writ exist in the case,[72] and that the case comes within the purview of the statute,[73] although the language of the statute need not be strictly followed.[74] An allegation of several grounds for the writ in the alternative is held bad for duplicity by some authorities,[75] though not by others.[76]

There must be an allegation of indebtedness in a definite sum,[77]

court is not deprived of the power to issue the writ, because the value of the property is claimed to be in excess thereof. Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608. Jurisdiction as affected by amount in controversy, see the title "Jurisdiction."

60. Edwards *v.* Marin, 28 La. Ann. 567; Gay & Co. *v.* Eaton, 27 La. Ann. 166.

61. Merchants' & F. Bank *v.* Fischer Lumber Co., 136 La. 860, 67 So. 932.

62. Lemann *v.* Truxillo, 32 La. Ann. 65; Peterson *v.* Willard, 17 La. Ann. 93.

63. Macfarlane *v.* Richardson, 1 La. Ann. 12.

64. Williams *v.* Duer, 14 La. 531.

65. Picket *v.* More, 2 Mart. O. S. (La.) 113.

66. Hayes *v.* Hayes, 4 Del. Ch. 20; Blanc *v.* Wallace, 26 La. Ann. 492; McClendon *v.* Bennett, 16 La. Ann. 335.

67. Lemann *v.* Truxillo, 32 La. Ann. 65; Bemis *v.* Wells, 10 Tex. Civ. App. 626, 31 S. W. 827.

68. Hawley *v.* Tarbe, 14 La. 92.

69. Allen, Nugent & Co. *v.* Champlin, 32 La. Ann. 511; Wallace *v.* Byrne, 17 La. Ann. 8; Brunson *v.* Dawson Bank (Tex. Civ. App.), 175 S. W. 438; Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 S. W. 372.

[a] **The authority of the agent** to make the affidavit, however, must be expressly shown therein. Wallace *v.* Byrne, 17 La. Ann. 8.

70. White *v.* Simonton (Tex. Civ. App.), 67 S. W. 1073.

71. State *v.* Allen, 105 La. 167, 29 So. 719; McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414.

72. Wilson *v.* Churchman, 4 La. Ann. 452.

73. Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; McClendon *v.* Bennett, 16 La. Ann. 335; Debaillon *v.* Ponsony, 5 Mart. (N. S.) 42; Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; Cheatham *v.* Riddle, 8 Tex. 162.

74. Gumbel & Co. *v.* Beer, 36 La. Ann. 484; Segur *v.* Sorel, 11 La. 439.

75. Lester *v.* Ricks (Tex. Civ. App.), 140 S. W. 395.

[a] "To waste *or* convert." Clark *v.* Elmendorf (Tex. Civ. App.), 78 S. W. 538.

76. Kuhn *v.* Embry, 35 La. Ann. 488; Mabry *v.* Tally, 15 La. Ann. 562.

77. Gumbel & Co. *v.* Beer, 36 La. Ann. 484; Wilson *v.* Churchman, 4 La. Ann. 452.

[a] **An affidavit which shows a less amount** of indebtedness than that claimed in the complaint is sufficient. Hawkins *v.* First Nat. Bank (Tex. Civ. App.), 175 S. W. 163.

but the various items of indebtedness need not be stated.[78] Nor is it necessary to set forth the amount of attorney's fees sought to be recovered.[79] The existence of a lien or privilege on the property sought to be sequestered likewise must be shown by proper allegations,[80] and it must appear therefrom that there is a danger of loss of the lien.[81] The property should be sufficiently described so that the same can be readily identified.[82] The value of the property sought to be sequestered also must be shown.[83] The affidavit must designate the county wherein the property sought to be sequestered is located.[84] But the person in whose possession the property is at the time of the application need not be named.[85]

4. Bond. — The furnishing of a bond is indispensable to the issuance of a writ of sequestration.[86]

F. THE WRIT. — The writ must designate the sequestrator in accordance with the statute.[87] The parties, however, have the right to make such arrangements in reference to the custody of the sequestered property as will promote their common convenience.[88] The writ must designate the amount of the bond,[89] and describe the

78. Brunson *v.* Dawson State Bank (Tex. Civ. App.), 175 S. W. 438.

79. Hawkins *v.* First Nat. Bank (Tex. Civ. App.), 175 S. W. 163.

80. Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881; Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269; Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405; Gumbel & Co. *v.* Beer, 36 La. Ann. 484.

81. American Hoist & D. Co. *v.* Frey, 127 La. 183, 53 So. 486; Gumbel & Co. *v.* Beer, 36 La. Ann. 484; Tyson *v.* First State Bank & T. Co. (Tex. Civ. App.), 154 S. W. 1055.

[a] **But the facts and circumstances causing** the apprehension of such loss need not be set forth. Martin *v.* Foy, Man. Unrep. Cas. (La.) 164.

82. Mills *v.* Hackett, 65 Tex. 580; Gravity Canal Co. *v.* Sisk, 43 Tex. Civ. App. 194, 95 S. W. 724; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

[a] **A "stock of shoes"** sufficiently describes the property under a statute requiring that the property sequestered shall be described in the affidavit with such certainty that it may be identified and distinguished from property of a like kind. Clopton *v.* Goodbar (Tex. Civ. App.), 55 S. W. 972.

83. Brunson *v.* Dawson State Bank (Tex. Civ. App.), 175 S. W. 438; Butts *v.* Lucia (Tex. Civ. App.), 153 S. W. 686.

[a] **An affidavit containing an allegation of the amount of indebtedness coupled with the statement that the property is worth that amount is sufficient.** McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414.

[b] **Where various chattels** are to be sequestered the value of each must be stated under some statutes. Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

84. McSpadden *v.* La Force (Tex. Civ. App.), 39 S. W. 163.

85. Whitaker *v.* Sanders (Tex. Civ. App.), 52 S. W. 638.

86. Pasley *v.* McConnell, 36 La. Ann. 704; Lemann *v.* Truxillo, 32 La. Ann. 65; Nickell *v.* Carter, 23 Tex. Civ. App. 570, 56 S. W. 769.

[a] **The amount** of the bond is to be fixed by the court. Mississippi Valley Transp. Co. *v.* Fosdick & Co., Man. Unrep. Cas. (La.) 3.

87. United States *v.* United States Bank, 11 Rob. (La.) 418; Frazier *v.* Willcox, 4 Rob. (La.) 517.

[a] **The sheriff** ordinarily is the public officer in whose custody the sequestered property is to remain during the pendency of the action. Field & Co. *v.* Broderick, 12 La. Ann. 552; Fink *v.* Martin, 10 Rob. (La.) 147; Thompson *v.* Graves (Tex. Civ. App.), 15 S. W. 38, 4 Wills. Civ. Cas., §7.

88. Frazier *v.* Willcox, 4 Rob. (La.) 517.

89. Lemann *v.* Truxillo, 32 La. Ann. 65.

property to be sequestered,[90] but the amount of the indebtedness need not be stated.[91] The date of issuance of the writ may be indorsed by the clerk nunc pro tunc.[92]

G. Operation and Effect of Writ. — **1. In General.** — The writ of sequestration pendente lite being merely a conservatory remedy,[93] confers no rights which did not exist before,[94] and does not affect the right to possession of the property,[95] nor change the title thereto.[96] The life of the writ of sequestration terminates with the entry of a final judgment in the suit,[97] and a dismissal of the case necessarily carries with it the writ of sequestration.[98] An irregularity in the issuance of the writ, however, does not affect the validity of the judgment rendered in the action.[99]

2. Levy and Return. — The sheriff in seizing the property sequestered may use the requisite force.[1] But the party against whom the writ is issued is not required to produce or to deliver up the property.[2] Where property is seized under one writ and the sheriff subsequently receives a second writ, the first levy is sufficient for both writs.[3] The sheriff must return a copy of the writ upon which the levy was made.[4]

3. Custody of Property. — The sequestered property, except when perishable,[5] remains in the custody of the law until the final determination of the action or release on bond.[6] The sheriff while in

90. Woessner *v.* Fly, 63 Tex. 198; Orange Co. Irr. Co. *v.* Orange Nat. Bank, 62 Tex. Civ. App. 19, 130 S. W. 869.

91. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704.

92. Whitaker *v.* Sanders (Tex. Civ. App.), 52 S. W. 638.

93. Gay & Co. *v.* Eaton, 27 La. Ann. 166; Blanchard *v.* Luce, 19 La. Ann. 46.

94. Bank of Alabama *v.* Hozey, 2 Rob. (La.) 150.

95. Succession of Gallia, 130 La. 867, 58 So. 691.

96. Coats *v.* Elliott, 23 Tex. 606.

97. Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 451, 39 So. 441; Tyson *v.* First State Bank & T. Co. (Tex. Civ. App.), 154 S. W. 1055.

98. Succession of Royer, 105 La. 281, 29 So. 511; Morris *v.* Anderson (Tex. Civ. App.), 152 S. W. 677.

99. Breed *v.* Repsher, 4 Mart. O. S. (La.) 187; Cheatham *v.* Riddle, 8 Tex. 162; Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608.

1. Flournoy & Co. *v.* Milling, 15 La. Ann. 473.

2. Ansley *v.* Stuart, 119 La. 1, 43 So. 892.

[a] **And the fact that defendant aided the sheriff** in locating the property does not prevent him from thereafter claiming to be the owner of said property. Long *v.* Kee, 44 La. Ann. 309, 10 So. 854.

3. State *v.* Allen, 52 La. Ann. 568, 27 So. 85; Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862; Patterson *v.* Spaulding, 5 La. Ann. 171.

4. Betterton *v.* Echols, 85 Tex. 212, 20 S. W. 83.

[a] **A mistake** (1) in the return may be corrected by order of court. Porter *v.* Miller, 7 Tex. 468. (2) A slight discrepancy between the description in the return of the sheriff of the property seized and that described in the writ will be disregarded. Halbert *v.* San Saba Springs L. & L. Assn. (Tex.), 34 S. W. 636.

[b] **And where the property is released on a claim of a third party,** the affidavit of the claimant together with the bond must likewise be returned. Betterton *v.* Echols, 85 Tex. 212, 20 S. W. 83.

5. Field & Co. *v.* Broderick, 12 La. Ann. 552.

6. Thompson *v.* Graves (Tex. Civ. App.), 15 S. W. 38, 4 Wills. Civ. Cas., §7.

possession of the property may make such expenditures as necessary for its preservation.[7]

H. RELEASE OF PROPERTY ON BOND. — The sequestered property may be released on bond,[8] except where such release would defeat the purpose of the action.[9] The bond may be furnished by the party against whom the writ of sequestration was issued,[10] or by plaintiff in the event that defendant fails to do so within the prescribed time,[11] or by an intervenor[12] or third party claiming the sequestered property.[13] Upon release of the property the bond takes the place of the property sequestered under the writ,[14] but a party furnishing a forthcoming bond cannot sell the property without order of court.[15]

I. DISSOLUTION OF SEQUESTRATION. — A writ of sequestration may be set aside on motion[16] presented at any time before the case is disposed of.[17] Defects in the writ itself cannot on motion to quash be established by matters outside of the record.[18] But matters appearing upon the face of the record, such as insufficiency of the affidavit,[19]

[a] **Sequestration Is a Judicial Deposit.**—Fowler *v.* Stonum, 6 Tex. 60.

[b] **The possession** of the sequestrator is that of the party legally entitled to the same. Bank of Alabama *v.* Hozey, 2 Rob. (La.) 150.

[c] **Parties may select custodian,** see *supra*, III, F, note 88.

7. Parkison *v.* Boyle, 7 Rob. (La.) 82.

8. Ramos Lumb. & Mfg. Co. *v.* Sanders, 112 La. 614, 36 So. 625.

[a] **A part of the sequestered property** cannot be released on bond, but the bond must cover the whole of the sequestered property. Taylor *v.* Penrose, 12 La. 137.

[b] **The bond must conform** to the statutory requirements. Bomer *v.* Meeks, 106 Miss. 870, 64 So. 833; Crowley *v.* Finch (Tex. Civ. App.), 153 S. W. 648.

9. Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547; State *v.* Judge, 38 La. Ann. 49.

10. Bank of Alabama *v.* Hozey, 2 Rob. (La.) 150; Nunn *v.* Raby (Tex. Civ. App.), 158 S. W. 187.

11. Hecker *v.* Bourdette, 121 La. 467, 46 So. 575; Duperier *v.* Flanders, 20 La. Ann. 29.

12. O'Neil *v.* Walker, 45 La. Ann. 609, 12 So. 872; Hardy *v.* Lemons, 36 La. Ann. 107.

13. Barton *v.* Stroud-Gibson Groc. Co. (Tex. Civ. App.), 40 S. W. 1050; Osborne & Co. *v.* Robinson (Tex. Civ. App.), 38 S. W. 327.

14. Nalle *v.* Baird, 30 La. Ann. 1148.

15. Marin *v.* Satterfield, 41 La. Ann. 742, 6 So. 551; Crawford *v.* Southern R. I. P. Co., 33 Tex. Civ. App. 510, 77 S. W. 280.

16. American Furniture Co. *v.* Grant-Jung Furn. Co., 50 La. Ann. 931, 24 So. 182; Yeager Mill Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398; Crawford *v.* Jones, 2 La. Ann. 826; Gravity Canal Co. *v.* Sisk, 43 Tex. Civ. App. 194, 95 S. W. 724.

[a] **A previous exception to the issuance** of the writ is not a prerequisite to the motion. Boimare *v.* St. Geme, 113 La. 898, 37 So. 869.

[b] **Though it issued improvidently,** the writ will not be set aside if there are grounds sufficient to immediately reinstate it. Succession of Royer, 105 La. 281, 29 So. 511.

17. Wheeler *v.* Wheeler, 65 Tex. 573; Gravity Canal Co. *v.* Sisk, 43 Tex. Civ. App. 194, 95 S. W. 724.

18. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704.

[a] **Lack of agent's authority** to give the bond cannot be questioned upon a motion to quash the writ. Hawkins *v.* First Nat. Bank (Tex. Civ. App.), 175 S. W. 163.

19. McSpadden *v.* La Force (Tex. Civ. App.), 39 S. W. 163.

[a] **An omission to state** in the affidavit that the allegations contained therein are true of affiant's own knowledge is not a sufficient ground to set aside a sequestration. Power *v.* First State Bank (Tex. Civ. App.), 162 S. W. 416.

[b] **The fact that the oath is ad-**

or the failure to file a bond,[20] may be taken advantage of. The allegations set forth in the application for the writ are presumed to be true.[21] Where objections to a writ are sustained as to a part of the sequestered property, restitution of such part should be made.[22]

J. APPEAL. — The order for the issuance of a writ of sequestration pendente lite is not appealable.[23] But where the sequestration will work an irreparable injury an order refusing to set aside such writ is subject to review on appeal.[24] An order allowing the release of sequestered property on bond is not appealable where the action is based upon a debt secured by a lien.[25] But where the writ of sequestration is issued for the protection of a right to property an order refusing a release of the property on a bond,[26] as well as an order allowing such release[27] are appealable.

K. REMEDIES FOR WRONGFUL SEQUESTRATION. — **1. In General.** Recovery of damages may be had for wrongful sequestration,[28] either by the interposition of a counterclaim in the same action,[29] or by bringing a separate action on the bond,[30] or for damages.[31]

2. Counterclaim. — Damages for wrongful sequestration may be recovered by counterclaim in the same action,[32] but only against the parties to the action[33] and the sureties.[34] Notice of the filing of such counterclaim need not be given to the sureties.[35]

3. Action for Damages. — a. *Parties.* — The sureties on the

ministered by affiant's attorney does not invalidate the writ. Power *v.* First State Bank (Tex. Civ. App.), 162 S. W. 416.

20. Nickell *v.* Carter, 23 Tex. Civ. App. 570, 56 S. W. 769.

21. Pirtle *v.* Price, 31 La. Ann. 357; Blanchard *v.* Luce, 19 La. Ann. 46.

[a] **But the writ must be vacated wherever** such allegations are controverted by proof. Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756.

22. Peters *v.* Anheuser-Busch Brew. Co. (Tex. Civ. App.), 55 S. W. 516.

23. State *ex rel.* Des Allemands Lumber Co. *v.* Allen, 110 La. 853, 34 So. 804.

24. Blanchard *v.* Luce, 19 La. Ann. 46; Taylor *v.* Penrose, 12 La. 137.

25. Richardson *v.* Johnson, 114 La. 1050, 38 So. 826.

26. Taylor *v.* Penrose, 12 La. 137.

27. Hecker *v.* Bourdette, 121 La. 467, 46 So. 575.

28. American Furniture Co. *v.* Grant-Jung Furn. Co., 50 La. Ann. 931, 24 So. 182; Sweeney *v.* Farmers' Milling & S. Co. (Tex. Civ. App.), 137 S. W. 1147.

29. See *infra*, III, K, 2.

30. Biggs *v.* D'Aquin, 13 La. Ann. 21; Tompkins *v.* Toland, 46 Tex. 584; Morris *v.* Anderson (Tex. Civ. App.), 152 S. W. 677.

[a] **The damages against the sureties** are (1) limited to the penalty named in the bond (Biggs *v.* D'Aquin, 13 La. Ann. 21), and (2) exemplary damages cannot be recovered against them. Morris *v.* Anderson (Tex. Civ. App.), 152 S. W. 677.

31. Wells & Co. *v.* St. Dizier, 9 La. Ann. 119; Clark *v.* Christine, 4 Rob. (La.) 196; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

32. American Furniture Co. *v.* Grant-Jung Furn. Co., 50 La. Ann. 931, 24 So. 182; Vela *v.* Guena, 75 Tex. 585, 12 S. W. 1127; Portier *v.* Fernandez, 35 Tex. 534.

33. Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405.

34. Wilkinson *v.* Stanley (Tex. Civ. App.), 43 S. W. 606.

35. Wilkinson *v.* Stanley (Tex. Civ. App.), 43 S. W. 606.

[a] **A judgment may be rendered** against them without notice. Morris *v.* Anderson (Tex. Civ. App.), 152 S. W. 677.

bond,[36] and the officer who sequestered the property,[37] are proper parties defendant to an action for damages.[38] A party who has an interest in the subject matter of the suit may intervene.[39]

b. *Plaintiff's Pleadings.* — The plaintiff's pleadings must show that the defendant caused the writ to be issued.[40] Where the writ was issued upon an affidavit the truth of the averments contained therein must be negatived by the plaintiff,[41] but the affidavit need not be pleaded in haec verba.[42] Where no affidavit was presented that fact should be specifically averred.[43] It should also appear how the action terminated,[44] and what was the value of the sequestered property.[45] The general rules as to pleading special damages should be followed,[46] and where exemplary damages are sought it must be alleged that defendant acted with malice.[47]

c. *Plea or Answer.* — Pursuant to the general rule as to pleading new matter in defense,[48] a defendant who relies on title to the property acquired by purchase must specifically plead such title.[49]

d. *Judgment.* — The judgment in an action for wrongful sequestration should provide for the recovery of damages actually sustained by plaintiff,[50] and, where the property cannot be returned, the plaintiff is entitled to the recovery of the value thereof.[51] The judgment may also require a defendant who had obtained possession under the writ to account for the rents and profits of the property.[52] Where no actual loss was sustained a judgment for nominal damages may

36. Tompkins *v.* Toland, 46 Tex. 584; Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

37. Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

38. See generally the title "Intervention."

39. Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22.

40. Rountree *v.* Walker, 46 Tex. 200.

41. Duncan *v.* Wise, 39 La. Ann. 74, 6 So. 13; Rountree *v.* Walker, 46 Tex. 200.

42. Wilkinson *v.* Stanley (Tex. Civ. App.), 43 S. W. 606.

43. Rountree *v.* Walker, 46 Tex. 200.

44. Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181.

[a] **But, where the complaint shows that the debt** upon which the action was brought, did not in fact exist, the omission to allege what the outcome of the action was, does not render the complaint defective as against a general demurrer. Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181.

45. Carson *v.* Texas Installment Co. (Tex. Civ. App.), 34 S. W. 762.

46. See 13 STANDARD PROC. 365, et seq.

[a] **Where it is claimed that plaintiff suffered in his good name, it is** not necessary to state that he had a good name. Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181.

47. Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181.

48. See 2 STANDARD PROC. 37, et seq., and the title "Confession and Avoidance."

49. Wells & Co. *v.* St. Dizier, 9 La. Ann. 119.

50. Stetson *v.* La Blanc, 6 La. 266; McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414.

51. Rea *v.* Schow & Bros., 42 Tex. Civ. App. 600, 93 S. W. 706; Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181.

52. Moore *v.* Rabb (Tex. Civ. App.), 159 S. W. 85; Taylor *v.* Flynt, 28 Tex. Civ. App. 219, 67 S. W. 347.

be rendered,[53] but no exemplary damages can be recovered in the absence of actual damages.[54]

53. Patterson *v.* Spaulding, 5 La. Ann. 171; Lacy *v.* Gentry (Tex. Civ. App.), 56 S. W. 949.

54. Hawkins *v.* Cook (Tex. Civ. App.), 178 S. W. 624; Rogers *v.* O'Barr (Tex. Civ. App.), 76 S. W. 593.

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SERVICE OF PROCESS AND PAPERS

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CROSS-REFERENCES:

Corporations;
Notice;
Orders;
Privilege;
Process;
Returns;
Sheriffs, Constables and Marshals;
Subpoena;
Sunday and Holidays;
Warrants.

Conclusiveness of judgments on constructive service, see 15 STANDARD PROC. 430.

Continuance to perfect service, see 5 STANDARD PROC. 472.

Costs, fees for serving papers as, see 5 STANDARD PROC. 940.

For forms, see 9 STANDARD PROC. 1126, et seq.

Infants, manner of serving, see 12 STANDARD PROC. 741.

Insane person, service on, see 13 STANDARD PROC. 600.

Judgment where some defendants are not served, see 14 STANDARD PROC. 907, 912; 21 STANDARD PROC. 87.

Municipal corporations, manner of serving, see 20 STANDARD PROC. 100.

Necessity of complaint showing service of process, see 6 STANDARD PROC. 673.

Necessity of appearance after service, see 2 STANDARD PROC. 562.

Presumption of service on collateral attack, see 15 STANDARD PROC. 428.

Service of briefs, see 4 STANDARD PROC. 587.

Service of process in justice's courts, see 17 STANDARD PROC. 1018.

Service of process on cross-bill and cross-complaint, see 6 STANDARD PROC. 288, 308.

Service in particular actions or proceedings, see the specific titles.

For further references and cross-references, see the index to this work, and the cross-references throughout this article.

I. DEFINITION. — The word "service" in practice with reference to summonses, writs, subpoenas, notices and other legal processes has been defined to be the execution of the writ or process.[1] The purpose of service of process is to bring the defendant before the court,[2] to acquire jurisdiction over his person,[3] and to give him notice that he may be aware of and resist what is sought of him.[4]

The law provides for two kinds of service of process in civil actions, personal or actual service and constructive service.[5]

Personal service is a service by reading the process or paper to the person to be served or by delivery to him personally of the original or a copy thereof, as distinguished from other modes of service.[6] The term is sometimes used as opposed to service by publication and embraces service by copy left at the usual place of residence of resident defendants also.[7] The latter method of service is frequently called

1. Bouv. Law Dict.

[a] **Service of a writ** is the actual performance of the duty commanded by it. Comrs. of Labette Co. *v.* Franklin, 16 Kan. 450. See also Ensley *v.* State, 4 Okla. Crim. 49, 109 Pac. 250.

[b] **Service may be said to be anything done** by virtue of the authority contained in the writ. As applied to the commencement of a writ, it is that notice given to a defendant which makes him a party and makes it incumbent on him to appear and answer to the cause or run the risk of having a valid judgment rendered against him. Sanford *v.* Dick, 17 Conn. 213.

2. See Jones *v.* Stevens, 1 Colo. 67; Radcliff *v.* Noyes, 43 Ill. 318.

In the case of infants, see 12 STANDARD PROC. 737.

3. Brumleve *v.* Cronan, 176 Ky. 818, 197 S. W. 498. See 17 STANDARD PROC. 678.

4. Hiller *v.* Burlington & M. R. R. Co., 70 N. Y. 223; Heller *v.* Levinson, 166 App. Div. 673, 152 N. Y. Supp. 35.

5. Hahn *v.* Kelly, 34 Cal. 391, 403, 94 Am. Dec. 742; Carter *v.* Daizy, 42 Miss. 501.

[a] **Actual service is personal** service. Carter *v.* Daizy, 42 Miss. 501. See Dunkle *v.* Elston, 71 Ind. 585.

6. **Cal.**—Holiness Church *v.* Metropolitan Church Assn., 12 Cal. App. 445, 107 Pac. 633. **Kan.**—Thisler *v.* Little, 86 Kan. 787, 121 Pac. 1123. **Mo.**—Dalton *v.* St. Louis, M. & S. E. Ry. Co., 113 Mo. App. 71, 87 S. W. 610. **N. Y.**—Central Bank *v.* Wright, 12 Wend. 190. **N. D.** McKenzie *v.* Boynton, 19 N. D. 531, 125 N. W. 1059; First Nat. Bank *v.* Holmes, 12 N. D. 38, 94 N. W. 764. **Okla.**—Clemmons *v.* State, 5 Okla. Crim. 119, 113 Pac. 238; Ensley *v.* State, 4 Okla. Crim. 49, 54, 109 Pac. 250.

[a] **Delivery of process to proper officers of a corporation** is personal service upon the corporation. Holiness Church *v.* Metropolitan Church Assn., 12 Cal. App. 445, 107 Pac. 633. See the title "**Corporations.**"

[b] **A nonresident who is served by mail is not personally** served. Bausman *v.* Tilley, 46 Minn. 66, 48 N. W. 459.

[c] **Service on a foreign corporation** (1) by delivery of process to the secretary of state is not personal service. Holiness Church *v.* Metropolitan Church Assn., 12 Cal. App. 445, 107 Pac. 633. (2) But service upon an agent designated by the statute is. Phillips *v.* Portage Transit Co., 137 Wis. 189, 118 N. W. 539.

7. **U. S.**—Settlemeir *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110; *In re* Norton, 148 Fed. 301. **Ind.**—Dunkle *v.* Elston, 71 Ind. 585; Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440. **Kan.** Atchison *v.* Challiss, 65 Kan. 179, 69 Pac. 173. **Minn.**—Bardwell *v.* Collins, 44 Minn. 97, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152, service by copy is the equivalent of personal service. **N. C.**—See Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402, whether actual service shall be made by reading the summons or notice to the defendant or leaving a copy with him personally or at his usual place of residence is for the legislature to prescribe. **Utah.**—Grant *v.* Lawrence, 37 Utah 450, 108 Pac. 931,

substituted service,[8] and is so designated in this article.[9]

Constructive service is service by publication;[10] though some courts have loosely applied the word "constructive" to service by leaving a copy of the process at defendant's place of abode,[11] or have spoken of service by publication as "substituted" service.[12]

II. NECESSITY FOR SERVICE. — A. OF PROCESS. — **1. Generally.**[13] — It is essential to the jurisdiction of the court,[14] and to the validity of every judgment[15] that the parties to be bound shall be served with process or notice of some kind, either actual or constructive, unless it is waived in some appropriate manner.[16]

Actual knowledge of the suit cannot be equivalent to service.[17]

Ann. Cas. 1912C, 280; People *v.* House, 4 Utah 382, 10 Pac. 843.

[a] **Statute calls such service personal** service. See McKenzie *v.* Boynton, 19 N. D. 531, 125 N. W. 1059.

8. Grant *v.* Lawrence, 37 Utah 450, 108 Pac. 931, Ann. Cas. 1912C, 280.

9. See *infra*, VI.

10. Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186; Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012. See *infra*, VII.

11. **Ill.**—Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186. **Ia.**—Journey *v.* Dickerson, 21 Iowa 308. **Miss.**—Carter *v.* Daizy, 42 Miss. 501. **Mo.**—Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237; Colter *v.* Luke, 129 Mo. App. 702, 108 S. W. 608; Dalton *v.* St. Louis, M. & S. E. Ry. Co., 113 Mo. App. 71, 87 S. W. 610.

12. See Smith *v.* Wells, 69 N. Y. 600.

13. **Commencement of action by service of process,** see the title "**Suits and Actions,**" and 21 STANDARD PROC. 688.

14. Earle *v.* McVeigh, 91 U. S. 503, 23 L. ed. 398; Walden's Lessee *v.* Craig's Heirs, 14 Pet. (U. S.) 147, 10 L. ed. 393. See 6 STANDARD PROC. 806; 17 STANDARD PROC. 678; 21 STANDARD PROC. 689.

To charge garnishee, principal defendant must be served. See 10 STANDARD PROC. 472.

In interpleader suit, see 14 STANDARD PROC. 198.

As affecting attachment, see 3 STANDARD PROC. 672.

15. **Cal.**—Columbia Screw Co. *v.* Warner Lock Co., 138 Cal. 445, 71 Pac. 498. **Idaho.**—Bear Lake County *v.* Budge, 9 Idaho 703, 708, 75 Pac. 614. **Ill.**—Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782. **Md.** Harryman *v.* Roberts, 52 Md. 64. **Miss.** Brown *v.* Board of Levee Comrs., 50 Miss. 468; Jack *v.* Thompson, 41 Miss. 49. **Mo.**—Cloud *v.* Pierce City, 86 Mo. 357, 366; Thompson *v.* Allen, 86 Mo. 85.

See 14 STANDARD PROC. 865; 12 STANDARD PROC. 737; 7 STANDARD PROC. 753.

In justice's court, see 17 STANDARD PROC. 1018.

Collateral attack on judgment, see 15 STANDARD PROC. 442; presumption as to service or appearance, 15 STANDARD PROC. 428.

Due process of law requires service. See 17 STANDARD PROC. 678.

[a] **Even in proceedings in rem,** notice is requisite. Earle *v.* McVeigh, 91 U. S. 503, 23 L. ed. 398. *Compare* 17 STANDARD PROC. 683.

[b] **No person is required to answer** in a suit on whom process has not been served or whose property has not been attached. Webster *v.* Reid, 11 How. (U. S.) 437, 460, 13 L. ed. 761.

16. **By appearance,** see 2 STANDARD PROC. 532, and 17 STANDARD PROC. 682.

17. **Cal.**—Waller *v.* Weston, 125 Cal. 201, 57 Pac. 892. **Md.**—Wilmer *v.* Picka, 118 Md. 543, 550, 85 Atl. 778. **Minn.**—Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344. **Tex.**—Davenport *v.* Rutledge (Tex. Civ. App.), 187 S. W. 988. **Wash.** Bennett *v.* Supreme Tent, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

[a] **Leaving process at a place other than the defendant's place of abode** is not sufficient even though the person with whom the copy is left subsequently gives it to the defendant. Kline *v.* Kline, 104 Ill. App. 274.

2. Notice of Proceedings After Service. — From the time of service, the defendant is in court and charged with notice of every step taken therein during the pendency of the cause, except, of course, as to matters as to which the law requires some further notice.[18] The defendants need not be again served with process after an amendment to the complaint or petition.[19] But where new parties are brought in, they must be served.[20] Mere formal amendments to the process do not necessitate service of the amended process.[21] But the court may order the process to be withdrawn from the files and served.[22]

B. Of Pleadings. — Statutes sometimes require service of the complaint with the process,[23] and require that all pleadings subsequent to the complaint must be filed with the clerk and copies thereof served on the adverse party or his attorney.[24]

18. **U. S.**—Walden's Lessee *v.* Craig's Heirs, 14 Pet. 147, 10 L. ed. 392. See Smith *v.* Woolfolk, 115 U. S. 143, 5 Sup. Ct. 1177, 29 L. ed. 357. **Kan.**—Kimball *v.* Connor, 3 Kan. 414. **Mo.**—St. Louis *v.* Gleason, 15 Mo. App. 25.

See 17 Standard Proc. 679, and generally the title "Notice."

[a] **Rule Applies to Special Proceedings.**—St. Louis *v.* Gleason, 15 Mo. App. 25.

Service of process on cross-complaint and cross-bill, see 6 Standard Proc. 288, 308.

19. Stevens *v.* Thompson, 5 Kan. 305; St. Louis *v.* Gleason, 15 Mo. App. 25. See 14 Standard Proc. 862.

[a] **The addition of a new party** does not necessitate a new order of publication. Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 209.

20. Thompson *v.* Allen, 86 Mo. 85. See 14 Standard Proc. 862.

21. **U. S.**—Chamberlain *v.* Bittersohn, 48 Fed. 40. **N. C.**—Bray *v.* Creekmore, 109 N. C. 49, 13 S. E. 723. **W. Va.** Brown *v.* Cook, 77 W. Va. 356, 87 S. E. 454, L. R. A. 1916D, 220.

Compare Turpin *v.* Taylor, 143 Ga. 224, 84 S. E. 547.

22. Empire Mill Co. *v.* District Court, 27 Idaho 383, 149 Pac. 499; Ridenbaugh *v.* Sandlin, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175.

23. See *infra,* V, G.

[a] **If a copy of the complaint is not served with the summons,** statute requires that (1) a copy must be served within a specified time after a written demand therefor. Stokes *v.* Schildknecht, 85 App. Div. 602, 83 N. Y. Supp. 358; Luce *v.* Trempert, 9 How. Pr. (N. Y.) 212, twenty days. (2) If no time is specified, a reasonable time is meant. Littlefield *v.* Murin, 4 How. Pr. (N. Y.) 306, 2 Code Rep. 128.

[b] **Having failed to demand a copy** of the complaint until he is in default, the defendant's remedy is to have his default opened and be permitted to serve a demand for a copy of the complaint. Stokes *v.* Schildknecht, 85 App. Div. 602, 83 N. Y. Supp. 358.

Delivery of copy of indictment to accused, see *infra,* XII.

24. Wood *v.* Johnston, 8 Cal. App. 258, 96 Pac. 508.

[a] **Supplemental complaint** must be served after it is filed, although a copy is served with the notice of motion for leave to file it. Galliano *v.* Kilfoy, 94 Cal. 86, 29 Pac. 416.

Of proposed amendments and amended pleadings, see 1 Standard Proc. 894, 900, and 14 Standard Proc. 861.

[b] **The answer** need not be served on a codefendant unless affirmative relief against him is asked. Muller *v.* Whelen, 114 App. Div. 138, 99 N. Y. Supp. 618; Gibson *v.* Bethea, 95 S. C. 343, 78 S. E. 1025.

Service of cross-complaint, see 6 Standard Proc. 308.

Serving demurrers, see 6 Standard Proc. 937.

Service of complaint in intervention, see 14 Standard Proc. 326.

[c] **The service of a pleading before filing** may be required by rule of court. Kosher *v.* Stuart, 64 Ore. 123, 121 Pac. 901, 129 Pac. 491.

[d] **Reservice on party in default** in case of material amendment, see 14 Standard Proc. 861, and Wood *v.* Nic-

III. SECOND SERVICE OF SAME PROCESS. — Where a summons is properly served, a second service of that summons upon the same party is a nullity.[25] But where the first service is a nullity, a good service may be subsequently made.[26] A second service of process does not waive the first service,[27] or effect a shortening of the time allowed a defendant under the law applying to the first service.[28]

IV. MANNER OF SERVICE GENERALLY. — The mode of service of process by which a defendant is brought into court is a matter of legislative discretion;[29] and service must be made at the time,[30] by the persons,[31] and in the manner[32] prescribed by the statute regulating the subject. But an irregularity in the service does not affect the jurisdiction when proper objection is not seasonably made.[33] If notice is required by statute and no manner of service is pointed out, generally personal service is meant.[34] Personal service is not always essential to due process of law.[35] When actual service is im-

olson, 43 Kan. 461, 23 Pac. 587; Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295, where new cause of action is stated.

[e] **Requirement May Be Waived.** Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653.

Returning copies served because of defects, see *infra*, XIV, C, 6.

25. Mayenbaum *v.* Murphy, 5 Nev. 383.

26. Coffin *v.* Bell, 22 Nev. 169, 183, 37 Pac. 240, 58 Am. St. Rep. 738; Caples *v.* Central Pac. R. Co., 6 Nev. 265.

[a] **Where the first judgment is insufficient,** the proper practice doubtless is to vacate the judgment, withdraw the summons from the file and serve it again. Coffin *v.* Bell, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738, the statute did not authorize the issuance of an alias summons. As to alias process, see 21 STANDARD PROC. 760.

27. Hogs Back Consol. Min. Co. *v.* New Basil C. Min. Co., 63 Cal. 121.

28. Hogs Back Consol. Min. Co. *v.* New Basil C. Min. Co., 63 Cal. 121; Mayenbaum *v.* Murphy, 5 Nev. 383.

29. **Cal.**—McCauley *v.* Fulton, 44 Cal. 355. **Ill.**—Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 205, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186; Welch *v.* Sykes, 3 Ill. 197, 44 Am. Dec. 689. **N. C.**—Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

30. White *v.* Superior Court, 126 Cal. 245, 58 Pac. 450; Brumleve *v.* Cronan, 176 Ky. 818, 197 S. W. 498.

[a] **A statute requiring issuance of summons within a year** does not require that it be served within the year. Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

31. Brumleve *v.* Cronan, 176 Ky. 818, 824, 197 S. W. 498.

32. **Ga.**—Dykes *v.* McClung, 74 Ga. 382. **Ky.**—Brumleve *v.* Cronan, 176 Ky. 818, 197 S. W. 498. **Mass.**—Peck *v.* Warren, 8 Pick. 163. **Tex.**—Kimmell *v.* Edwards (Tex. Civ. App.), 193 S. W. 363, 194 S. W. 168.

Not in a manner agreed on by the parties. See 17 STANDARD PROC. 680.

Manner of service on corporations, see 5 STANDARD PROC. 617.

33. See 17 STANDARD PROC. 681.

34. **U. S.**—Haldane *v.* United States, 69 Fed. 819, 16 C. C. A. 447, 32 U. S. App. 607. **Del.**—Lewis *v.* Woodall, 4 Houst. 543. **Ill.**—Haj *v.* American Bottle Co., 261 Ill. 362, 103 N. E. 1000, Ann. Cas. 1915A, 220 note; Kinkade *v.* Gibson, 209 Ill. 246, 70 N. E. 683; Chicago & A. R. Co. *v.* Smith, 78 Ill. 96. **Ia.**—Scanlon *v.* Scanlon, 154 Iowa 748, 135 N. W. 634. **Mo.**—Dalton *v.* St. Louis, M. & S. E. Ry. Co., 113 Mo App. 71, 87 S. W. 610; Hamill *v.* Talbott, 72 Mo. App. 22, 30. **N. Y.** McDermott *v.* Board of Police, 25 Barb. 635, 5 Abb. Pr. 422. **Okla.**—Clemmons *v.* State, 5 Okla. Crim. 119, 113 Pac. 238; Ensley *v.* State, 4 Okla. Crim. 49, 54, 109 Pac. 250.

35. Jacob *v.* Roberts, 223 U. S. 261, 32 Sup Ct. 303, 56 L. ed. 429.

Personal service is essential to the rendition of a personal judgment against nonresidents. See 6 STANDARD PROC. 807, and 10 STANDARD PROC. 473.

In actions in rem, personal service **is unnecessary to** jurisdiction over

practicable, substituted or constructive service may be provided for.[36] And a judgment on constructive service rendered against a nonresident of the state will be given full faith and credit in another state to the extent it is a proceeding in rem.[37] Where the summons is not a process but is merely a notice by the plaintiff's attorney,[38] the common law rules as to service of writs and judicial process do not apply.[39]

V. PERSONAL SERVICE. — A. TIME OF. — Service must be made before return day,[40] and it is sometimes required to be made a certain number of days before return day or return term.[41] So also the plaintiff may be required to issue and serve a summons within a prescribed time after the commencement of the action on pain of a dismissal.[42]

In computing the number of days before return day when service must be made, the day of service should be excluded and the day of return included,[43] unless statute provides otherwise.[44] Parts of days are to be disregarded.[45] But Sundays intervening between the day of service and the term are counted.[46]

property of the defendant. See 17 STANDARD PROC. 683.

36. Bear Lake County *v.* Budge, 9 Idaho 703, 708, 75 Pac. 614; State *v.* Guilbert, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 706, 38 L. R. A. 519. See *infra*, VI and VII.

[a] **All Substituted Service Must Rest Upon the Ground of Necessity.** Title & Document Restoration Co. *v.* Kerrigan, 150 Cal. 289, 311, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682.

37. Kane *v.* Cook, 8 Cal. 449; Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337.

[a] **But an action of debt** cannot be brought thereon in another state. Kendrick *v.* Kimball, 33 N. H. 482.

Full faith and credit extended to judgments of sister states, see 15 STANDARD PROC. 645, et seq.

Divorce decrees, see 15 STANDARD PROC. 670.

38. See 21 STANDARD PROC. 684.

39. First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775, it may be served like any other notice by any private person unless prohibited by statute.

40. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; Harrington *v.* Harrington (Tex. App.), 16 S. W. 538.

[a] **Service on return day** is irregular and ground for reversal. Simcock *v.* First Nat. Bank, 14 Kan. 529. *Contra*, Aumock *v.* Jamison, 1 Neb. 432.

[b] **Service afterwards (1) is a nullity** (Harrington *v.* Harrington [Tex. App.], 16 S. W. 538), unless (2) the defendant could have answered long before judgment. Batjer *v.* Roberts (Tex. Civ. App.), 148 S. W. 841, collateral attack.

41. **Ala.**—Foster *v.* Thompson, 10 Ala. App. 365, 65 So. 414. **Ill.**—Johnson *v.* Baker, 38 Ill. 98, 87 Am. Dec. 293, must be served three days before trial. **Tex.**—Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227. **Wis.**—Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

[a] **Service a less number of days** before return day is insufficient. Scranton *v.* Manley, 13 Pa. Super. 439.

[b] **A service too late for one term** is sufficient on which to render judgment at the next succeeding term. Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638; Hambel *v.* Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46.

42. Hibernia Sav. & L. Soc. *v.* Cochran, 141 Cal. 653, 75 Pac. 315. See the statutes and 7 STANDARD PROC. 677.

43. Reigelsberger *v.* Stapp, 91 Ind. 311; Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

Service on Sundays and holidays, see the title, "**Sunday and Holidays.**"

44. See the statutes, and Robinson *v.* Foster, 12 Iowa 186; Fitzhugh *v.* Hall, 28 Tex. 558, both the day of service and day of return should be excluded.

45. Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

46. Robinson *v.* Foster, 12 Iowa 186;

B. WHERE MADE. — Personal service of process must be made within the territorial jurisdiction of the court.[47] It cannot be made without the state,[48] except in proceedings in rem or quasi in rem.[49] Neither can process of a court of one county be served in another county,[50] unless the statute authorizes it.[51] The sheriff can serve process anywhere in his county.[52] But a sheriff of one county cannot serve process in another county,[53] unless authorized by statute,[54] nor has a special bailiff such power.[55]

C. BY WHOM MADE. — **1. Generally.** — The persons who may make personal service of process are designated by statute.[56] Service by an unauthorized person is void.[57]

2. By Officers. — Unless he is a party to the action,[58] process may be served by the sheriff of the county where the defendant is found,

Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227.

47. Kendall *v.* United States, 12 Pet. 524, 623, 9 L. ed. 1181; Jewett *v.* Garrett, 47 Fed. 625.

48. **U. S.**—See Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. **Cal.**—Dela Montanya *v.* Dela Montanya, 112 Cal. 101, 110, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82. **Ind.**—Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440. **Kan.**—Atchison *v.* Challiss, 65 Kan. 179, 69 Pac. 173. **N. Y.**—Grubel *v.* Nassauer, 210 N. Y. 149, 103 N. E. 1113, 52 L. R. A. (N. S.) 161; Huntley *v.* Baker, 33 Hun 578. **N. C.**—Hinton *v.* Penn Mut. L. Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636.

See 17 STANDARD PROC. 678.

[a] **Process served without the state does not give jurisdiction** to render a judgment in personam. Raher *v.* Raher, 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1912D, 680, 35 L. R. A. (N. S.) 292, 302.

49. See 17 STANDARD PROC. 683, 689, and *infra*, VII, K.

50. Cook *v.* Pitts, 114 Miss. 39, 74 So. 777; Campbell *v.* Triplett, 74 Miss. 365, 20 So. 844.

[a] **Service in Another County Is a Nullity.**—Gary *v.* Northwestern M. A. Assn. (Iowa), 50 N. W. 27; Foster *v.* Cimarron Val. Bank, 14 Okla. 24, 76 Pac. 145.

51. See the statutes and C. E. Ingalls & Bro. *v.* Merchants' Broom Co., 68 Fla. 369, 67 So. 106.

[a] **In any county where the defendant may be found,** service may be made. **U. S.**—Swift *v.* Meyers, 13 Sawy. 583, 37 Fed. 37. **Colo.**—Fletcher *v.* Stowell, 17 Colo. 94, 28 Pac. 326. **Kan.**—Mudge *v.* Hull, 56 Kan. 314, 43 Pac. 242. **Neb.**—Gandy *v.* Jolly, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460. **Ohio.**—Maholm *v.* Marshall, 29 Ohio St. 611.

Issuance of process to other counties, see 21 STANDARD PROC. 699.

52. White *v.* Underwood, 125 N. C. 25, 34 S. E. 104, 74 Am. St. Rep. 630, 46 L. R. A. 706.

[a] **Service in a jail** may be made. White *v.* Underwood, 125 N. C. 25, 34 S. E. 104, 74 Am. St. Rep. 630, 46 L. R. A. 706.

53. Lillard *v.* Brannin, 91 Ky. 511, 16 S. W. 349; Godwin *v.* Monds, 106 N. C. 448, 10 S. E. 1044.

54. See the statutes and Gaynor *v.* Wilde, 38 Pa. 300, he may make service in the "adjoining county" only.

55. Guarantee Trust & S. D. Co. *v.* Buddington Wilson & Co., 23 Fla. 514, 2 So. 885; Lillard *v.* Brannin, 91 Ky. 511, 16 S. W. 349.

56. See the statutes.

Such a person may serve a notice of motion. See 20 STANDARD PROC. 27.

[a] **An American consul** to a foreign country cannot there serve process of a state court. *In re* Dumas, 32 La. Ann. 679, 687.

57. **Ark.**—Hughes *v.* Martin, 1 Ark. 386. **Colo.**—Munson *v.* Pawnee Cattle Co., 53 Colo. 337, 126 Pac. 275. **Kan.**—Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704.

58. **Colo.**—Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790. **Ky.**—Knott *v.* Jarboe, 1 Metc. 504. **N. Y.**—Smith *v.* Burliss, 23 Misc. 544, 52 N. Y. Supp. 841, 28 Civ. Pro. 89. **R. I.**—Slocomb *v.* Powers, 10 R. I. 255.

[a] **That a sheriff is a stockholder** in a corporation party, does not make him a party within the rule. Hardwick *v.* Jones, 65 Mo. 54.

under some statutes,[59] or by the officer to whom the process is directed, under others,[60] or by his deputy.[61] The disqualification of the officer extends to the deputy as such,[62] but the disqualification of one deputy does not affect service by another deputy of the same officer.[63] Service by other officers, such as the coroner, is authorized when the sheriff is a party,[64] but such statutes do not prohibit service by an individual.[65]

In the federal practice, the service of process shall be by the marshal of the district or his deputy.[66]

On Change of Incumbency. — At common law, the sheriff who has commenced the execution of a writ by a levy, must proceed and complete it even after the expiration of his office.[67] But some statutes provide that when any process remains with the sheriff, in whole or in part, at the expiration of his term of office, it shall be executed by his successor.[68] And should service of process be made by an

59. Cohen *v.* Portland Lodge, 144 Fed. 266; Hahn *v.* Kelly, 34 Cal. 391, 403, 94 Am. Dec. 742.

[a] **Service of sheriff of wrong county** appearing in the record avoids the judgment collaterally. Munson *v.* Pawnee Cattle Co., 53 Colo. 337, 126 Pac. 275.

[b] **A sheriff cannot refuse to serve process** (1) regularly issued because in his opinion it is defective or irregular (Roth *v.* Duvall, 1 Idaho 149), or (2) because there is no cause of action. Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

[c] **Sheriff de facto** may execute process. Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62.

60. **Ark.**—Rudd *v.* Thompson, 22 Ark. 363; Hughes *v.* Martin, 1 Ark. 386. **Ga.**—Caldwell *v.* Alexander Seed Co., 17 Ga. App. 571, 87 S. E. 843. **Kan.** Branner *v.* Chapman, 11 Kan. 118. **Ky.** See Brumleve *v.* Cronan, 176 Ky. 818, 197 S. W. 498. But see Hagan *v.* Stuart, 4 Ky. L. Rep. 834, holding that process may be executed by any officer to whom it might have been directed. The marshal may execute process directed to the sheriff. See also 15 STANDARD PROC. 909, note 87.

Levy of execution, see 15 STANDARD PROC. 908.

61. Little *v.* Devendorf, 109 Iowa 47, 79 N. W. 476; Atwood *v.* Reyburn, 5 Mo. 533.

62. Hillyer *v.* Pearson, 118 Ga. 815, 45 S. E. 701; Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751. But see Blum *v.* Bassett, 67 Tex. 194, 3 S. W. 33, subpoena.

[a] **He may make service as an individual,** however Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751.

63. Slocomb *v.* Powers, 10 R. I. 255.

[a] **The fact that one deputy is a stockholder in the defendant corporation** does not prevent service by another deputy. Adams *v.* Wiscasset Bank, 1 Greenl. (Me.) 361, 10 **Am.** Dec. 88.

64. **Ariz.**—Lewis *v.* Cunningham, 10 Ariz. 158, 85 Pac. 244. **Mich.**—Hubel *v.* Rorison, 81 Mich. 41, 45 N. W. 590. **Neb.**—Barlass *v.* May, 16 Neb. 647, 21 N. W. 436. **N. C.**—State ex rel. Battle *v.* Baird, 118 N. C. 854, 24 S. E. 668.

[a] **Process must be directed to** him. Rudd *v.* Thompson, 22 Ark. 363.

65. Lewis *v.* Cunningham, 10 Ariz. 158, 85 Pac. 244.

66. Martin *v.* Gray, 142 U. S. 236, 12 Sup. Ct. 186, 35 L. ed. 997.

67. **Cal.**—People *v.* Boring, 8 Cal. 406, 68 Am. Dec. 331. But *compare* present statute. **Ky.**—Allen *v.* Trimble, 4 Bibb. 21, 7 Am. Dec. 726; Rogers *v.* Darnaby, 4 B. Mon. 238, 240. **N. J.** State *v.* Hamilton, 16 N. J. L. 153. **N. Y.**—Tuttle *v.* Jackson ex dem. Hills, 6 Wend. 213, 21 Am. Dec. 306. See Jackson ex dem. Scofield *v.* Collins, 3 Cow. 89. **S. C.**—Gibbes *v.* Mitchell, 2 Bay 120. **Eng.**—Clerk *v.* Withers, 6 Mod. 290, 87 Eng. Reprint 1030.

68. *In re* Baker, 32 Cal. App. 320, 162 Pac. 922; Maxton *v.* Mount, 86 Ill. App. 187.

[a] **Process directed to a predecessor in office** may be executed by the present incumbent. **Maxton *v.* Mount, 86 Ill. App. 187.**

officer after the expiration of his term of office, it is a nullity.[69]

3. By Individuals. — After providing for service by officers, the statutes sometimes authorize service by any other person[70] of sufficient age[71] not a party to the action,[72] or by a person not a party to the action, appointed by the officer to whom it is directed,[73] or, under some statutes, appointed by the court, for good cause.[74] The plaintiff,[75] or his attorney,[76] cannot legally make a service of process. But it has been held that the attorney of the plaintiff may be deputized to serve

69. Simonton *v.* Pattin, 1 Marv. (Del.) 399, 41 Atl. 91.

70. **Cal.**—Hibernia Sav. & L. Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425. **Mich.**—Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136. **W. Va.**—Hollandsworth *v.* Stone, 47 W. Va. 773, 35 S. E. 864.

71. See *infra*, this note.

[a] **Although the statute is silent as to age,** a minor cannot serve the process. Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472; Vail *v.* Rowell, 53 Vt. 109; Harvey *v.* Hall, 22 Vt. 211. *Contra*, Bell *v.* Pruitt, 51 S. C. 344, 29 S. E. 5.

72. Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751.

[a] **The word "party"** is used in its technical sense. Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692.

[b] **An agent** of a corporation plaintiff is not a "party." Loucks *v.* Hallenbeck, 48 App. Div. 426, 63 N. Y. Supp. 1; Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692.

[c] **A deputy is not a "party to the action"** merely because the sheriff is, and he may serve process in his individual capacity. Axtell *v.* Rooks, 39 S. D. 31, 162 N. W. 751.

73. Brumleve *v.* Cronan, 176 Ky. 818, 824, 197 S. W. 498.

[a] **Deputy of such officer may appoint** also. He should sign his principal's name and his own to the appointment. Norman *v.* Norman, 6 Bush (Ky.) 495.

[b] **Appointee's authority must be indorsed** (1) on the writ. Davis *v.* Hamilton, 53 Ill. App. 94; Norman *v.* Norman, 6 Bush. (Ky.) 495. (2) The deputation may be written on a separate piece of paper attached to the back of the process. Cowdery *v.* Johnson, 60 Vt. 595, 15 Atl. 188. (3) It is otherwise if the paper is not attached to the process. Gordon *v.* Knapp, 2 Ill. 488.

[c] **A deputation in blank** is valid. Jewett *v.* Garrett, 47 Fed. 625. *Contra*, Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342.

[d] **The power of special bailiff is exhausted on a return of "not found,"** and a new power is necessary to authorize him to serve an alias. Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6.

74. Brumleve *v.* Cronan, 176 Ky. 818, 197 S. W. 498; Lillard *v.* Brannin, 91 Ky. 511, 16 S. W. 349; North Pacific Cycle Co. *v.* Thomas, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

[a] **Only in pending actions** or proceedings, can court make appointment. Brumleve *v.* Cronan, 176 Ky. 818, 825, 197 S. W. 498.

75. **Ark.**—Rutherford *v.* Moody, 59 Ark. 328, 27 S. W. 230. **Colo.**—Nelson *v.* Chittenden, 53 Colo. 30, 123 Pac. 656, Ann. Cas. 1914A, 1198; Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790. **Mich.** Bush *v.* Meacham, 53 Mich. 574, 19 N. W. 192. **N. Y.**—Smith *v.* Burliss, 23 Misc. 544, 52 N. Y. Supp. 841, 28 Civ. Proc. 89.

But see Penfold *v.* Slyfield, 110 Mich. 343, 68 N. W. 226.

[a] **Service Is Void.**—Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790. *Contra*, Losey *v.* Stanley, 83 Hun 420, 31 N. Y. St. 950.

[b] **Although the statute does not expressly prohibit** the plaintiff from serving process, a service by him is void. Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790.

[c] **He cannot be deputized** to serve process. Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790.

76. Rutherford *v.* Moody, 59 Ark. 328, 27 S. W. 230; Nelson *v.* Chittenden, 53 Colo. 30, 123 Pac. 656, Ann. Cas. 1914A, 1198. *Contra*, First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775.

[a] **Rule is based on public policy** and the principles of the common law, and not on any statutory prohibition. Nelson *v.* Chittenden, 53 Colo. 30, 123 Pac. 656, Ann. Cas. 1914A, 1198.

the process.[77]

D. On Whom Service Made.[78] — The summons must be served on the person for whom it is issued,[79] or, it has been held, on a person designated by him to receive summons.[80] And service on the defendant's attorney does not give jurisdiction over defendant's person.[81] All joint defendants named in the writ must be served,[82] unless statutes provide otherwise.[83] A nonresident temporarily within the jurisdiction may be served,[84] unless, under the circumstances, he is privileged from service.[85]

E. How Made. — **1. Generally.** — Independent of statute the mode of making personal service of process has been held to be by showing the original under seal and delivering a copy,[86] or by reading the same to the defendant.[87] Under statutes, the methods prescribed are usually by reading the original process to the defendant,[88] or by delivering to

77. Jewett *v.* Garrett, 47 Fed. 625; Wilford *v.* Miller, Morris (Ia.) 405.

78. **Substituted service,** see *infra,* VI.

79. Hebel *v.* Amazon Ins. Co., 33 Mich. 400; Barnett *v.* Tayler, 30 Tex. 453.

[a] **A service on the wrong person who on discovering the mistake mails the process** to the defendant is not valid service. Savings Bank *v.* Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498.

80. Lyster *v.* Pearson, 6 Misc. 618, 26 N. Y. Supp. 77.

Service on designated agent of corporation, see 5 Standard Proc. 621, 737; of partnership, see 21 Standard Proc. 70.

81. Drake *v.* Duvenick, 45 Cal. 455; Goldberg *v.* Fowler, 29 Misc. 328, 60 N. Y. Supp. 475.

Substituted service on attorney, see *infra,* VI, E.

Service of notices and papers on the attorney, see *infra,* X.

82. Draper *v.* Moriarty, 45 Conn. 476; Butts *v.* Francis, 4 Conn. 424.

83. See 15 Standard Proc. 87, note 15 [a].

Service on partner, see 21 Standard Proc. 68.

84. **U. S.**—Jewett *v.* Garrett, 47 Fed. 625, 631. **Ala.**—Lee *v.* Baird, 139 Ala. 526, 36 So. 720. **Neb.**—Adair County Bank *v.* Forrey, 74 Neb. 811, 105 N. W. 714. **W. Va.**—Atkinson *v.* Washington & Jefferson College, 54 W. Va. 32, 46 S. E. 253.

[a] **Although he is on the train** passing through. Jewett *v.* Garrett, 47 Fed. 625, 631.

85. See the title "**Privilege.**"

86. Edmondson *v.* Mason, 16 Cal 386; Kalanianaole *v.* Dimond & Co., 15 Haw. 486.

87. Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Ball *v.* Shattuck, 16 Ill. 299.

[a] **Common Law.**—These decisions do not attempt to state the common law as to the manner of service. "There is no more authority in the common law for saying service of summons shall be by copy, than that it must be by reading." Law *v.* Grommes, 158 Ill. 492, 495, 41 N. E. 1080.

88. See the statutes and **Ia.**—Anderson *v.* Kerr, 10 Iowa 233. **Mont.**—Sanford *v.* Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482. **N. J.**—Steedle *v.* Woolston, 88 N. J. L. 91, 95 Atl. 737, summons of small cause court. **N. C.**—S. Lowman & Co. *v.* Ballard, 168 N. C. 16, 84 S. E. 21, Ann. Cas. 1917B, 899, L. R. A. 1915D, 427.

[a] **In the presence of the party,** the summons should be read. S. Lowman & Co. *v.* Ballard, 168 N. C. 16, 84 S. E. 21, Ann. Cas. 1917B, 899, L. R. A. 1915D, 427.

Service by telephone, see *infra,* IX.

[b] **Reading the summons to a person within the hearing of the defendant,** is sufficient. Metzger *v.* Huntington, 51 Ill. App. 377, the officer thought the person addressed was the defendant.

[c] **The reading of the material facts** only is insufficient. Crary *v.* Barber, 1 Colo. 172.

[d] **Reading may be waived** by the party. Casteel *v.* Hiday, 13 Ind. 536; Williamson *v.* Cocke, 124 N. C. 585, 32 S. E. 963.

[e] **Copy need not be left, where**

him a copy thereof,[89] or by both such reading and delivery.[90] Some statutes allow service in either mode.[91] The party served must be conscious of the act of service.[92]

Alias. — The original summons need not be served with the alias.[93]

2. Where Defendant Refuses To Receive Service. — If the defendant refuses to accept papers offered him with a view to service upon him, the officer will inform him of their nature, and of his purpose to make service of them,[94] and lay them down in any appropriate place in his presence.[95] When a service by reading is prescribed an offer to read is sufficient if the person served refuses to permit the reading.[96]

F. THE COPY OF THE PROCESS DELIVERED. — The copy of process

service is by reading. Kleckner *v.* Lehigh Co., 6 Whart. (Pa.) 66.

89. **Ga.**—Jarrell *v.* Guann, 105 Ga. 139, 31 S. E. 149. **Ky.**—Case *v.* Colston, 1 Metc. 145. **Minn.**—Groff *v.* National Bank, 50 Minn. 348, 52 N. W. 934. **Tex.**—Perez *v.* Perez, 59 Tex. 322; Anderson *v.* Brown, 16 Tex. 554.

[a] **Where there are several defendants,** a copy must be served on each. There is no need of several originals though. Anderson *v.* Brown, 16 Tex. 554.

[b] **Leaving copy with defendant's wife** is insufficient. Sherrell *v.* Huber, 186 Ill. App. 475. As substituted service, see *infra,* VI.

[c] **A service by thrusting the paper in the defendant's outside pocket,** who acknowledges that fact is sufficient. Heller *v.* Levinson, 166 App. Div. 673, 152 N. Y. Supp. 35.

[d] **A service by reading is insufficient,** where a delivery is required. Case *v.* Colston, 1 Metc. (Ky.) 145.

[e] **Depositing process on a chair without offering** to deliver them to the defendant's hands, and without asking for the defendant or stating the nature of the paper is insufficient. Correll *v.* Granget, 12 Misc. 209, 34 N. Y. Supp. 25, 67 N. Y. St. 892.

90. Mo. Rev. St., 1909, §1760 (by reading the writ and delivering a copy of the petition); Waddingham *v.* St. Louis, 14 Mo. 190.

91. **Ark.**—Rose *v.* Ford, 2 Ark. 26. **Mo.**—Waddingham *v.* St. Louis, 14 Mo. 190. **Pa.**—Kleckner *v.* Lehigh Co., 6 Whart. 66.

92. See *infra,* this note.

[a] **Putting the defendant in unknown possession of the summons, disguised or enveloped,** so as to conceal it from his knowledge is not a good service. (Bulkley *v.* Bulkley, 6 Abb. Pr. (N. Y.) 307 [where summons contained in a package to be presented to defendant's mother, was given to defendant on her departure on a voyage]), unless (2) the defendant immediately opens the envelop and finds the papers. Jackson *v.* Schuylkill Silk Mills, 92 Misc. 442, 156 N. Y. Supp. 219.

[b] **Service on a sick man** unconscious of the act by laying the copy on his body is invalid. People ex rel. Midler *v.* Judge of Superior Ct., 38 Mich. 310.

[c] **Service on a person too drunk** to comprehend the nature of the service is insufficient. Murphy *v.* Loos, 104 Ill. 514.

93. Lawrence *v.* Bernstein, 46 Misc. 608, 92 N. Y. Supp. 817.

94. Davison *v.* Baker, 24 How. Pr. (N. Y.) 39; Correll *v.* Granget, 12 Misc. 209, 34 N. Y. Supp. 25, 67 N. Y. St. 892. But see Norton *v.* Meader, 4 Sawy. (U. S.) 603, 619, 18 Fed. Cas. No. 10,351, holding that the objection that the officer did not explain the character of the paper cannot be heard from the defendant. See Steedle *v.* Woolston, 88 N. J. L. 91, 95 Atl. 737.

95. Norton *v.* Meader, 4 Sawy. (U. S.) 603, 18 Fed. Cas. No. 10,351; Davison *v.* Baker, 24 How. Pr. (N. Y.) 39; Correll *v.* Granget, 12 Misc. 209, 34 N. Y. Supp. 25, 67 N. Y. St. 892.

[a] **By offering to deliver a copy,** the service may be made, under statute. Case *v.* Colston, 1 Metc. (Ky.) 145.

[b] **The officer cannot legally by personal violence** compel the acceptance of the process. Davison *v.* Baker, 24 How. Pr. (N. Y.) 39.

96. Slaght *v.* Robbins, 13 N. J. L. 340.

served need not be under seal,[97] nor is it necessary to indicate thereon in any manner that the original was under seal.[98] If the copy of the process delivered to the defendant omit vital things, service thereof will not give jurisdiction,[99] but unimportant clerical errors therein do not affect jurisdiction.[1] It has been held that the copy may be amended.[2]

G. SERVING PLEADING WITH PROCESS. — A copy of the pleading need not be served with the process,[3] except when statute requires it.[4] The failure to serve the pleading is regarded as jurisdictional in some states,[5] and as a mere irregularity in others.[6]

Where there are several defendants, a copy of the pleading need be

97. **Ill.**—Sietman *v.* Goeckner, 127 Ill. App. 67. **Ind.**—Hughes *v.* Osborn, 42 Ind. 450; Kelley *v.* Mason, 4 Ind. 618. **Mich.**—Lyon *v.* Baldwin, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. **Neb.**—Herold *v.* Coates, 88 Neb. 487, 129 N. W. 998. **Tex.**—Peters *v.* Crittenden, 8 Tex. 131. **Can.** Cameron *v.* Wheeler, 6 U. C. Q. B. 355.

Compare Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840. But see Stegman *v.* Wills, 3 Pa. Dist. 252.

[a] **"The sheriff is not the keeper** of the seal of the court, nor authorized to affix it to writs or the copies thereof." Hughes *v.* Osborn, 42 Ind. 450.

98. **Ill.**—Sietman *v.* Goeckner, 127 Ill. App. 67. **Neb.**—Herold *v.* Coates, 88 Neb. 487, 129 N. W. 998. **Can.** Cameron *v.* Wheeler, 6 U. C. Q. B. 355.

[a] **Absence of seal from copy raises no presumption** that the original was not sealed. **U. S.**—Kimball *v.* Taylor, 2 Woods 37, 14 Fed. Cas. No. 7,775. **La.**—Medley *v.* Voris, 2 La. Ann. 140. **Neb.**—Herold *v.* Coates, 88 Neb. 487, 129 N. W. 998.

99. Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840.

1. **Ga.**—Williams *v.* Buchanan & Bro., 75 Ga. 789. **Ind.**—Hughes *v.* Osborn, 42 Ind. 450. **Kan.**—Stewart *v.* Bodley, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105; Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840. **Mich.** Lyon *v.* Baldwin, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. **N. Y.** Union Furn. Co. *v.* Shepherd, 2 Hill 413; Sivaslian *v.* Akulian, 166 N. Y. Supp. 535. **Vt.**—Collins *v.* Merriman, 31 Vt. 622.

[a] **Omission of date from copy of** a writ left with the defendant is not material. Lyon *v.* Baldwin, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. *Compare* Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840.

2. Hackfeld & Co. *v.* Coerper, 18 Hawaii 585, even if the defendant appear specially to quash the summons.

3. Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695; Pipkin *v.* Kaufman, 62 Tex. 545, when the defendant is within the county, no copy of the petition need be served. But it is otherwise when service outside the county is made.

[a] **On application to the clerk,** the defendant may obtain a copy. Kan. Gen. St., 1909, §5652. But see Case *v.* Bartholow, 21 Kan. 300 (decided under an earlier statute); Pipkin *v.* Kaufman, 62 Tex. 545.

[b] **The defendant may demand a copy of the petition** when served and instruct the sheriff to what point it shall be directed. Woodward *v.* Whitescarver, 6 Iowa 1.

4. See the statutes, and the following cases: **Cal.**—Southern Pac. R. Co. *v.* Superior Court, 59 Cal. 471; McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52. **Minn.**—W. W. Kimball Co. *v.* Brown, 73 Minn. 167, 75 N. W. 1043, a copy must be served, unless the complaint is filed with the clerk. The summons must then notify the defendant of the filing of the complaint. See 21 STANDARD PROC. 755. **Ore.**—Lane *v.* Ball, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975. **Tex.**—Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695, when service outside the county is made, a copy must be served.

5. McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52; Lane *v.* Ball, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

6. W. W. Kimball Co. *v.* Brown, 73 Minn. 167, 75 N. W. 1043; Thompson *v.* Chicago S. F. & C. Ry. Co., 110 Mo. 147, 19 S. W. 77.

served on one only, under some statutes.[7]

Copy of Complaint Served. — The copy of the pleading served with the process should be a true and correct copy;[8] but trivial differences between the complaint on file and the one served do not defeat jurisdiction.[9] The copy need not be certified,[10] unless required by law.[11] It need not contain a copy of the file mark,[12] or of the indorsements,[13] and copies of a deed, note, or other writing relied on and filed in the case need not be served.[14] It has been held that the copy of the petition may supply insufficiencies in the process.[15]

H. SERVICE BY FRAUD AND FORCE. — **1. Service on a Resident. Entering Dwelling House Forcibly.** — At common law, and in the absence of statute permitting it, an officer serving civil process has no right to enter a private or dwelling house forcibly or against the will of

7. See the statutes, and the following cases: Collier *v.* Catherine Lead Co., 208 Mo. 246, 106 S. W. 971; Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747.

[a] **Service of copy of the pleading on one of the defendants will be presumed** where the record is silent, although two of the defendants are designated by fictitious names, and the third claims he was not served with a copy of the pleading. Sacramento Sav. Bank *v.* Spencer, 53 Cal. 737. But see present California statute.

[b] **Although the defendants reside in different counties,** service of only one copy of the petition is required. The fact that several writs are issued does not require service of a copy of the petition in each county. Collier *v.* Catherine Lead Co., 208 Mo. 246, 270, 106 S. W. 971.

8. See *infra*, this note.

[a] **The caption** cannot be omitted from the copy. Lukis *v.* Allen, 45 La. Ann. 1447, 14 So. 186.

[b] **A copy of the verification** must be served also. Wolf *v.* Binder, 10 Pa. Co. Ct. 108.

[c] **The defendant may rely on the copy served,** and on demurrer, the plaintiff cannot contend the original differs. Hunt *v.* Miller, 101 Wis. 583, 77 N. W. 874. See also Guarino *v.* Fireman's Ins. Co., 44 Misc. 218, 88 N. Y. Supp. 1044.

9. **Cal.**—Fraser *v.* Oakdale Lumber & Water Co., 73 Cal. 187, 14 Pac. 829; McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52, where the name of one of the defendants was omitted, although stated in the summons. **Conn.**—Lyon *v.* Lyon, 21 Conn. 185. **Ga.**—Brooke *v.* Lowry Nat. Bank, 141 Ga. 493, 81 S. E. 223.

[a] **Clerical Errors in Copy Do Not Render Complaint Demurrable.**—Hall *v.* Marvin, 142 App. Div. 75, 126 N. Y. Supp. 206.

[b] **The omission of the signature of the attorney** from a copy of the complaint required to be served with the summons is immaterial. Wilson *v.* Fine, 38 Fed. 789; Brooke *v.* Lowry Nat. Bank, 141 Ga. 493, 81 S. E. 223.

10. Cowell *v.* Stuart, 69 Cal. 525, 11 Pac. 57.

11. Kimmell *v.* Edwards (Tex. Civ. App.), 193 S. W. 363.

[a] **Seal of authentication** not necessary. Thomas *v.* Womack, 13 Tex. 580.

12. Emmons *v.* Marbelite Plaster Co., 193 Fed. 181; Pruitt *v.* State, 92 Tex. 434, 49 S. W. 366.

13. Wichita Mill & Elevator Co. *v.* State, 57 Tex. Civ. App. 165, 122 S. W. 427.

14. Hadwin *v.* Home Mut. Ins. Co., 13 Mo. 473.

[a] **Copies of documents annexed** to the petition need not be served although the petition mentions that they form part of it. Osborn *v.* Chambers, 4 La. Ann. 296. The rule would seem to be otherwise where such an exhibit becomes part of the pleading. See 8 STANDARD PROC. 806.

15. Pruitt *v.* State (Tex. Civ. App.) 47 S. W. 553, as to date of filing of petition.

[a] **A want of fullness in the statement** of the nature of the plaintiff's demand as contained in the citation is supplied by the copy of the petition. Carlton *v.* Mayner, 47 Tex. Civ. App. 47, 103 S. W. 411.

the occupant.[16] He cannot, in the first instance, open outer doors or windows or other outside protection of the debtor's dwelling, if they be closed.[17] But if the door or window be open, he may go in under civil process.[18] And where the execution of process has been properly commenced, the officer may afterwards break an outer door if necessary to continue or complete the execution.[19] These rules afford no protection to one who flies to another's house or who brings his goods there to avoid process. In such case after a demand and refusal, the

16. **Cal.**—Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123. **Mass.**—Swain *v.* Mizner, 8 Gray 182, 69 Am. Dec. 244. **Mo.** State ex rel. Gehring *v.* Claudius, 1 Mo. App. 551, 559. **N. H.**—Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459. **R. I.**—Kelley *v.* Schuyler, 20 R. I. 432, 39 Atl. 893, 78 Am. St. Rep. 887, 44 L. R. A. 435. **Eng.**—Semaynes' Case, 5 Coke 91, 1 Smith Lead. Cas. 228, 238, 77 Eng. Reprint 194.

[a] **Whether the plaintiff is the state or a private person** is immaterial. Hawkins *v.* Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147. But see Semayne's Case, 5 Coke 91, 1 Smith Lead. Cas. 228, 238, 77 Eng. Reprint 194, holding rule is inapplicable when the king is a party.

[b] **Rule Applies to Deputies.** Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

[c] **The fact that the defendant is not in the house** at the time does not authorize an opening of the door by the sheriff. Curtis *v.* Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292.

[d] **Entry at invitation of servant** (1) is lawful (Hitchock *v.* Holmes, 43 Conn. 528), unless (2) fraud is resorted to. Olson *v.* McConihe, 54 Misc. 48, 105 N. Y. Supp. 386, where the process server asked to see a servant.

[e] The lock (1) cannot be picked. Ewald *v.* Fidelity Title & T. Co., 43 Pa. Super. Ct. 593. (2) Nor can the plaintiff use a key in his possession. Mason *v.* Libbey, 1 Abb. N. C. (N. Y.) 354, 51 How. Pr. 436.

[f] **Dwelling House Defined.**—Hawkins *v.* Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[g] **A Levy by Improper Use of Force Is Void.**—Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

17. **D. C.**—Palmer *v.* King, 41 App. Cas. 419, Ann. Cas. 1915C, 1139. **Ill.** Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551. **Ky.**—Hawkins *v.* Com., 14 B. Mon. 395, 61 Am. Dec. 147. **Md.** Cate *v.* Schaum, 51 Md. 299. **Mass.** Ilsley *v.* Nichols, 12 Pick. 270, 22 Am. Dec. 425; Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172. **Mich.**—Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37. **N. Y.**—Glover *v.* Whittenhall, 6 Hill 597. **Tex.**—Hillman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788. **Vt.**—State *v.* Hooker, 17 Vt. 658.

[a] **Window shutters** cannot be unlatched. Jewell *v.* Mills, 3 Bush (Ky.) 62.

[b] **Where a part of a store is used as a residence,** the outer door of the dwelling is the door to the part occupied for dwelling purposes. Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37.

18. **Del.**—Boggs *v.* Vandyke, 3 Harr. 288. **D. C.**—Palmer *v.* King, 41 App. Cas. 419, Ann. Cas. 1915C, 1139. **Eng.** Miller *v.* Tebb, 9 Times L. R. 515; Semayne's Case, 5 Coke 91, 1 Smith Lead. Cas. 228, 238, 77 Eng. Reprint 194.

[a] **A window partly open** may be further opened. Crabtree *v.* Robinson, L. R. 15 Q. B. Div. (Eng.) 312, 54 L. J. Q. B. N. S. 544, 33 Wkly. Rep. 936, 50 J. P. 70.

19. Glover *v.* Whittenhall, 6 Hill (N. Y.) 597.

[a] **In a pursuit to retake a defendant** who has been previously arrested and who has escaped, the sheriff may break open an outer door after demanding admission and refusal, or without such demand when it would be a senseless ceremony. Allen *v.* Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

[b] **If the officer is expelled after having made a legal entry** and the outer door is closed, he may break in. Allen *v.* Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Aga Kurboolie Mahomed *v.* Reg., 4 Moore P. C. C. 239, 13 Eng. Reprint 293.

[c] **Where the officer has made a**

officer may break into the house.[20] But an officer invading the premises of strangers which do not in fact shelter the person to be served is a trespasser.[21]

Inner Doors, etc. — Having effected a lawful entrance, the officer may break inner doors,[22] and he may break open trunks or wardrobes, etc., for the purpose of a necessary levy.[23]

Buildings other than dwelling houses are not within the rule,[24] although in such case the officer must first ask and be denied admittance if there be any person present.[25]

These rules apply to all processes in civil actions,[26] except the final process of habere facias possessionem.[27] The exception has been extended to executions for specific property in actions of detinue also.[28]

2. Service on a Nonresident.[29] — Service on a defendant inveigled

levy on goods, he may force the doors to regain possession and control, if admittance is refused upon a reasonable demand. Glover *v.* Whittenhall, 6 Hill (N. Y.) 597. But see Hillman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788.

20. Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Semayne's Case, 5 Coke 91, 1 Smith Lead. Cas. 228, 238, 77 Eng. Reprint 194.

21. Blatt *v.* McBarron, 161 Mass. 21, 36 N. E. 468, 42 Am. St. Rep. 385.

[a] **Finding the door open,** the officer may enter the house of a stranger; if the defendant's goods are in it he is justified; if not he is a trespasser. Cooke *v.* Birt, 5 Taunt. 765, 1 E. C. L. 392, 1 Marsh. 333, 128 Eng. Reprint 893.

22. **Mich.**—Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37. **N. Y.**—Haggerty *v.* Wilber, 16 Johns. 287, 8 Am. Dec. 321; Williams *v.* Spencer, 5 Johns. 352. **Tex.**—Hillman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788. **Eng.**—Lee *v.* Gansell, Cowp. pt. 1, p. 1, Lofft 374, 98 Eng. Reprint 700; Lloyd *v.* Sandilands, 8 Taunt. 250, 4 E. C. L. 132, 2 Moore 207, 129 Eng. Reprint 379.

[a] **But the outer door of an apartment house** is not the outer door of each department. Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244.

23. Hillman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788.

24. **Mont.**—Ramsey *v.* Burns, 27 Mont. 154, 69 Pac. 711. **N. Y.**—Haggerty *v.* Wilber, 16 Johns. 287, 8 Am. Dec. 321. **R. I.**—Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635, 91 Am. St. Rep. 624, 54 L. R. A. 670. **Vt.**—Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

25. **Ky.**—Rountree *v.* Glatt, 13 Ky. L. Rep. 462. **Mont.**—Ramsey *v.* Burns, 27 Mont. 154, 69 Pac. 711. **Vt.**—Fullam *v.* Stearns, 30 Vt. 443; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

26. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

[a] **Summons.**—Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

[b] **Subpoena.**—State ex rel. Gehring *v.* Claudius, 1 Mo. App. 551.

[c] **Writ of Arrest.**—Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

Writ of attachment, see 3 STANDARD PROC. 502.

Distress warrant, see 18 STANDARD PROC. 530.

Writ of replevin, see the title, "Replevin."

[d] **Writ of Execution.**—Boggs *v.* Vandyke, 3 Harr. (Del.) 288; Curtis *v.* Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292.

[e] **Writ of Retorno Habendo.** Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

Execution against the person, see 16 STANDARD PROC. 301.

Criminal process, see the titles, "Warrants;" "Search and Seizure."

27. Semayne's Case, 5 Coke 91, 1 Smith Lead. Cas. 228, 77 Eng. Reprint 194, for after the judgment in a real action, it is not the house in right and judgment of law of the tenant or defendant.

28. Keith *v.* Johnson, 1 Dana (Ky.) 604, 25 Am. Dec. 167.

29. **Privilege of non-resident party** coming into state to defend, see 21 STANDARD PROC. 627.

or induced to come into the state by deception practiced upon him by the plaintiff or those acting in his behalf, for the purpose of making personal service, is invalid.[30] The same is true where the presence of the defendant within the state is procured by an improper use of criminal process,[31] or by force.[32]

VI. SUBSTITUTED SERVICE. — A. GENERALLY. — Statutes sometimes provide for substituted service by leaving copies of process at defendant's usual place of abode.[33] Such substituted service is a form of personal service.[34] Service in this manner can be made only when the defendant cannot be found,[35] and, it has been held, when his true name is known.[36] Nonresidents of the state cannot be served in this way, at least so as to authorize a personal judgment against them;[37] but the opposite is true in case of a resident of the state who

30. **U. S.**—Commercial Mut. Acc. Co. *v.* Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. ed. 782; Blandin *v.* Ostrander, 239 Fed. 700, 152 C. C. A. 534; Jewett *v.* Garrett, 47 Fed. 625; Blair *v.* Turtle, 1 McCrary 372, 5 Fed. 394. **Ill.**—Wanzer *v.* Bright, 52 Ill. 35. **Ia.** Crandall *v.* Trowbridge, 170 Iowa 155, 150 N. W. 669, Ann. Cas. 1916C, 608 note; Dunlap & Co. *v.* Cody, 31 Iowa 260, 7 Am. Rep. 129. **Kan.**—McLain *v.* Parker, 88 Kan. 717, 129 Pac. 1140. **N. J.**—Reed *v.* Williams, 29 N. J. L. 385. **Wis.**—Townsend *v.* Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793.

31. Compton, Ault & Co. *v.* Wilder, 40 Ohio St. 130.

[a] **But where the plaintiff has nothing to do** with bringing the defendant within the state, the service is valid. Nichols, Shepard & Co. *v.* Goodheart, 5 Ill. App. 574.

Privilege of party brought into the jurisdiction under charge of crime, see 21 STANDARD PROC. 629.

32. **U. S.**—Blair *v.* Turtle, 5 Fed. 394, 1 McCrary 372. **Kan.**—State *v.* Simmons, 39 Kan. 262, 18 Pac. 177. **N. J.**—Reed *v.* Williams, 29 N. J. L. 385. **N. Y.**—Ziporkes *v.* Chmelniker, 15 N. Y. St. 215, 47 Hun 639.

33. See the statutes and Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629. But see Barton *v.* Burton Mfg. Co. (Ala.), 79 So. 664; Hobby *v.* Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

[a] **In federal equity practice,** substituted service is authorized. *In re* Norton, 148 Fed. 301; Walker *v.* Hughes, 132 Fed. 885.

[b] **But in admiralty,** service must be made personally upon the defendant. Walker *v.* Hughes, 132 Fed. 885. See 1 STANDARD PROC. 497.

Personal service as a substitute for publication, see *infra,* VII, K.

34. See *supra,* I.

35. **U. S.**—Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110; In re Norton, 148 Fed. 301. **Minn.**—Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540. **Ore.**—Whittier *v.* Woods, 57 Ore. 432, 112 Pac. 408; Trullenger *v.* Todd, 5 Ore. 36. **Wash.**—Mitchell, Lewis & Staver Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235. **Wis.**—Matteson *v.* Smith, 37 Wis. 333.

36. Enewold *v.* Olsen, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573, holding substituted service on "F. Olsen, real name unknown" is insufficient to bind Ferdinand Olsen.

[a] **To be ignorant of either the christian name or surname** is to be ignorant of the person's true name within the statute. Enewold *v.* Olsen, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

37. **Del.**—Caldwell *v.* Armour, 1 Penne. 545, 43 Atl. 517. **Ill.**—Joel *v.* Bennett, 276 Ill. 537, 115 N. E. 5. **Ind.** Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440. **Ia.**—Raher *v.* Raher, 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1912D, 680, 35 L. R. A. (N. S.) 292. **Me.**—Thomas *v.* Thomas, 96 Me. 223, 52 Atl. 642, 90 Am. St. Rep. 342.

See *infra,* VI, I.

Service on agent of non-resident, see *infra,* VI, E.

[a] **A non-resident of the state who is temporarily residing** in the state cannot be served by substituted service. Thomas *v.* Thomas, 96 Me. 223, 52 Atl. 642, 90 Am. St. Rep. 342; Ames *v.* Winsor, 19 Pick. (Mass.) 247. *Compare* Bicknell *v.* Herbert, 20 Hawaii 132, Ann. Cas. 1913A, 1186, where a resident intending to move away per-

is merely temporarily absent therefrom.[38]

B. COMPLIANCE WITH STATUTE. — The statutes authorizing substituted service must be strictly complied with.[39]

C. ORDER ALLOWING SERVICE. — To authorize substituted service on a resident of the state, some statutes require that an order of court be first obtained[40] upon satisfactory proof of the facts by affidavit and return.[41]

D. WHERE COPY IS LEFT. — It is required that the copy of the process be left at the defendant's usual place of abode or dwelling house,[42] or at his usual or last place of residence.[43] The word "at" means "near" or "by" as well as "in,"[44] so that it is sufficient if the process be delivered to the proper person while he is "near" the house.[45] The "house of usual abode" or "usual place of abode"

manently afterwards returned to the state on a business trip, rented a room for a month and was served in this manner.

[b] **A resident intending to remove from the state permanently** is a nonresident when he passes beyond the boundary of the state, although his wife may still reside in the state. Amsbaugh *v.* Exchange Bank, 33 Kan. 100, 104, 5 Pac. 384; Hervey *v.* Hervey, 56 N. J. Eq. 166, 181, 38 Atl. 767.

38. See *infra*, VI, I.

39. **U. S.**—Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110. **Minn.** Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344. **Neb.**—Minnesota Thresher Mfg. Co. *v.* L'Heureux, 82 Neb. 692, 118 N. W. 565. **Wis.**—Pollard *v.* Wegener, 13 Wis. 569.

[a] **If process is left at an improper place,** (1) the service is a nullity (Hays *v.* Alway, 39 S. D. 586, 166 N. W. 139), even though (2) the process is subsequently delivered to the defendant. Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344.

40. Buswell *v.* Lincks, 8 Daly (N. Y.) 518; Nichols *v.* Emmett, 56 Misc. 321, 107 N. Y. Supp. 663; Malloy *v.* Lennon, 22 Misc. 542, 49 N. Y. Supp. 1004.

[a] **Statute Applies to the City Court of New York.**—Malloy *v.* Lennon, 22 Misc. 542, 49 N. Y. Supp. 1004.

[b] **The Order Is Not Appealable.** Bank of Long Island *v.* Gregory, 132 App. Div. 93, 116 N. Y. Supp. 309.

41. Bank of Long Island *v.* Gregory, 132 App. Div. 93, 116 N. Y. Supp. 309.

42. **U. S.**—Kibbe *v.* Benson, 17 Wall. 624, 21 L. ed. 741, dwelling house. **Ill.** Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430; Kline *v.* Kline, 104 Ill. App. 274. **Ia.**—Davis *v.* Burt, 7 Iowa 56. **Mass.** Ames *v.* Winsor, 19 Pick. 247, at place of last and usual abode or dwelling house. **Minn.**—Brigham *v.* Connecticut Mut. L. Ins. Co., 79 Minn. 350, 82 N. W. 668 ("at the house of the usual abode"); Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342. **Mo.**—Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237; Ser *v.* Bobst, 8 Mo. 506. **N. J.**—Heilemann *v.* Clowney, 90 N. J. L. 87, 103 Atl. 687. **Wash.**—Mitchell, Lewis & Staver Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235. **W. Va.**—Van Diver *v.* Roberts, 4 W. Va. 493.

[a] **Leaving a copy at defendant's "dwelling house"** is insufficient, where service at "usual place of abode" is required. Ser *v.* Bobst, 8 Mo. 506.

43. **Ind.**—Stout *v.* Harlem, 20 Ind. App. 200, 48 N. E. 235, 50 N. E. 492. **La.**—Rehage *v.* Hayford, 141 La. 103, 74 So. 711. **Neb.**—Wood *v.* Roeder, 45 Neb. 311, 63 N. W. 853, "usual place of residence."

[a] **"The usual or last place of residence" means** the residence into which the person still a resident of this state, has moved in this state, last before the service of process. Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440.

[b] **A return of leaving a copy "at the residence"** is sufficient under statute requiring it to be left at the "usual place of residence." Walke *v.* Bank of Circleville, 15 Ohio 288, 298.

44. Bursow *v.* Doerr, 96 Neb. 219, 147 N. W. 474, Ann. Cas. 1916C, 248.

45. **Ind.**—Conrad *v.* Johnson, 25 Ind. 487. **Ky.**—Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1060, holding the service

means one's customary dwelling place or residence,[46] or the place where he abides or lives at the time the summons is served.[47] It is not synonymous with the term domicile.[48] But a service at the defendant's "residence" is held sufficient by some courts.[49] It has been held that the reservation of a single room in an apartment or flat does not make such room the house of usual abode as distinct from the remainder of the flat.[50] But the temporary sojourning at a hotel or boarding house for a few days does not make that a "usual place of abode."[51]

sufficient although the person receiving the notice was from fifty to two hundred yards distant from the house. **Neb.**—Bursow *v.* Doerr, 96 Neb. 219, 147 N. W. 219, Ann. Cas. 1916C, 248, where the person served was not more than twenty feet from the house. **Wash.**—State ex rel. Pacific & I. Co. *v.* Superior Court, 84 Wash. 392, 146 Pac. 834, where person served was about thirty feet from the door of the house.

See Heilemann *v.* Clowney, 90 N. J. L. 87, 103 Atl. 687 query. But *compare* Kibbe *v.* Benson, 17 Wall. (U. S.) 624, 21 L. ed. 741, holding a delivery in a corner of the yard, one hundred and twenty-five feet from the house is insufficient.

46. Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344; Missouri, K. & T. Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634.

47. **U. S.**—Earle *v.* McVeigh, 91 U. S. 503, 23 L. ed. 398. **Ind.**—Pigg *v.* Pigg, 43 Ind. 117. **Miss.**—Hendricks *v.* Kellogg, 116 Miss. 22, 76 So. 746. **Mo.**—Madison Co. Bank *v.* Suman's Admr., 79 Mo. 527. **N. J.**—Sweeney *v.* Miner, 88 N. J. L. 361, 95 Atl. 1014; Missell *v.* Hayes, 84 N. J. L. 196, 85 Atl. 818; Mygatt *v.* Coe, 63 N. J. L. 510, 44 Atl. 198. **Utah.** Grant *v.* Lawrence, 37 Utah 450, 108 Pac. 931, Ann. Cas. 1912C, 280. **W. Va.** Capehart *v.* Cunningham, 12 W. Va. 750.

[a] **The words "usual place of residence"** mean the place of abode at the time of service. Kruse *v.* Johnson, 87 Neb. 694, 127 N. W. 1072; Blodgett *v.* Utley, 4 Neb. 25.

[b] "Last" place of abode (1) is not meant. Earle *v.* McVeigh, 91 U. S. 503, 508, 23 L. ed. 398; Kline *v.* Kline, 104 Ill. App. 274. (2) Service at "last" place of residence is insufficient. Ireland *v.* Bryan, 3 Mart. N. S. (La.) 515; Madison Co. Bank *v.* Suman's Admr., 79 Mo. 527.

48. **Haw.**—Bicknell *v.* Herbert, 20 Hawaii 132, Ann. Cas. 1913A, 1186. **Minn.**—Missouri K. & T. Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634. **Miss.**—Hendricks *v.* Kellog, 116 Miss. 22, 76 So. 746. **N. J.**—Missell *v.* Hayes, 84 N. J. L. 196, 85 Atl. 818; Mygatt *v.* Coe, 63 N. J. L. 510, 44 Atl. 198. **Utah.**—Grant *v.* Lawrence, 37 Utah 450, 108 Pac. 931, Ann. Cas. 1912C, 280.

Contra, Walker *v.* Stevens, 52 Neb. 653, 72 N. W. 1038; Wood *v.* Roeder, 45 Neb. 311, 63 N. W. 853 ("residence" and "usual place of residence"); McFarlane *v.* Cornelius, 43 Ore. 513, 522, 73 Pac. 325, 74 Pac. 468, "usual place of abode."

[a] **The usual place of residence of a prisoner in jail** is (1) the home of his residence and domicile. Walker *v.* Stevens, 52 Neb. 653, 72 N. W. 1038, where defendant was held to answer to a felony. (2) But where the home of the prisoner is sold, service on him in jail is sufficient. Dunn's Appeal, 35 Conn. 82.

49. Du Val *v.* Johnson, 39 Ark. 182; Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180. See Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344. *Contra,* Bicknell *v.* Herbert, 20 Hawaii 132, Ann. Cas. 1913A, 1186; Heilemann *v.* Clowney, 90 N. J. L. 87, 103 Atl. 687.

50. Brigham *v.* Connecticut Mut. L. Ins. Co., 79 Minn. 350, 82 N. W. 668. *Compare* Heilemann *v.* Clowney, 90 N. J. L. 87, 103 Atl. 687, holding it insufficient to slip the process under a door leading into a hall which communicates with defendant's apartment and a business establishment.

51. White *v.* Primm, 36 Ill. 416. See also Craig *v.* Gisborne, 13 Gray (Mass.) 270. *Compare* Bicknell *v.* Herbert, 20 Hawaii 132, Ann. Cas. 1913A, 1186, holding the room occupied for a month during a business trip to Hawaii is a "usual place of abode."

The personal presence of the defendant or his family is not necessarily implied in every case, and service may be made during their temporary absence.[52]

Leaving a copy at the defendant's usual place of business is not sufficient,[53] except in actions against partnerships and the like, when authorized by law.[54]

A married man's place of usual abode is presumed to be the house where his wife and family reside.[55]

E. PERSON WITH WHOM COPY MUST BE LEFT. — It is usually required that the copy of the process be left with some person of the family of the defendant,[56] or with some person then residing in his

52. **Ark.**—Du Val *v.* Johnson, 39 Ark. 182. **Minn.**—Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344. **Neb.**—Wood *v.* Roeder, 45 Neb. 311, 63 N. W. 853.

See Bicknell *v.* Herbert, 20 Hawaii 132, Ann. Cas. 1913A, 1186.

[a] **Nor will continuous absence** from their home, of the defendant and family, from date of service until after the time of trial defeat jurisdiction or vitiate service. Wood *v.* Roeder, 45 Neb. 311, 63 N. W. 853, *disapproving* obiter in Haynes *v.* Aultman, Miller & Co., 36 Neb. 257, 54 N. W. 511.

[b] **But when a defendant closes his general place of abode in the state,** and is absent from the state, he has no "usual place of abode" in the state within the statute. Sweeney *v.* Miner, 88 N. J. L. 361, 95 Atl. 1014; Feighan *v.* Sobers, 86 N. J. L. 356, 91 Atl. 1068.

53. **Del.**—Hitch *v.* Gray, 1 Marv. 400, 41 Atl. 91, 2 Hardesty 113. **Neb.** Wittstruck *v.* Temple, 58 Neb. 16, 78 N. W. 456. **Okla.**—Cohen *v.* Cochran Grocery Co., 173 Pac. 642. **Pa.** Sweeney *v.* Girolo, 154 Pa. 609, 26 Atl. 600. **Wash.**—Hoffman *v.* Spokane Jobbers' Assn., 54 Wash. 179, 102 Pac. 1045.

[a] **Leaving copy at last and usual place of business** is not a compliance when it appears the place of residence and the place of business are some distance apart. Stout *v.* Harlem, 20 Ind. App. 200, 48 N. E. 235, 50 N. E. 492.

54. Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768. See the title "**Partnership.**"

55. **Conn.**—Grant *v.* Dalliber, 11 Conn. 234, 238. **Minn.**—Berryhill *v.* Sepp, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344; Missouri, K. & T. Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634. **Utah.**—Grant *v.* Lawrence, 37 Utah 450, 108 Pac. 931, Ann. Cas. 1912C, 280.

[a] **But This Presumption May Be Overcome.**—Grant *v.* Lawrence, 37 Utah 450, 108 Pac. 931, Ann. Cas. 1912C, 280.

56. **Ill.**—Mack *v.* Brown, 73 Ill. 295; Montgomery *v.* Brown, 7 Ill. 581. **Ia.** Wilson & Co. *v.* Call, 49 Iowa 463. **Ky.** Fleece *v.* Goodrum, 1 Duv. 306. **Mich.** Laidlow *v.* Morrow, 44 Mich. 547, 7 N. W. 191. **Miss.**—Hendricks *v.* Kellog, 116 Miss. 22, 76 So. 746. **Mo.**—Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237. **Pa.**—Hoffa *v.* Weidenhamer, 22 Pa. Co. Ct. 528. **Va.**—Fowler *v.* Mosher, 85 Va. 421, 7 S. E. 542; Smithson *v.* Briggs, 33 Gratt. (74 Va.) 180.

[a] **Must Be a Member of the Family To Which Defendant Belongs.** Heinemann *v.* Pier, 110 Wis. 185, 85 N. W. 646.

[b] **The word "family"** (1) in this connection is a collective body of persons who live in one house, under one head or manager, including parents, children and servants, and as the case may be, lodgers or boarders. Colter *v.* Luke, 129 Mo. App. 702, 108 S. W. 608; Heinemann *v.* Pier, 110 Wis. 185, 85 N. W. 646. (2) The term member of family is not confined to those in the employ or under the control of the defendant. Ellington *v.* Moore, 17 Mo. 424.

[c] **A bachelor** may be served by leaving a copy with a proper person of the family in which he resides. Pyles *v.* Beall, 37 Fla. 557, 20 So. 778.

[d] **The words "person" and "member,"** when speaking of persons of a family, are synonymous. Colter *v.* Luke, 129 Mo. App. 702, 108 S. W. 608.

[e] **A test** to determine whether the person served is a person of the family is; if the relation between him

house of usual abode.[57] He must be of suitable age and discretion.[58] But it is not requisite that he be a white person,[59] or that he be able to understand or read the English language,[60] unless statute so provides.[61] If the defendant resides in the family of another, then a copy must be left with a member of that family of suitable age.[62]

Service on Agent or Attorney. — Service on agents of parties is sometimes authorized by statute.[63] And substituted service on the attorney

and the other persons of the household is of a permanent and domestic character, and not intended to be merely temporary, he is a person of the family. Colter *v.* Luke, 129 Mo. App. 702, 108 S. W. 608.

[f] **The wife** of the defendant (1) residing with him is a member of his family. **U. S.**—Oglesby *v.* Sillom, 4 Woods 72, 9 Fed. 860. **Ia.**—Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811; Wilson & Co. *v.* Call, 49 Iowa 463. **Utah.** People *v.* House, 4 Utah 382, 10 Pac. 843. (2) The return must state the wife is a member of the defendant's family, under the statute in Virginia. King *v.* Davis, 137 Fed. 198, 207.

Leaving with husband for the wife, see 11 STANDARD PROC. 766.

[g] **After divorce proceedings** are commenced neither the husband nor the wife is a person of the other's family; nor are the children living with one of them persons of the family of the other. McFarlane *v.* Cornelius, 43 Ore. 513, 520, 73 Pac. 325, 74 Pac. 468.

[h] **A widowed mother** residing with the son is a person of his family. Ellington *v.* Moore, 17 Mo. 424.

[i] **A widowed sister** keeping house for her brother is a member of his family. Wade *v.* Jones, 20 Mo. 75, 61 Am. Dec. 584.

[j] **A married daughter living with her husband in a separate apartment** in the same building is not "some one of the family," of the father. Heinemann *v.* Pier, 110 Wis. 185, 85 N. W. 646.

[k] **A defendant residing at a public hotel** is not within the statute. McKenzie *v.* Boynton, 19 N. D. 531, 125 N. W. 1059.

57. Rehage *v.* Hayford, 141 La. 103, 74 So. 111 (to a person "living in the house"); Sparks *v.* Weatherby, 16 La. 594; Brigham *v.* Connecticut Mut. L. Ins. Co., 79 Minn. 350, 82 N. W. 668.

[a] **Leaving a copy with other residents of a flat** though not a member of plaintiff's family is sufficient. Brigham *v.* Connecticut Mut. L. Ins. Co., 79 Minn. 350, 82 N. W. 668. *Contra,* Rehage *v.* Hayford, 141 La. 103, 74 So. 111.

[b] **Service on clerk** of defendant at the house is insufficient if the clerk is not a "resident therein." Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342.

58. **U. S.**—Kibbe *v.* Benson, 17 Wall. 624, 21 L. ed. 741. **Ia.**—Davis *v.* Burt, 7 Iowa 56. **Mo.**—Ser *v.* Bobst, 8 Mo. 506. **Okla.**—See Bollenbach *v.* Huber, 46 Okla. 127, 148 Pac. 716. **Pa.**—Kimbel *v.* Villella, 20 Pa. Co. Ct. 18.

59. Schneiderheinze *v.* Berg, 269 Mo. 263, 190 S. W. 593.

60. Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811.

61. Du Val *v.* Johnson, 39 Ark. 182, "a free white person."

62. McKenzie *v.* Boynton, 19 N. D. 531, 125 N. W. 1059.

63. See the statutes, and the following cases: Murphy *v.* Albany Pecan Dev. Co., 169 Iowa 542, 151 N. W. 500; Fall River *v.* Riley, 140 Mass. 488, 5 N. E. 481. But see Davidson *v.* Clark, 7 Mont. 100, 14 Pac. 663.

On partnerships, see the title "**Partnership.**"

On corporations, see 5 STANDARD PROC. 621, 731, 737.

[a] **Service on nonresident** of the county, residing (1) in the state, having a place of business in the county, may be had by service in such county upon any agent of such person. Joel *v.* Bennett, 276 Ill. 537, 115 N. E. 5. (2) But a statute authorizing such service on a nonresident of the state, without a seizure of property, is unconstitutional as applied to actions in personam. **U. S.**—Moredock *v.* Kirby, 118 Fed. 180. **Del.**—Caldwell *v.* Armour, 1 Penne. 545, 43 Atl. 517. **Ill.**—Joel *v.* Bennett, 276 Ill. 537, 115 N. E. 5. **Minn.**—Cabanne *v.* Graf, 87 Minn. 510, 92 N. W. 461, 94 Am. St. Rep. 722, 59 L. R. A. 735. See Rauber *v.* Whitney, 125 Ind. 216, 25 N. E. 186, replevin suit against nonresident.

[b] **Return must show** defendant has no usual place of abode. Fall River

is authorized in some cases.[64]

F. Information as to Contents. — The party serving the notice is not required to advise the person who actually receives it of its contents or for whom it is intended,[65] unless the statute requires it.[66]

G. Posting Notice. — If there is no one at the house with whom a copy of the process may be left, statutes sometimes authorize service by posting the copy at the front door.[67]

H. The Copy and Number of Copies Delivered. — The copy must be attested under some statutes.[68] Where there are several defendants, a copy must be left for each.[69]

I. Jurisdiction Acquired. — Substituted service being the equivalent of personal service, in the case of residents,[70] jurisdiction over the person of a resident defendant is obtained by service in this manner,[71] so that on such service, a personal judgment may be rendered,[72] even when the defendant may temporarily be absent from the state.[73]

v. Riley, 140 Mass. 488, 5 N. E. 481.

64. **Service upon attorney where cross-bill is filed,** see 6 Standard Proc. 286.

Service on attorney in action to restrain proceedings at law, see 13 Standard Proc. 117.

Service of notices and papers on the attorney, see *infra,* X.

65. Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811; Groff *v.* National Bank, 50 Minn. 348, 351, 52 N. W. 934.

66. See the statutes and Mack *v.* Brown, 73 Ill. 295; Pollard *v.* Wegener, 13 Wis. 569.

67. Earle *v.* McVeigh, 91 U. S. 503, 23 L. ed. 398; King *v.* Davis, 137 Fed. 198, 206; Brown *v.* Board of Levee Comrs., 50 Miss. 468, 482. But see Heilemann *v.* Clowney, 90 N. J. L. 87, 103 Atl. 687.

[a] **That it is a "front door" must be shown by the return.** King *v.* Davis, 137 Fed. 198, 206.

68. Proctor *v.* Whitcher, 15 App. Div. 227, 44 N. Y. Supp. 190.

69. **Mo.**—St. Louis *v.* Flynn, 128 Mo. 413, 422, 31 S. W. 17; Stewart *v.* Stringer, 41 Mo. 400, 97 Am. Dec. 278. **N. H.**—Rogers *v.* Buchanan, 58 N. H. 47. **Pa.**—Lay *v.* Levering, 20 Pa. Dist. 1093.

70. See *supra,* I.

Nonresidents cannot be served in this way so as to authorize a personal judgment. See *supra,* VI, A, and 17 Standard Proc. 686.

71. Knowles *v.* Gaslight & Coke Co., 19 Wall. 58, 22 L. ed. 70; Lucas *v.* Wilson, 67 Ga. 356. But see Pinney *v.* Providence L. & Inv. Co., 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577, note holding service on corporation by leaving summons with register of deeds is not due process of law.

72. **Ind.**—Beard *v.* Beard, 21 Ind. 321; Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440. **Kan.**—Atchison *v.* Challiss, 65 Kan. 179, 69 Pac. 173. **Ky.**—Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629. **Md.**—Harryman *v.* Roberts, 52 Md. 64. **Miss.**—Hendricks *v.* Kellog, 116 Miss. 22, 76 So. 746. **N. Y.**—Continental Nat. Bank *v.* Thurber, 74 Hun 632, 26 N. Y. Supp. 956, 57 N. Y. St. 226; Cassidy *v.* Leitch, 2 Abb. N. C. 315; Huntley *v.* Baker, 33 Hun 578. **Utah.**—People *v.* House, 4 Utah 382, 10 Pac. 843. **Eng.**—Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 40 L. J. Q. B. (N. S.) 73, 24 L. T. N. S. 93, 19 Wkly. Rep. 587.

73. **Ark.**—Du Val *v.* Johnson, 39 Ark. 182. **Conn.**—Hurlbut *v.* Thomas, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43. **Ill.**—See Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430. **Ind.**—Beard *v.* Beard, 21 Ind. 321, 326; Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440. **Ia.**—Raher *v.* Raher, 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1912D, 680, 35 L. R. A. (N. S.) 292. **Mo.**—Hamill *v.* Talbott, 72 Mo. App. 22. **Neb.** Wood *v.* Roeder, 45 Neb. 311, 63 N. W. 853. **N. J.**—Harrison *v.* Farrington, 35 N. J. Eq. 4. **N. Y.**—Huntley *v.* Baker, 33 Hun 578.

But see Currier *v.* Gilman, 55 N. H. 364, holding this is not personal service when the defendant is absent from the state.

And such a judgment is as binding in another state as in the state where rendered.[74]

VII. SERVICE BY PUBLICATION. — A. ORIGIN. — The method of obtaining jurisdiction over persons by constructive service of process is a creature of statute.[75]

B. COMPLIANCE WITH STATUTE. — The statutes authorizing service by publication, being in derogation of the common law, are to be construed strictly;[76] and in order to obtain jurisdiction to render a valid judgment, there must be a strict compliance with the statute,[77] although some courts insist upon a substantial compliance only.[78] Mere informalities or irregularities, however, do not render the judgment absolutely void, but merely liable to be reversed or set aside on seasonable objection.[79]

C. IN WHAT ACTIONS AUTHORIZED. — **1. Generally.** — Service upon nonrsidents of the state by publication is generally authorized

74. Hamill *v.* Talbott, 72 Mo. App. 22.

75. **Ky.**—Carr's Admr. *v.* Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614. **Minn.**—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376. **Mo.**—Cloud *v.* Pierce City, 86 Mo. 357. **N. D.**—Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451. **Ore.**—Bagley *v.* Bloch, 83 Ore. 607, 619, 163 Pac. 425.

But see Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

76. **U. S.**—Gage *v.* Riverside Trust Co., 156 Fed. 1002. **Fla.**—Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672. **Kan.** Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676. **Minn.**—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376. **Mo.**—Orchard *v.* Smith, 193 S. W. 574. **Neb.**—Claypool *v.* Robb, 90 Neb. 193, 133 N. W. 178. **Okla.**—Rodgers *v.* Nichols, 15 Okla. 579, 83 Pac. 923. **Ore.**—Bagley *v.* Bloch, 83 Ore. 607, 619, 163 Pac. 425.

77. **Cal.**—McMinn *v.* Whelan, 27 Cal. 300. **Colo.**—Empire Ranch & Cattle Co. *v.* Coldren, 51 Colo. 115, 117 Pac. 1005; Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438. **Haw.**—Proper *v.* Proper, 14 Haw. 596. **Kan.**—Finn *v.* Howard, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420. **Md.**—Dorsey *v.* Dorsey, 30 Md. 522, 96 Am. Dec. 633. **Minn.**—H. L. Spencer Co. *v.* Koell, 91 Minn. 226, 97 N. W. 974. **Mo.**—Kelly *v.* Murdagh, 184 Mo. 377, 83 S. W. 437; Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663. **Neb.**—Moran *v.* Catlett, 93 Neb. 158, 139 N. W. 1041. See Atkins *v.* Atkins, 9 Neb. 191, 2 N. W. 466.

See 17 STANDARD PROC. 690; 14 STANDARD PROC. 867; 7 STANDARD PROC. 755.

Compliance must be shown by record, as against collateral attack, see 15 STANDARD PROC. 445, et seq.

[a] **If the affidavit is defective** the court acquires no jurisdiction. Krumenacker *v.* Andis, 38 N. D. 500, 165 N. W. 524.

[b] **That the judgment is substantially correct** will not justify overlooking a noncompliance with the statute. Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886.

78. **Ind.**—Day *v.* Nottingham, 160 Ind. 408, 66 N. E. 998. See Quarl *v.* Abbett, 102 Ind. 233, 240, 1 N. E. 476, 52 Am. Rep. 662. **Ky.**—Kreiger *v.* Sonne, 151 Ky. 739, 152 S. W. 936; Carr's Admr. *v.* Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614. **N. D.** Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451.

[a] **On collateral attack** (1) a different rule applies. Kreiger *v.* Sonne, 151 Ky. 739, 152 S. W. 936. (2) The proceedings should be liberally construed in order that justice may be done. Fulton *v.* Levy, 21 Neb. 478, 32 N. W. 307.

79. **Cal.**—Chapman *v.* Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130. **Ind.**—Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. **Kan.** Finn *v.* Howard, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420; Claypoole *v.* Houston, 12 Kan. 324.

by statute in actions in rem and quasi in rem.[80] The latter class of actions embraces actions between parties where the direct object is to reach and dispose of property owned by them or some interest therein.[81] Some statutes contemplate that every action which can be maintained by personal service, may be maintained against a nonresident by publication, if property can be found upon which to exercise jurisdiction,[82] whether the action be legal or equitable.[83] But it is essential to the rendition of judgment that the court have control over the res.[84] This is usually obtained by an attachment.[85] But it is not always essential that an actual seizure of property be made, the power to seize it being sufficient.[86]

In actions strictly in personam, constructive service on nonresidents

80. See 17 STANDARD PROC. 689.

[a] **Constructive service is effectual only in actions** strictly in rem, in actions affecting the personal status of the plaintiff, and in actions to recover upon money demands where and to the extent that some lien brings property into court as a res to answer for the judgment which may be rendered. English *v.* Jenks, 54 Mont. 295, 169 Pac. 727.

[b] **An action to establish a lost or destroyed title paper** has been held to be quasi in rem within the rule. Virginia & West Virginia Coal Co. *v.* Charles, 251 Fed. 83, 114.

In eminent domain, see 8 STANDARD PROC. 275.

In divorce actions, see 7 STANDARD PROC. 754; 15 STANDARD PROC. 670.

81. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

[a] **Actions commenced by attachment** are substantially in rem and service by publication may be authorized. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

Garnishment proceedings are in the nature of a proceeding in rem. See 10 STANDARD PROC. 375.

82. McLaughlin *v.* McCrory, 55 Ark. 442 (under the code); Dillon *v.* Heller, 39 Kan. 599, 18 Pac. 693.

83. **Minn.**—Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823. **Nev.**—State *ex rel.* Sparks *v.* State Bank & Trust Co., 37 Nev. 55, 139 Pac. 505, 142 Pac. 627. **W. Va.**—Tennant's Heirs *v.* Fretts, 67 W. Va. 569, 68 S. E. 387, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625. See 6 STANDARD PROC. 747.

84. Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 71 Atl. 605; Perry *v.* Young, 133 Tenn. 522, 182 S. W. 577, L. R. A. 1917B, 385. See 17 STANDARD PROC. 689.

85. See 17 STANDARD PROC. 685, and the title "**Attachment.**"

[a] **Releasing the attachment does not deprive the court of jurisdiction** where the purchaser is held as garnishee. Core *v.* Oil & Oil Land Co., 40 Ohio St. 636.

86. Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 71 Atl. 605; Perry *v.* Young, 133 Tenn. 522, 182 S. W. 577, L. R. A. 1917B, 385. See 17 STANDARD PROC. 685.

Seizure as a prerequisite to publication, see *infra,* VII, E.

[a] "**It is not the actual seizure of the res which is the essential element** of an action quasi in rem, but the power to seize the res. . . . So long as the res is situate within the jurisdiction of the court, and the custodian of the res is made a party to the suit, the requirement of an action quasi in rem." Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 210, 71 Atl. 605.

[b] The seizure (1) may be by bill in equity. Baillie *v.* Columbia Gold Min. Co., 86 Ore. 1, 42, 166 Pac. 965, 167 Pac. 1167. (2) In proceedings for partition, condemnation, or mortgage foreclosure, the court obtains control over the property just as effectually by the initiation of the proceeding as by a levy of a writ on the same. Roller *v.* Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. ed. 520; Bennett *v.* Fenton, 41 Fed. 283, 10 L. R. A. 500. To same effect, see Heidritter *v.* Elizabeth Oil-Cloth Co., 112 U. S. 294, 301, 5 Sup. Ct. 135, 28 L. ed. 729; Tutt *v.* Davis, 13 Cal. App. 715, 110 Pac. 690.

[c] **In an action to reform an instrument** in the possession of the complainant, the court has control of the res and may direct service by publication against a nonresident. Perry *v.*

by publication is ineffectual for any purpose, unless the defendant enters a voluntary appearance.[87] And statutes general in terms do not authorize personal judgments on constructive service,[88] although it has been held that the court may order publication in a purely personal action, upon which it will acquire jurisdiction if the defendant appears.[89] But in actions against residents of the state, publication may be had in a personal action.[90]

Some statutes specifically enumerate the causes of action on which service by publication may be had.[91] Thus they authorize service against nonresidents, when the subject of the action is real or personal property in the state in or upon which the defendant has or claims an interest, or the relief demanded consists wholly or partly in excluding him from any interest therein,[92] when the action is to obtain a divorce or the annulment of the contract of marriage,[93] and in actions to establish or set aside a will.[94] But service by publication is not authorized in actions for the vacation of decrees.[95]

2. Suits in Equity. — While it is true that equity acts in personam, and its decrees are not in rem strictly speaking,[96] when it attempts

Young, 133 Tenn. 522, 182 S. W. 577, L. R. A. 1917B, 385.

[d] **An action to establish title to corporate stock** is an action quasi in rem, although a transfer of the stock is asked for and no receiver is appointed to take possession. Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 71 Atl. 605.

87. See 17 STANDARD PROC. 686. **Judgment not entitled to full faith and credit,** see 15 STANDARD PROC. 655.

88. Perkins *v.* Wakeham, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67, note. While the statute in terms applies to all actions, it is not invalid because it includes proceedings purely in personam.

[a] **Where the statute is silent** as to the character of actions in which service by publication may be had against absent and nonresident defendants, it must be confined to actions in rem, and judgments in personam are nugatory. Roller *v.* Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. ed. 520; Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 78 Pac. 967, 3 Ann. Cas. 1000, 67 L. R. A. 940.

89. Kirkpatrick *v.* Post, 53 N. J. Eq. 591, 32 Atl. 267; Clarke *v.* Boreel, 21 Hun (N. Y.) 594. See also Kaufman *v.* Wooters, 138 U. S. 285, 11 Sup. Ct. 298, 34 L. ed. 962; York *v.* Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. ed. 604.

[a] **Reason.—The order is valid and will not be set aside on motion as it** does not deprive the defendant of property without due process of law. But if the nonresident fail to appear and final judgment be entered, then or on an attempt to enforce the judgment, the question of the defendant's right to protection under the fourteenth amendment arises. Kirkpatrick *v.* Post, 53 N. J. Eq. 591, 600, 32 Atl. 267.

90. See *infra*, VII, L.

91. See the statutes.

[a] **The provisional remedies** mentioned in the statute are those allowing the taking and seizure of property such as attachment and garnishment, and do not include temporary restraining orders. Waldock *v.* Atkins (Okla.), 158 Pac. 587.

92. Smith *v.* Ince, 138 Minn. 223, 164 N. W. 903; Hodgens *v.* Columbia Trust Co., 103 Misc. 415, 171 N. Y. Supp. 235.

[a] **An action in the nature of equitable replevin** with incidental relief is embraced within the statute. Hodgens *v.* Columbia Trust Co., 103 Misc. 415, 171 N. Y. Supp. 235.

[b] **Mortgage foreclosure suits** are embraced within the statute. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

93. See 7 STANDARD PROC. 754.

94. See the title "Wills."

95. Pullman *v.* Pullman, 92 Wash. 120, 158 Pac. 746, even though it be a divorce decree in which service by publication is had. But see Whitehead *v.* Post, 2 Ohio Dec. Reprint 468.

96. See Arndt *v.* Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918.

to accomplish its purpose by the force of its own decree, it acts in rem, and service by publication may be had.[97] And service by publication may be had in actions to quiet title,[98] and for specific performance of contracts to convey real estate,[99] in actions to foreclose mortgages or enforce liens,[1] to partition real estate,[2] to reform instruments,[3] or to cancel conveyances obtained by fraud,[4] when authorized by statute.[5]

[a] **If the court is authorized to act in personam only,** it acquires no jurisdiction by publication to grant relief. McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56.

97. McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56; Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 71 Atl. 605.

[a] **Equitable Proceedings in Rem.** "If the enforcement of the decree touching the title is dependent solely upon the inherent powers of a court of chancery, it is, of necessity, a decree in personam, because generally equity jurisdiction is exercised in personam, and depends upon the control of the court over the parties. If, however, there is statutory power given to the court to effectuate its decree by controlling the property, then the proceeding becomes in its nature a proceeding in rem, and in such case service by publication, in case of nonresidents, will confer jurisdiction to deal with the property." Bennett *v.* Fenton, 41 Fed. 283, 10 L. R. A. 500.

98. U. S.—Arndt *v.* Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918; Parker *v.* Overman, 18 How. 137, 140, 15 L. ed. 318. **Cal.**—Title & Document Restoration Co. *v.* Kerrigan, 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; Perkins *v.* Wakeham, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67. **Fla.**—Myakka Co. *v.* Edwards, 68 Fla. 372, 67 So. 217, Ann. Cas. 1917B, 201. **Ind.**—Essig *v.* Lower, 120 Ind. 239, 21 N. E. 1090. **Minn.** McClymond *v.* Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354. **Mo.** Shemwell *v.* Betts, 264 Mo. 268, 174 S. W. 390. **Neb.**—Scarborough *v.* Myrick, 47 Neb. 794, 66 N. W. 867. **Ore.** Kieffer *v.* Victor Land Co., 53 Ore. 174, 90 Pac. 582, 98 Pac. 877. **Tex.**—Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80. **Wash.**—Phillips *v.* Tompson, 73 Wash. 78, 131 Pac. 461, **Ann. Cas. 1914D, 672. W. Va.**—Tennant's Heirs *v.* Fretts, 67 W. Va. 569, **68 S. E. 387, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625, note.**

[a] **Where the decree itself settles the status** of the title and the right to possession and control of the land, without the necessity of enforcing the decree by actual control over the defendant, the action is in rem and service by publication is effectual against nonresidents. Bennett *v.* Fenton, 41 Fed. 283, 286, 10 L. R. A. 500.

99. U. S.—Boswell's Lessee *v.* Otis, 9 How. 336, 348, 13 L. ed. 164. **Cal.** Tutt *v.* Davis, 13 Cal. App. 715, 110 Pac. 690. **Md.**—Hollander *v.* Central Metal & S. Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135. **Ore.** Hawkins *v.* Doe, 60 Ore. 437, 119 Pac. 754, Ann. Cas. 1914A, 765. **S. C.**—Bush *v.* Aldrich, 96 S. E. 922.

But see Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 78 Pac. 967, 3 Ann. Cas. 1000, 67 L. R. A. 940.

[a] **It is an action for the determination of a right or interest in real property** within the statute. Tutt *v.* Davis, 13 Cal. App. 715, 110 Pac. 690. See also Hawkins *v.* Doe, 60 Ore. 437, 119 Pac. 754, Ann. Cas. 1914A, 765. *Contra,* Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 500, 78 Pac. 967, 3 Ann. Cas. 1000, 67 L. R. A. 940.

1. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Oswald *v.* Kampmann, 28 Fed. 36. See the title "**Mortgages.**"

2. Grannis *v.* Ordean, 234 U. S. 385, 34 Sup. Ct. 779, 58 L. ed. 1363; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. See 20 STANDARD PROC. 1022.

3. Perry *v.* Young, 133 Tenn. 522, 182 S. W. 577, L. R. A. 1917B, 385, action to reform an assignment of an insurance policy.

[a] **An action to reform a real estate mortgage** is an action relating to real estate. Carey *v.* Reeves, 32 Kan. 718, 5 Pac. 22.

[b] **An action to reform a deed** is one to exclude the defendant from an interest in land. Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134.

4. McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56.

5. See *infra,* this note.

[a] **There must be a statute (1)**

3. Effect of Claim for Personal Relief. — The fact that a greater measure of relief is asked than can be given without personal service,[6] or the fact that a cause of action is joined upon which constructive service cannot be had,[7] does not defeat jurisdiction as to the claim or cause of action on which such service may be had.

D. On Whom Service by Publication May Be Had. — Service by publication is authorized upon a person who does not reside in the state,[8] or who has departed from the state,[9] or cannot, after due diligence, be found within the state,[10] or who conceals himself within

giving the suit the character of one in rem (McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56. See Essig *v.* Lower, 120 Ind. 239, 21 N. E. 1090; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80), as (2) by giving the court power to effectuate its decree by controlling the property (Bennett *v.* Fenton, 41 Fed. 283, 10 L. R. A. 500; Hollander *v.* Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135, where statute authorized the appointment of a trustee to convey title), or (3) the statute authorizing service by publication must embrace such actions. **U. S.**—Boswell *v.* Otis, 9 How. 336, 13 L. ed. 164; Bennett *v.* Fenton, 41 Fed. 283, 10 L. R. A. 500. **Cal.** Tutt *v.* Davis, 13 Cal. App. 715, 110 Pac. 690. **Ore.**—Hawkins *v.* Doe, 60 Ore. 437, 119 Pac. 754, Ann. Cas. 1914A, 765. But see Tennant's Heirs *v.* Fretts, 67 W. Va. 569, 68 S. E. 387, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625, note holding that an equity court by its inherent powers may quiet title to land on service by publication, and render a decree in rem independently of statute.

6. Hook *v.* Hoffman, 16 Ariz. 540, 147 Pac. 722.

7. **U. S.**—Porter Land & Water Co. *v.* Baskin, 43 Fed. 323. **Ariz.**—Hook *v.* Hoffman, 16 Ariz. 540, 147 Pac. 722. **Minn.**—Smith *v.* Smith, 123 Minn. 431, 144 N. W. 138, 52 L. R. A. (N. S.) 1061. **N. Y.**—Chesley *v.* Morton, 9 App. Div. 461, 41 N. Y. Supp. 463, 75 N. Y. St. 860. **Okla.**—Continental Gin Co. *v.* Arnold, 167 Pac. 613, L. R. A. 1918B, 511, note; Culver *v.* Diamond, 167 Pac. 223.

But see Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

8. **Cal.**—Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007. **N. C.**—Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402. **Tex.**—Johnson *v.* Herbert, 45 Tex. 304.

[a] **On Nonresidents Who Have Property in the State.**—Haight *v.* Husted, 4 Abb. Pr. (N. Y.) 348; Bryan *v.* University Publishing Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; Guffey *v.* Grand Trunk R. Co., 67 Misc. 553, 122 N. Y. Supp. 947; Von Hesse *v.* MacKaye, 55 Hun 365, 8 N. Y. Supp. 894; Richardson *v.* Carr (Okla.), 171 Pac. 476, 483. But see Anderson *v.* Goff, 72 Cal. 65, 69, 13 Pac. 73, 1 Am. St. Rep. 34, the statute has no such requirement. But the effect of the judgment thus obtained is quite another thing.

[b] **The fact that the defendant comes into the county and state frequently** does not prevent service by publication when he is absent at the time. Palmer *v.* McCormick, 30 Fed. 82.

[c] **A person who has not abandoned his domicile in the state,** but has been without the state for a year and a half may be proceeded against as a nonresident. Hollander *v.* Central Metal & S. Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

[d] **To constitute a man a nonresident,** something more than a transient visit to another state is required. He must have determined to make some place without the state his place of residence at least temporarily. Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

9. **Cal.**—Spencer *v.* Houghton, 68 Cal. 82, 8 Pac. 679. **Ill.**—Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186. **Tex.**—Fernandez *v.* Casey, 77 Tex. 452, 14 S. W. 149, a resident who is temporarily absent.

[a] **Although an intent to defraud creditors or avoid service cannot be alleged,** service by publication may be authorized. Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

10. Nelson *v.* Chicago, B. & Q. R.

the state so that process cannot be served upon him,[11] or who is a transient person.[12] So also publication is authorized when the residence of the defendant is unknown to the officer serving the writ,[13] or when the defendant is a corporation and no officer upon whom process may be served can, after due diligence, be found in the state,[14] or in the county where suit was brought,[15] or when the defendant is a foreign corporation who cannot be served in the state.[16]

Service upon unknown parties by publication is sometimes provided for in actions in rem or quasi in rem.[17] But residents of the state, present and capable of being found within the jurisdiction of the court, cannot be served in this manner.[18]

Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186; Roberts *v.* Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140.

What constitutes due diligence, see *infra,* VII, F, 5, d.

11. Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 206, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186.

A corporation cannot conceal itself, see 5 STANDARD PROC. 627.

12. Hambel *v.* Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; Gordon *v.* Reeder (Tex. Civ. App.), 202 S. W. 983.

[a] **A person who has a permanent residence in another state,** but who is in the state at the time and a transient person, is within the statute. Hambel *v.* Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46.

13. Kendrick *v.* Kimball, 33 N. H. 482, statute applies to an inhabitant of the state who departed therefrom for the purpose of avoiding service after an attachment was levied.

14. **Fla.**—Clearwater Merc. Co. *v.* Roberts, J. R. Shoe Co., 51 Fla. 176, 40 So. 436, 120 Am. St. Rep. 153, 4 L. R. A. (N. S.) 117, when the corporation fails to elect officers or appoint agents, or where they are absent from the state for six months. **Kan.** Leavenworth, T. & S. W. Ry. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346. **N. C.** Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

[a] **Domestic corporations** are within the statute. Leavenworth, T. & S. W. Ry. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346; Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

15. Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186 (railroad corporation); Ward Lumber Co. *v.* Henderson-White Mfg. Co., 107 Va. 626, 59 S. E. 476, 17 L. R. A. (N. S.) 324. See also 5 STANDARD PROC. 627.

16. Keaton *v.* Jorndt, 220 Mo. 117, 119 S. W. 629.

17. See the statutes, and the following: **Cal.**—Title & Document Restoration Co. *v.* Kerrigan, 150 Cal. 289, 311, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682. **Mass.** Tyler *v.* Judges of Court of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, registration under Torrens system. **Minn.**—McClymond *v.* Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354; Shepherd *v.* Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212. **Okla.**—Buck *v.* Simpson, 166 Pac. 146. **Tex.**—Byrnes *v.* Sampson, 74 Tex. 79, 11 S. W. 1073. **Va.** Fayette Land Co. *v.* Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016. **Wash.** Phillips *v.* Tompson, 73 Wash. 78, 131 Pac. 461, Ann. Cas. 1914D, 672.

In quiet title suits, see the title "**Quieting Title.**"

In partition suits, see 20 STANDARD PROC. 1022.

In escheat, see 8 STANDARD PROC. 667.

18. **Idaho.**—Bear Lake County *v.* Budge, 9 Idaho 703, 75 Pac. 614. **Ind.** Beard *v.* Beard, 21 Ind. 321, 326. **Minn.** Roberts *v.* Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140; Bardwell *v.* Collins, 44 Minn. 97, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152, holding statute unconstitutional. **Neb.**—Hayes County *v.* Wileman, 82 Neb. 669, 118 N. W. 478; Wagner *v.* Lincoln Co., 80 Neb. 473, 114 N. W. 574; Topliff *v.* Richardson, 76 Neb. 114, 107 N. W. 114. **Okla.**—Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054.

Infants[19] and insane persons[20] may be served by publication. But service by publication on a person who is dead at the date of the pretended service is ineffectual.[21] Whether an alien enemy may be served by publication, is a question on which there is a difference of opinion.[22]

E. CONDITIONS PRECEDENT. — Statutory prerequisites cannot be dispensed with.[23] Where the summons itself is published it must, of course, be first issued;[24] but the previous issuance of summons is not necessary where the publication consists of a notice other than a summons.[25] In some states summons must be returned "not found," at least under certain circumstances;[26] in others this is unnecessary.[27] The previous filing of petition or complaint is not necessary,[28] unless

Ore.—Bagley *v.* Bloch, 83 Ore. 607, 163 Pac. 425.

19. See 12 STANDARD PROC. 746.

20. See 13 STANDARD PROC. 603.

21. Topliff *v.* Richardson, 76 Neb. 114, 107 N. W. 114.

[a] **But the acquisition of jurisdiction over unknown parties** is not prevented by the fact that the only person named in the summons is dead. McClymond *v.* Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354; Phillips *v.* Tompson, 73 Wash. 78, 131 Pac. 461, Ann. Cas. 1914D, 672.

22. See *infra*, this note.

[a] **Alien Enemy Can Be Served by Publication.—Ill.**—Seymour *v.* Bailey, 66 Ill. 288. **Ky.**—Selden *v.* Preston, 11 Bush 191. **Md.**—Dorsey *v.* Dorsey, 30 Md. 522, 96 Am. Dec. 633.

[b] **Alien enemy cannot be served by publication,** (1) as the defendant can neither legally see or obey the notice. Sturm *v.* Fleming, 22 W. Va. 404; Haymond *v.* Camden, 22 W. Va. 180. (2)He cannot be served by publication when he is driven from the country by military authority (Dean *v.* Nelson, 10 Wall. [U. S.] 158, 19 L. ed. 926), but (3) may be if he voluntarily leaves the country to engage in hostilities against it. Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581, 586, 20 L. ed. 216. But see Haymond *v.* Camden, 22 W. Va. 180.

Actions by and against alien enemy, see the titles "**Aliens;**" "**War.**"

23. Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376; Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836.

Necessity for affidavit, see *infra*, VII, F, 1.

Exercise of diligence to find the defendant, see *infra*, VII, F, 5, d.

24. Soule *v.* Hough, 45 Mich. 418, 8 N. W. 50, 159. See 21 STANDARD PROC. 689, note 42.

25. **Kan.**—Larimer *v.* Knoyle, 43 Kan. 338, 345, 23 Pac. 487; Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012. **Ky.**—Hoffman *v.* Brungs, 83 Ky. 400, as against nonresident. **Neb.**—Wescott *v.* Archer, 12 Neb. 345, 11 N. W. 491, 577. **Ore.**—Bank of Colfax *v.* Richardson, 38 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

[a] **Although statute provides that an action may be commenced** by filing a petition and causing a summons to be issued, an ordinary summons need not be issued before service by publication. Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012.

26. **Ark.**—Turnage *v.* Fisk, 22 Ark. 286. **Mo.**—Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158 (construing statute); Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638. **N. C.**—McClure *v.* Fellows, 131 N. C. 509, 42 S. E. 951.

[a] **A delay of four or five months between the return "not found"** and the order for publication does not invalidate service. Richardson *v.* Wortman, 34 Colo. 374, 83 Pac. 381; Eagle Gold Min. Co. *v.* Bryarly, 28 Colo. 262, 65 Pac. 52.

[b] **The return of the summons does not deprive the court of the power** to order publication. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

27. **Cal.**—Woodward *v.* Brown, 119 Cal. 283, 301, 51 Pac. 2, 542, 63 Am. St. Rep. 108. **Minn.**—Perkins *v.* Gibbs, 108 Minn. 151, 121 N. W. 605; Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903, *overruling* Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134. **Ore.**—Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

28. Foster *v.* Henderson, 54 Iowa

required by statute,[29] as where an action can only be commenced in that way.[30] And it is not essential that property be attached before the affidavit for publication or before publication ordered,[31] unless statute so requires,[32] or, it has been held, before service.[33] Jurisdiction to hear and determine, being dependent, however, upon the actual or constructive seizure of the res,[34] such a seizure must be made before the determination of the case.[35]

F. AFFIDAVIT FOR PUBLICATION AND PROOF. — **1. Necessity for.** As a general rule, an affidavit showing the facts authorizing service by publication is a jurisdictional prerequisite to such service.[36] But

220, 6 N. W. 186; Armstrong *v.* Middlestadt, 22 Neb. 711, 36 N. W. 151. But see Billings *v.* Kothe, 49 Iowa 34.

29. See the statutes and Oelbermann *v.* Ide, 93 Wis. 669, 68 N. W. 393, 57 Am. St. Rep. 947; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

30. See the title "Suits and Actions."

31. **Cal.**—Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240. **Mo.**—Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522. **N. D.** Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451. **S. D.**—South Dakota Com. Assn. *v.* Ramsey, 34 S. D. 48, 147 N. W. 75.

Necessity of seizure generally, see *supra,* VII, C, 1.

[a] **Reason.**—"The proceeding for the publication of summons is distinct and separate from the proceeding in attachment. The judgment against a nonresident is dependent upon both these proceedings, but neither of the proceedings is dependent upon the other." Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240.

[b] **Warrant of Attachment Need Not Be Issued.**—Sexton *v.* Bernheimer, 104 Misc. 1, 171 N. Y. Supp. 696; Parke *v.* Gay, 28 Misc. 329, 59 N. Y. Supp. 890.

[c] **The fact that the defendant does not own the particular property attached** does not defeat the publication if he has any property subject to attachment. South Dakota Com. Assn. *v.* Ramsey, 34 S. D. 48, 147 N. W. 75.

32 See the statutes and the following: **U. S.**—Baumgardner *v.* Bono Fertilizer Co., 58 Fed. 1, under Virginia practice. **Miss.**—Griffing *v.* Mills, 40 Miss. 611. **Mo.**—Durossett's Admr. *v.* Hale, 38 Mo. 346, explained in Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522. **Ore.**—Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Goodale *v.* Coffee, 24 Ore. 346, 33 Pac. 990, holding that when the court gets jurisdiction over the defendant's property it may order publication. **S. C.** Breon *v.* Miller Lumber Co., 83 S. C. 221, 65 S. E. 214, 137 Am. St. Rep. 803, 24 L. R. A. (N. S.) 276.

33. See *infra,* this note.

[a] **Service Before Seizure.**—Under a statute authorizing an order of publication against a nonresident upon an affidavit showing that the defendant is a nonresident, that he has property in the state, and that "the court has jurisdiction of the subject of the action," the "subject of the action" does not refer to any property of the defendant from which it is sought to satisfy such judgment as may be obtained, but refers to the cause of action set forth in the complaint. And therefore substituted service may be properly made before the court acquires jurisdiction by attachment or other process, over any property of the defendant. Likewise process may be personally served upon the defendant without the state before an actual seizure of property. The validity of such service depends on the existence of three jurisdictional facts, —— nonresidents of the defendant, the ownership by the defendant of property within the state, and jurisdiction of the court over the cause of action. South Dakota Com. Assn. *v.* Ramsey, 34 S. D. 48, 147 N. W. 75.

34. See 17 STANDARD PROC. 684, 685.

35. See 17 STANDARD PROC. 684, 685, and Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240; Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522.

36. **Cal.**—People *v.* Pearson, 76 Cal. 400, 18 Pac. 424; Forbes *v.* Hyde, 31 Cal. 342; Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070. **Colo.** Empire Ranch & Cattle Co. *v.* Coldren, 51 Colo. 115, 117 Pac. 1005; Everett *v.*

in some states it is sufficient if the facts be set out in a verified petition,[37] and the officer's return of "not found" is sometimes made the basis of an order.[38]

2. When Made. — The affidavit being prepared with reference to the condition of things as they exist at the time when the order is applied for,[39] it should be made within a reasonably brief time before the publication of the summons is ordered.[40] The affidavit is not void

Connecticut Mut. L. Ins. Co., 4 Colo. App. 509, 36 Pac. 616. **Ia.**—Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535. **Kan.**—Osborne *v.* Schlichenmeier, 68 Kan. 421, 75 Pac. 474; Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681; Ogden *v.* Walters, 12 Kan. 282, 294. *Compare* Ensign *v.* Ensign, 45 Kan. 612, 26 Pac. 7, and Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487, as to the affidavit in divorce cases that the defendant's residence is unknown. **Minn.** Smith *v.* Ince, 148 Minn. 223, 164 N. W. 903; Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376; Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836. **Neb.** McKenna *v.* Pleasant, 96 Neb. 581, 148 N. W. 479; McGavock *v.* Pollack, 13 Neb. 535, 14 N. W. 659.

Failure to file avoids judgment collaterally, see 15 STANDARD PROC. 446.

[a] **Attachment affidavit** held sufficient. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694; Bray *v.* Marshall, 75 Mo. 327; Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

37. **Ark.**—Ballard *v.* Hunter, 74 Ark. 174, 85 S. W. 252. **Ky.**—Wilson *v.* Teague, 95 Ky. 47, 23 S. W. 656; Alley *v.* Hastie, 15 Ky. L. Rep. 690, 25 S. W. 274. **Mo.**—Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158. **N. Y.**—See McCully *v.* Heller, 66 How. Pr. 468. **Wis.**—Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124, facts must appear in the affidavit and complaint taken together.

38. Holloway *v.* Holloway, 85 Ark. 431, 108 S. W. 837 (when the defendant has left the county or conceals himself to avoid service the clerk issues a warning order); Beidler *v.* Beidler, 71 Ark. 318, 74 S W 13; Ad Valorem Min. Co. *v.* Miller 274 Mo. 696, 204 S. W. 387; Kelly *v* Murdagh 184 Mo. 377, 83 S. W. 437 (when the defendant cannot be found the order may be made. But the order cannot be based on nonresidence); Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971.

[a] **A premature return** cannot be basis of order. Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158.

[b] **Plaintiff must ask for order.** Pitkin *v.* Flagg, 198 Mo. 646, 97 S. W. 162.

39. **Cal.**—Forbes *v.* Hyde, 31 Cal. 342. **Mich.**—New York Baptist Union *v.* Atwell, 95 Mich. 239, 54 N. W. 760. **N. Y.**—McCarthy *v.* Kimball, 55 How. Pr. 418.

40. **Ark.**—See Cannon *v.* Lunsford, 89 Ark. 64, 115 S. W. 940. **Cal.**—Forbes *v.* Hyde, 31 Cal. 342 (whether an affidavit made four months before the order is insufficient as a basis for the order, query); People *v.* Huber, 20 Cal. 81; Bank of Venice *v.* Hutchinson, 19 Cal. App. 219, 125 Pac. 252. **Ill.**—Campbell *v.* McCahan, 41 Ill. 45. **Ky.**—Cornwall's Assignee *v.* Falls City Bank, 92 Ky. 381, 18 S. W. 452. **Mich.**—Adams *v.* Wayne Circ. Judge, 98 Mich. 51, 56 N. W. 1051. **Minn.**—Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823. **Wis.** Zahorka *v.* Geith, 129 Wis. 498, 109 N. W. 552.

[a] **What is a reasonable time** depends upon the circumstances of each case. Campbell *v.* McCahan, 41 Ill. 45, *followed* in Atkinson *v.* Atkinson, 43 Utah 53, 134 Pac. 595, 47 L. R. A. (N. S.) 499.

[b] **Need not be sworn to on the same day** on which the action is commenced, where the action is commenced by service of process. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823. See also Campbell *v.* McCahan, 41 Ill. 45.

[c] **Order made on day following** the day the affidavit is sworn to is sufficient. Cornwall's Assignee *v.* Falls City Bank, 92 Ky. 381, 18 S. W. 452; Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091.

[d] **But delays** between the making of the affidavit and the application for the order or the making of an order thereon will not be permitted which amount to (1) fifteen days

because entitled in an action not actually commenced when it is sworn to.[41]

3. By Whom Made. — Except where statute requires the affidavit to be made by the plaintiff,[42] it may be made by his attorney who knows the facts,[43] as well as by the plaintiff himself.[44] Where there are several parties plaintiff, an affidavit by each is not required.[45]

4. Formal Requirements of. — The affidavit must be in writing.[46] It must contain a venue or disclose where it is made,[47] and it should have a proper jurat.[48] A caption is no essential part of the affi-

(Cohn *v.* Kember, 47 Cal. 144), (2) fourteen days (Roosevelt *v.* Land & River Imp. Co., 108 Wis. 653, 84 N. W. 157), (3) twenty days (Campbell *v.* McCahan, 41 Ill. 45), (4) a month (Atkinson *v.* Atkinson, 43 Utah 53, 134 Pac. 595, 47 L. R. A. [N. S.] 499), and (5) even five days. New York Baptist Union *v.* Atwell, 95 Mich. 239, 54 N. W. 760. (6) But a delay from Saturday night to Monday noon is not unreasonable. **Adams** *v.* Wayne Circ. Judge, 98 Mich. 51, 56 N. W. 1051.

41. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Becker *v.* Linton, 80 Neb. 655, 114 N. W. 928, 127 Am. St. Rep. 795.

42. Mecure *v.* Gibson, 25 Colo. App. 391, 138 Pac. 1019; Everett *v.* Connecticut Mut. L. Ins. Co., 4 Colo. App. 509, 36 Pac. 616; Sayre-Newton Lumb. Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445.

43. **U. S.** — Bird *v.* M'Clelland Stumpf & P. B. Mfg. Co., 45 Fed. 458. **Cal.**—Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. **Ia.**—Banta *v.* Wood, 32 Iowa 469. **Mich.**—Powell *v.* Pierce, 168 Mich. 427, 134 N. W. 447. **Wis.**—Jenks *v.* Arms, 160 Wis. 171, 151 N. W. 263.

[a] **But when service on unknown heirs is desired,** the attorney is not competent to make the affidavit. Moran *v.* Catlett, 93 Neb. 158, 139 N. W. 1041.

[b] **An affidavit by the plaintiff also** is not required when the attorney makes an affidavit. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

[c] **An affidavit stated to be based on information received** from the plaintiff is insufficient. Columbia Screw Co. *v.* Warner Lock Co., 138 Cal. 445, 71 Pac. 498. *Contra,* Powell *v.* Pierce, 168 Mich. 427, 134 N. W. 447.

[d] **The affiant's means of knowledge,** and the reason why the affidavit is not made by the plaintiff need not be stated. Banta *v.* Wood, 32 Iowa 469.

44. See Banta *v.* Wood, 32 Iowa 469.

[a] **An infant plaintiff cannot make** the affidavit. Rue *v.* Quinn, 137 Cal. 651, 60 Pac. 216, 70 Pac. 732.

45. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

46. Bantley *v.* Finney, 43 Neb. 794, 62 N. W. 213. See Virginia & West Virginia Coal Co. *v.* Charles, 251 Fed. 83, 114.

47. Albers *v.* Kozeluh, 68 Neb. 522, 94 N. W. 521, 97 N. W. 646; Blair *v.* West Point Mfg. Co., 7 Neb. 146.

[a] **It must disclose that the officer** before whom it is executed is an officer of the county where it is filed or it must show on its face a proper venue. Albers *v.* Kozeluh, 68 Neb. 522, 532, 94 N. W. 521, 97 N. W. 646.

[b] **Although the affidavit is entitled in a cause pending in one county,** it is not insufficient because the notarial seal shows the officer to be a notary of another county. Gibson *v.* Austin, 23 Colo. App. 220, 128 Pac. 859.

[c] **Omission of venue is not fatal.** The important thing is that it shall appear that the oath was administered by a person authorized to administer it. Gibson *v.* Austin, 23 Colo. App. 220, 128 Pac. 859. See also Palmer *v.* McCormick, 30 Fed. 82; Crowell *v.* Johnson, 2 Neb. 146.

[d] **But extrinsic evidence** cannot be resorted to supply an absence of a venue. Albers *v.* Kozeluh, 68 Neb. 522, 531, 94 N. W. 521, 97 N. W. 646.

48. North Star Lumb. Co. *v.* Johnson, 196 Fed. 56; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

[a] **An omission of a jurat** or an omission of the officer to sign the jurat is not fatal when it is proved on trial that the affidavit was in fact sworn to. Extrinsic evidence may be resorted to. Bantley *v.* Finney, 43 Neb. 794, 62 N. W. 213. See also Sears' Heirs *v.* Sears'

davit,[49] and merely serves as a means of identification as to the case in which it should be filed.[50]

5. Contents of. — a. *Generally.*[51] — The contents of the affidavit for publication are prescribed by law,[52] and the court cannot require anything additional.[53] The affidavit must be complete in itself as to all material matters.[54] But it may, by reference to documents on file, adopt their contents,[55] or it may refer to a copy of a pleading annexed thereto.[56] But in the absence of such reference, other papers of record will not aid the affidavit,[57] although some courts hold otherwise.[58] If there is a total want of evidence on a vital point in the affidavit, the court acquires no jurisdiction by the publication of summons.[59] But where there is not an entire omission to state some vital fact, but it is inferentially or insufficiently set forth,[60] the proceedings

Heirs, 95 Ky. 173, 25 S. W. 600, 44 Am. St. Rep. 213.

[b] **A signature,** "S. Fee, J. P." is sufficient. Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

[c] **A jurat "subscribed before me" omitting the words "sworn to"** was held to be sufficient on collateral attack in Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782.

[d] **If the date is omitted** from the jurat, the affidavit is presumed to have been made at the time of its presentation. The same is true where there is obviously a mistake as to the date. Bank of Venice *v.* Hutchinson, 19 Cal. App. 219, 125 Pac. 252.

[e] **Seal.**—The clerk of court, not having a seal, need not affix a seal to the affidavit. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

49. Becker *v.* Linton, 80 Neb. 655, 114 N. W. 928, 127 Am. St. Rep. 795.

[a] **The absence of a caption** is immaterial. Harris *v.* Lester, 80 Ill. 307.

50. Becker *v.* Linton, 80 Neb. 655, 114 N. W. 928, 127 Am. St. Rep. 795.

[a] **Under an "et al,"** part of the parties plaintiff or defendant may be included. Seymour *v.* Bailey, 66 Ill. 288. *Contra,* Arnold *v.* Nye, 11 Mich. 456.

[b] **An Affidavit Entitled in One Action May Be Used in Another.** Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62, 70, 2 Abb. Pr. (N. S.) 47, 32 How. Pr. 97.

51. Forms of Affidavit, see 9 STANDARD PROC. 1129.

52. See the statutes.

[a] **Every jurisdictional fact** required by the statute must be stated. Goodale *v.* Coffee, 24 Ore. 346, 33 Pac. 990.

53. Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240; Porter *v.* Superior Court, 30 Cal. App. 608, 159 Pac. 222.

54. Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376.

55. Ligare *v.* California S. R. Co., 76 Cal. 610, 18 Pac. 777; Goodale *v.* Coffee, 24 Ore. 346, 355, 33 Pac. 990.

56. Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075, for the purpose of establishing the existence of a cause of action.

57. Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376.

58. Miller *v.* Eastman, 27 Neb. 408, 43 N. W. 179, affidavit for attachment may be examined to supply defects in affidavit for publication.

59. Colo.—Empire Ranch & Cattle Co. *v.* Saul, 22 Colo. App. 605, 127 Pac. 123, where address of defendant is not given. **Kan.**—Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830. **Neb.**—Scarborough *v.* Myrick, 47 Neb. 794, 66 N. W. 867.

60. U. S.—Cohen *v.* Portland Lodge, 144 Fed. 266. **Kan.**—Long *v.* Fife, 45 Kan. 271, 25 Pac. 594, 23 Am. St. Rep. 724; Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830. **Neb.**—Majors *v.* Edwards, 36 Neb. 56, 53 N. W. 1041. **N. Y.**—Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800.

[a] **The affidavit must contain a statement of some fact** which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon, before he has jurisdiction to make an order for publication. Forbes *v.* Hyde, 31 Cal. 342.

[b] **The degree of proof is not reviewable,** if the affidavit makes a prima facie case. Adams *v.* Wayne Circ.

are merely voidable. The statute of jeofails does not cure defects in the affidavit.[61]

The court is compelled to accept the statements of the affidavit as true,[62] but the wilful making of a false affidavit is a fraud for which the judgment may be set aside.[63]

Stating Probative Facts.— The ultimate facts, without the evidence to support them is all that need be stated when an order for publication is not required, and when the statute requires the affidavit to "state" the facts merely.[64] But when the affidavit is required to "show" the facts to the satisfaction of a court, an affidavit merely repeating the language of the statute is insufficient; the probative facts must be stated.[65]

Allegations on information and belief are held to be insufficient by some courts,[66] but are allowed by others when the facts to be shown are such as are necessarily matters of information and belief.[67]

b. *Description of the Parties and Affiant.* — An affidavit by an attorney or agent of the plaintiff should show that the affiant is such

Judge, 98 Mich. 51, 56 N. W. 1051.

[c] **Mere clerical errors** do not vitiate. Jenks *v.* Arms, 160 Wis. 171, 151 N. W. 263.

61. Rohrer *v.* Oder, 124 Mo. 24, 27 S. W. 606.

62. Dunlap *v.* Steere, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361.

[a] **Whether the allegations are true or not, the court has jurisdiction** to order publication if the affidavit contains the necessary allegations. Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091. *Contra,* Kitchen *v.* Crawford, 13 Tex. 516.

[b] **The affidavit is only prima facie evidence** of the facts therein stated. Ware *v.* Robinson, 9 Cal. 107.

63. Dunlap *v.* Steere, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361.

64. Kan.—Ogden *v.* Walters, 12 Kan. 282, 293. **Minn.**—Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823. **Mo.**—See Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158. **Mont.**—Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706, *distinguishing* Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576. **Okla.**—Continental Gin Co. *v.* Arnold, 167 Pac. 613; Richardson *v.* Howard, 51 Okla. 240, 151 Pac. 887; City Nat. Bank *v.* Sparks, 50 Okla. 648, 151 Pac. 225; Ballew *v.* Young, 24 Okla. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084.

65. U. S.—Cohen *v.* Portland Lodge, 144 Fed. 266. See Bull *v.* Campbell, 225 Fed. 923, 141 C. C. A. 47. **Cal.** People *v.* Mulcahy, 159 Cal. 34, 112 Pac. 853; Yolo *v.* Knight, 70 Cal. 430, 11 Pac. 662; Ricketson *v.* Richardson, 26 Cal. 149, 153. **N. Y.**—Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800.

[a] **The ultimate facts of the statute are to be found from the probatory facts** stated in the affidavit. Ricketson *v.* Richardson, 26 Cal. 149, 153.

66. Ark.—Waggoner *v.* Fogleman, 53 Ark. 181, 13 S. W. 729; Turnage *v.* Fisk, 22 Ark. 286. **Colo.**—Mercure *v.* Gibson, 25 Colo. App. 391, 138 Pac. 1019; Lougee *v.* Beeney, 22 Colo. App. 603, 126 Pac. 1102. **Kan.**—Harrison *v.* Beard, 30 Kan. 532, 2 Pac. 632. **Minn.** Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585, the statement as to property in the state must be positive. **Mo.** Orchard *v.* Smith, 193 S. W. 574. **Neb.** See Leigh *v.* Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592. **Wis.** Hafern *v.* Davis, 10 Wis. 501.

[a] **An affidavit wholly on information** and belief is insufficient. Lyon *v.* Baxter, 64 How. Pr. (N. Y.) 426.

[b] **Where a statute requires the existence of certain facts to be "stated,"** an averment on information and belief is insufficient. Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585.

67. Mich.—Colton *v.* Rupert, 60 Mich. 318, 326, 27 N. W. 520. **Minn.** Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585, statute expressly allows the statement of residence to be made on information and belief. **Neb.**—Leigh *v.* Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592, statement that owner of land is unknown may be

attorney or agent.[68] The defendant must be mentioned in the affidavit.[69]

c. *Grounds for Publication.* — The affidavit must "state" or "show to the satisfaction of the court or judge"[70] some ground or grounds for publication, as that service of summons cannot be had upon the defendant in the state,[71] that the person on whom service is to be made resides out of the state,[72] or has departed from the state

made on information and belief. **N. Y.** Chase *v.* Lawson, 36 Hun 221, as to nonresidence.

[a] **The averment as to residence** of the nonresident, not being required by the statute, may be on information and belief. Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240.

[b] **As against collateral attack,** allegations on information and belief are sufficient. Thompson *v.* Thompson, 226 U. S. 551, 565, 33 Sup. Ct. 129, 57 L. ed. 347.

[c] **Sources of information** must be stated. Klee *v.* Klee, 171 N. Y. Supp. 632.

68. **Ala.**—Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346. **Colo.** Empire Ranch & Cattle Co. *v.* Saul, 22 Colo. App. 605, 127 Pac. 123. **Mo.** Davison *v.* Bankers' Life Assn., 166 Mo. App. 625, 150 S. W. 713.

[a] But see Bird *v.* McClelland Stumpf & P. B. Mfg. Co., 45 Fed. 458, holding an omission of this allegation does not vitiate the affidavit.

[b] **A recital of the fact of agency** is sufficient. Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346.

[c] **That affidavit is made on plaintiff's behalf** need not be stated. Jenks *v.* Arms, 160 Wis. 171, 151 N. W. 263.

69. Rawson *v.* Sherwood, 59 Kan. 776, 53 Pac. 69.

[a] **Designating parties as "defendants"** whose names are previously set out in full is sufficient, although there is no action pending. Becker *v.* Linton, 80 Neb. 655, 114 N. W. 928, 127 Am. St. Rep. 795.

70. See *supra*, VII, F, 5, a.

71. **Ia.**—Carr *v.* King, 169 N. W. 133; Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941. **Kan.**—Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559; Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985. **Neb.** McGavock *v.* Pollack, 13 Neb. 535, 14 N. W. 659. **Wis.**—Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

[a] **Words of statute need not be used.** If enough is stated to show service cannot be made within the state, as by showing nonresidence, it is sufficient. McCormick *v.* Paddock, 20 Neb. 486, 30 N. W. 602. *Contra*, Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941.

72. **U. S.**—Thompson *v.* Thompson, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347; Butterfield *v.* Miller, 195 Fed. 200, 115 C. C. A. 152. **Cal.**—Parsons *v.* Weis, 140 Cal. 410, 77 Pac. 1007. **Colo.** Empire Ranch & Cattle Co. *v.* Coldren, 51 Colo. 115, 117 Pac. 1005. **Ind.**—Martin *v.* Starr, 7 Ind. 224. **Kan.**—Claypoole *v.* Houston, 12 Kan. 324; Ogden *v.* Walters, 12 Kan. 282, 294. **Ky.**—Baker *v.* Baker, Eccles & Co., 162 Ky. 683, 173 S. W. 109, L. R. A. 1917C, 171; Jackson *v.* McElroy, 2 Bush 132. **Minn.** Brown *v.* St. Paul & N. P. Ry. Co., 38 Minn. 506, 38 N. W. 698. **Mo.**—Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663. **Neb.**—Davis *v.* Huston, 15 Neb. 28, 16 N. W. 820; McGavock *v.* Pollack, 13 Neb. 535, 14 N. W. 659. **Nev.**—Little *v.* Currie, 5 Nev. 90. **N. Y.**—Evans *v.* Weinstein, 124 App. Div. 316, 108 N. Y. Supp. 753. **Va.**—Lawson *v.* Moorman, 85 Va. 880, 9 S. E. 150.

[a] **A statement of the grounds of the affiant's belief as to the residence** of the defendant in another state may be required by the court. Bender *v.* Hutton, 160 Cal. 372, 117 Pac. 322.

[b] **Nonresidence at the time the affidavit is made,** instead of at the time the petition is filed, may be shown. Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

[c] **That the nonresident cannot be served** in this state need not be stated. Van Natta *v.* Harroun Real Estate Co., 221 Mo. 373, 120 S. W. 738 (*overruling* Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495); Keaton *v.* Jorndt, 220 Mo. 111, 119 S. W. 629; Paddock *v.* Paddock (Mo. App.), 91 S. W. 398.

[d] **In Kentucky,** it (1) must be stated also that the defendant is believed to be absent from the state. Baker *v.* Baker, Eccles & Co., 162 Ky. 683, 693, 173 S. W. 109, L. R. A. 1917C, 171; Redwine *v.* Underwood, 101 Ky.

or county of his residence with the intent to delay or defraud his creditors, or to avoid service,[73] or cannot after due diligence be found within the state,[74] or that he conceals himself to avoid service.[75] Either of the grounds stated in the statute in the disjunctive may be set up alone,[76] or, it has been held, two or more grounds may be set up in the alternative.[77]

To obtain publication of summons against unknown parties, the complaint or petition,[78] is required to state that there are parties interested in the subject of the suit whose names plaintiff cannot insert because he does not know them,[79] and to describe their interests.[80]

Corporations. — An affidavit in a suit against a domestic corporation must state in the language of the statute that the officers "cannot be found."[81] If the defendant is a foreign corporation, that fact must be stated,[82] as well as the fact that it cannot be served in the state.[83]

d. *Due Diligence.* — Where the publication is based on the ground that the defendant cannot, after due diligence, be found within the state, the exercise of due diligence to find the defendant within the

190, 40 S. W. 462; Hamilton *v.* Reike & Sons, 9 Ky. L. Rep. 197. (2) Though the appeal will not be dismissed for an omission in this regard, the warning order will be quashed. Arthurs *v.* Harlan, 78 Ky. 138.

73. Ogden *v.* Walters, 12 Kan. 282, 294.

74. **U. S.**—McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745. **Cal.**—Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. **Ia.**—Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941. **Kan.**—Shields *v.* Miller, 9 Kan. 390. **N. C.**—Faulk *v.* Smith, 84 N. C. 501.

[a] **An averment that the defendant has departed** from the state or keeps himself concealed therein to avoid service is insufficient to show that due diligence was used to discover him. Faulk *v.* Smith, 84 N. C. 501.

75. Bradford *v.* McAvoy, 99 Cal. 324, 33 Pac. 1091; Ogden *v.* Walters, 12 Kan. 282, 294.

76. **Cal.**—Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007. **Mont.**—Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706. **Wash.**—De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

77. See *infra,* this note.

[a] **An affidavit in the disjunctive** that the defendant is concealed within the state or has departed from it, is sufficient, the material fact being that he could not be found. Bickerdike *v.* Allen, 157 Ill. 95, 107, 41 N. E. 740, 29 L. R. A. 782. *Contra,* Holloway *v.* Holloway, 85 Ark. 431, 108 S. W. 837.

78. Lawrence *v.* Murphy, 45 Utah 572, 147 Pac. 903.

[a] **Allegations in the affidavit** are wholly insufficient. Lawrence *v.* Murphy, 45 Utah 572, 147 Pac. 903.

79. Eminence Land & Min. Co. *v.* Current River L. & C. Co., 187 Mo. 420, 437, 86 S. W. 145.

[a] **The use of diligence** to ascertain (1) the names and residences of the heirs need not be disclosed (Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613), unless (2) required by statute. Kirkland *v.* Texas Express Co., 57 Miss. 316.

[b] **An affidavit of nonresidence** is insufficient as to unknown parties. Rohrer *v.* Oder, 124 Mo. 24, 27 S. W. 606.

80. Hambel *v.* Lowry, 264 Mo. 168, 174 S. W. 405; Eminence Land & Min. Co. *v.* Current River L. & C. Co., 187 Mo. 420, 437, 86 S. W. 145; Lawrence *v.* Murphy, 45 Utah 572, 147 Pac. 903.

81. Leavenworth T. & S. W. Ry. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346.

82. See next note following.

83. **Mo.**—Keaton *v.* Jorndt, 220 Mo. 117, 119 S. W. 629. **Ohio.**—Foote *v.* Central American Com. Co., 7 Ohio C. C. N. S. 531. **Wis.**—Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

[a] **An averment that the defendant has no officer** in the state on whom service can be had is a statement of fact and not a conclusion. Kansas Nat. Bank *v.* Goodner-Horne Co. (Okla.), 162 Pac. 772. See Marx *v.* Ebner, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. ed. 547.

[b] **If summons could be served on the secretary of state,** the fact that the

state must be shown.[84] Whether the use of diligence must be shown when the defendant is alleged to be a nonresident of the state depends upon the statutes;[85] no such showing is required under some statutes,[86] but it is otherwise under other statutes.[87]

In alleging diligence, the acts constituting due diligence, and not the conclusion that due diligence was used, must be stated,[88] except when the affidavit is to be presented to the clerk and the statute only requires it to "state" the fact,[89] or when the statute expressly provides otherwise.[90] Specific statements as to the inquiries and efforts made and the names of the parties inquired of to ascertain the whereabouts of the defendant are essential.[91] But it is not necessary to state what

defendant cannot be served is not sufficiently shown. Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

84. **U. S.**—Bull *v.* Campbell, 225 Fed. 923, 14 C. C. A. 47; McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745. **Cal.** Rue *v.* Quinn, 137 Cal. 651, 655, 66 Pac. 216, 70 Pac. 732. **Ky.**—Kreiger *v.* Sonne, 151 Ky. 739, 152 S. W. 936. **Mich.**—Soule *v.* Hough, 45 Mich. 418, 8 N. W. 50, 159. **Mont.**—Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576.

[a] **An affidavit stating concealment of the defendant** to avoid service is insufficient if the exercise of due diligence is not shown. Faulk *v.* Smith, 84 N. C. 501.

85. See the statutes.

86. **U. S.**—Marx *v.* Ebner, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. ed. 547, an affidavit of non-residence and a return "not found" held to be a sufficient showing of diligence. See Bull *v.* Campbell, 225 Fed. 923, 141 C. C. A. 47 on collateral attack. **Cal.**—Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Furnish *v.* Mullan, 76 Cal. 646, 18 Pac. 854. **Idaho.**—McKnight *v.* Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. **Mo.**—Coombs *v.* Crabtree, 105 Mo. 292, 16 S. W. 830. **Wash.** De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

[a] **That the defendant "cannot after due diligence** be found within the state" need not be shown, as this is a different ground for publication. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

87. **Ia.**—Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941. **N. Y.**—Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800 (the affidavit must show due diligence to make personal service or state facts tending to show why personal service cannot be made); McCracken *v.* Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481. But *compare* Kennedy *v.* New York L. Ins. & T. Co., 101 N. Y. 487, 5 N. E. 774; Carleton *v.* Carleton, 85 N. Y. 313; Andrews *v.* Borland, 10 N. Y. St. 396, under a former statute. **Okla.**—Continental Gin Co. *v.* Arnold, 167 Pac. 613. **S. D.**—Bothell *v.* Hoellwarth, 10 S. D. 491, 74 N. W. 231.

88. **U. S.**—Romig *v.* Gillett, 187 U. S. 111, 23 Sup. Ct. 40, 47 L. ed. 97; Cohen *v.* Portland Lodge, 144 Fed. 266; McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745. **Cal.**—Roberts *v.* Jacob, 154 Cal. 307, 97 Pac. 671; Ligare *v.* California So. R. Co., 76 Cal. 610, 18 Pac. 777; Ricketson *v.* Richardson, 26 Cal. 149, 153. **Idaho.**—Lohr *v.* Curley, 27 Idaho 739, 152 Pac. 185; Mills *v.* Smiley, 9 Idaho 325, 76 Pac. 783. **N. D.** Pillsbury *v.* J. B. Streeter, Jr. Co., 15 N. D. 174, 107 N. W. 40. **Okla.**—Rentie *v.* Rentie, 172 Pac. 1083; Richardson *v.* Howard, 51 Okla. 240, 151 Pac. 887. **Ore.**—Felts *v.* Boyer, 73 Ore. 83, 144 Pac. 420. **S. D.**—Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214.

89. Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706; Sueterlee *v.* Sir, 25 Wis. 357. See Continental Gin Co. *v.* Arnold (Okla.), 167 Pac. 613.

90. Lohr *v.* Curley, 27 Idaho 739, 152 Pac. 185, but this does not dispense with the necessity for the use of diligence.

91. **U. S.**—Cohen *v.* Portland Lodge, 144 Fed. 266. **Cal.**—Sharp *v.* Salisbury, 144 Cal. 721, 78 Pac. 282; People *v.* Wrin, 143 Cal. 11, 76 Pac. 646; Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. **Dak.**—Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701. **Mich.**—Thompson *v.* Shiawassee Circ. Judge, 54 Mich. 236, 19 N. W. 967. **Minn.**—Mackubin *v.* Smith, 5 Minn. 367.

[a] **The probative facts must be**

information was received, if from other facts stated, it can be reasonably inferred the inquiries were unavailing.[92] It has been held sufficient if a statement of facts as to residence and actual abode of the defendant is made which shows beyond a peradventure, that any search for him within the state would be unavailing.[93]

Other Affidavits. — Where service by a person other than a sheriff is attempted his affidavit should be required as a rule.[94] But the affidavits of the persons inquired of need not be produced; nor need such persons be produced as witnesses.[95]

What is due diligence depends upon the circumstances of each case.[96]

produced. Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214.

[b] **That all reasonable inquiry** has been made of persons likely or presumed to know the whereabouts of the person sought to be notified should be shown. Grigsby *v.* Wopschall, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206.

[c] **The sheriff's return** need not be attached to or made a part of the affidavit. Cohen *v.* Portland Lodge, 144 Fed. 266.

[d] **Attempts by Qualified Persons.** That individuals who attempted to make service were persons qualified to do so must be stated. Wilson *v.* Leo, 19 Cal. App. 793, 127 Pac. 1043.

92. Chapman *v.* Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130; Ligare *v.* California S. R. Co., 76 Cal. 610, 18 Pac. 777.

93. **U. S.**—McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745, under Oregon statute. **Neb.**—See McCormick *v.* Paddock, 20 Neb. 486, 30 N. W. 602. **N. Y.** See also Kennedy *v.* New York L. Ins. & T. Co., 101 N. Y. 487, 5 N. E. 774. **Ore.**—Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664, 677; Pike *v.* Kennedy, 15 Ore. 420, 15 Pac. 637.

[a] **Where Non-Residence Shown.** (1) Where the statute provides that before service by publication can be made, "an affidavit must be filed stating that the plaintiff with due diligence is unable to make service," it is sufficient to state that fact without any averment of facts showing an active effort to make service, when nonresidence of the defendant is shown. Continental Gin Co. *v.* Arnold (Okla.), 167 Pac. 613; Richardson *v.* Howard, 51 Okla. 240, 151 Pac. 887; Ballew *v.* Young, 24 Okla. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084. (2) It is otherwise under a similar statute requiring the fact to appear. Bothell *v.* Hoellworth, 10 S. D. 491, 74 N. W. 231.

[b] **Nonresidence is not of itself sufficient** (1) to authorize service by publication because that is not inconsistent with the idea that the defendant may be in the state doing business, and hence would not relieve of the necessity of due diligence. But the allegation of non-residence, in connection with a statement that the defendant was actually living in the resident state shows diligence to be unavailing. Pike *v.* Kennedy, 15 Ore. 420, 15 Pac. 637. (2) This case, says McDonald *v.* Cooper, 32 Fed. 745, 749, carries the doctrine to the very verge. "These New York cases and this Oregon one are the only authorities of which I am aware that hold that any state of facts concerning the defendant's whereabouts may be stated in the affidavit in place of the showing which the statute expressly requires,—that 'the defendant, after due diligence, cannot be found within the state.'"

94. Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698; Wilson *v.* Leo, 19 Cal. App. 793, 127 Pac. 1043.

[a] **Reason of Rule.**—Statements as to efforts made by the persons attempting to serve process and their inquiries etc., which are based entirely upon information received from them are hearsay and insufficient. Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698; Wilson *v.* Leo, 19 Cal. App. 793, 127 Pac. 1043. *Compare* Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

[b] **The affidavit should show** the nature of the effort made to serve the party and, where practicable, the reasons why such service cannot be had. Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698.

95. Cohen *v.* Portland Lodge, 144 Fed. 266.

96. **Cal.**—Rue *v.* Quinn, 137 Cal. 651,

The party must exercise reasonable or bona fide diligence to ascertain the residence and whereabouts of the defendant.[97] It has been held that the sheriff's return may be relied upon as part of the evidence that the defendant cannot be found in the county.[98]

e. *Cause of Action.* — It must appear by affidavit,[99] or in some states by verified complaint on file,[1] that a cause of action exists

66 Pac. 216, 70 Pac. 732. **N. Y.** McCracken *v.* Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; Chase *v.* Lawson, 36 Hun 221. **S. D.** Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214.

[a] **It is a question for the court** whether, under the circumstances, the diligence used is or is not "due" within the meaning of the statute. Bixby *v.* Smith, 3 Hun 60, 5 Thomp. & C. (N. Y.) 279; Pillsbury *v.* J. B. Streeter, Jr. Co., 15 N. D. 174, 107 N. W. 40.

[b] **The order for publication and the judgment following publication is not conclusive** of the fact that due diligence was exercised. Stern *v.* Judson, 163 Cal. 726, 735, 127 Pac. 38.

[c] **In the case of a non-resident,** who there is no reason to think may be within the state, due diligence does not require active effort to serve him. Richardson *v.* Howard, 51 Okla. 240, 151 Pac. 887.

97. Stern *v.* Judson, 163 Cal. 726, 736, 127 Pac. 38; Berry *v.* Howard, 33 S. D. 447, 146 N. W. 577; Grigsby *v.* Wopschall, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206; Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

[a] **Every conceivable means** need not be used. Grigsby *v.* Wopschall, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206.

[b] **Not extraordinary and extreme diligence** is required, but only proper and suitable diligence. Belmont *v.* Cornen, 82 N. Y. 256; Chase *v.* Lawson, 36 Hun (N. Y.) 221; Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

[c] **Search in every part of the state** is not required. Jacob *v.* Roberts, 223 U. S. 261, 32 Sup. Ct. 303, 56 L. ed. 429; Belmont *v.* Cornen, 82 N. Y. 256. But *compare* Wheeler *v.* Cobb, 75 N. C. 21.

[d] **That search was confined to the county** may be considered by the judge. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

[e] **Of whom inquiry should be made,** see Hartung *v.* Hartung, 8 Ill. App. 156; and Grigsby *v.* Wopschall, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206, 216.

98. **U. S.**—Marx *v.* Ebner, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. ed. 547; Cohen *v.* Portland Lodge, 144 Fed. 266. **Cal.**—Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Seaver *v.* Fitzgerald, 23 Cal. 85, it is sufficient evidence of diligence. **Wis.**—See Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091. *Contra,* Grigsby *v.* Wopschall, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206, 217.

[a] **But inability to make service in the state** cannot be shown by a return not served in the county. Romig *v.* Gillett, 187 U. S. 111, 23 Sup. Ct. 40, 47 L. ed. 97.

[b] **A return "not found" made on the day the summons is issued** is insufficient to show nonresidence. Clayton *v.* Clayton, 4 Colo. 410.

[c] **As against a foreign corporation** which may be served by delivery of process to the secretary of state, a return not found is insufficient to show inability to serve the defendant. Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

99. **Cal.**—People *v.* Mulcahy, 150 Cal. 34, 112 Pac. 853; Columbia Screw Co. *v.* Warner Lock Co., 138 Cal. 445, 71 Pac. 498; Forbes *v.* Hyde, 31 Cal. 542. **Colo.**—Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713. **S. D.**—Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075.

But see Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

[a] **Must Be the Same Cause of Action Alleged in the Complaint.**—Vermont Loan & T. Co. *v.* McGregor, 5 Idaho 510, 51 Pac. 104.

[b] **Affidavit may incorporate** the verified complaint by reference. Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214.

1. Columbia Screw Co. *v.* Warner Lock Co., 138 Cal. 445, 71 Pac. 498; Ligare *v.* California S. R. Co., 76 Cal.

against the defendant to be served,[2] or that he is a necessary or proper party to the action,[3] or under some statutes that the case is one of those mentioned in the statute authorizing such service.[4] That the court has jurisdiction of the subject of the action[5] must be alleged

610, 18 Pac. 777; Bryan *v.* University Pub. Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638.

[a] **Complaint Must Be Verified.** Yolo *v.* Knight, 70 Cal. 430, 11 Pac. 662.

2. See *infra*, this note.

[a] **A mere statement of a conclusion** that (1) a cause of action against the defendant exists is insufficient when the facts are not stated. **Cal.**—Yolo *v.* Knight, 70 Cal. 430, 11 Pac. 662; Forbes *v.* Hyde, 31 Cal. 342; Ricketson *v.* Richardson, 26 Cal. 149, 152. **Nev.** Little *v.* Currie, 5 Nev. 90. **N. C.** Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508. (2) It is otherwise when the affidavit is addressed to the clerk, and the affidavit is merely required to "state" the fact. **Colo.**—Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043, this requirement is omitted from the present statute of Colorado. **Minn.**—Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823. **Wis.**—Sueterlee *v.* Sir, 25 Wis. 357.

[b] **A full statement** of the facts constituting the cause of action is not required. Field *v.* Malone, 102 Ind. 251, 1 N. E. 507; Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825.

3. **Cal.**—Braly *v.* Seaman, 30 Cal. 610. **Colo.**—Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713. **Ind.**—Dowell *v.* Lahr, 97 Ind. 146.

[a] **Facts showing the defendant to be a necessary** party (1) must be stated (Ricketson *v.* Richardson, 26 Cal. 149, 153; Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508), except (2) where the affidavit need merely "state" the fact. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

4. Finn *v.* Howard, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420; Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830.

[a] **A "showing"** is required, not a mere "statement" of the character of the action. Leavenworth T. & S. W. Ry. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346.

[b] **A description** of the action indicating in an intelligible manner that the action is one of those mentioned is sufficient. No special formula is required. Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559.

[c] **Plaintiff's cause of action** need not be set forth. Scarborough *v.* Myrick, 47 Neb. 794, 66 N. W. 867.

[d] **Mere Conclusion.**—(1) An allegation that the above entitled cause is one of those mentioned in the statute does not sufficiently show such fact as against direct attack or petition in error. Claypoole *v.* Houston, 12 Kan. 324. (2) But is sufficient as against collateral attack. Finn *v.* Howard, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420; Majors *v.* Edwards, 36 Neb. 56, 53 N. W. 1041; *Compare* Atkins *v.* Atkins, 9 Neb. 191, 2 N. W. 466. (3) This allegation in the terms of the statute is not required when the recitals in the affidavit show the case is one within the statute authorizing publication. Lausten *v.* Union Nat. Bank (Okla.), 173 Pac. 823.

[e] **A statement that the action is brought to quiet title** (1) to certain land is sufficient as against collateral attack (Finn *v.* Howard, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420), but (2) not as against direct attack. Leavenworth, T. & S. W. Ry. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346.

[f] **A description as an action of divorce** is sufficient. Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559.

5. Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451 (construing the Minnesota statute); South Dakota Com. Assn. *v.* Ramsey, 34 S. D. 48, 147 N. W. 75.

[a] **The subject of action** refers to the claim asserted by him and the satisfaction of which he seeks out of the property attached, which he concedes to belong to the defendant. Whitehead *v.* Buffalo & L. H. Ry. Co., 18 How. Pr. (N. Y.) 218; Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451. It does not refer to any property of the defendant, out of which the claim is to be satisfied. South Dakota Com. Assn. *v.* Ramsey, 34 S. D. 48, 147 N. W. 75.

[b] **An affidavit stating the court has "jurisdiction of the action"** is sufficient. Hartzell *v.* Vigen, 6 N. D.

in some states. If the action concerns real estate, the affidavit should state the location of the land.[6]

f. *Property in the State.* — That the nonresident defendant has property in the state need not be shown in some states,[7] but must be shown in others.[8] When such a showing is required, the statement thereabout should be direct and describe the property.[9]

g. *Attachment and Summons.* — The affidavit need not show that a writ of attachment has issued,[10] or been levied,[11] or that the sheriff has returned the summons.[12]

h. *Residence of Parties.* — If the residence of the defendant is known it should be stated.[13] If not known, that fact is required to

117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451.

6. Leavenworth T. & S. W. Ry. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346.

7. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

8. **U. S.**—McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745, 750. **Kan.** Mortgage Trust Co. *v.* Norris, 8 Kan. App. 699, 54 Pac. 283. **Minn.**—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376. **N. Y.** Guffey *v.* Grand Trunk R. Co., 67 Misc. 553, 122 N. Y. Supp. 947. **N. D.** Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561. **Ore.**—Colburn *v.* Barrett, 21 Ore. 27, 26 Pac. 1008. **Wis.**—Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124, either that the non-resident has property in the state or that the cause of action arose therein must be shown.

9. McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745; Winner *v.* Fitzgerald, 19 Wis. 393. But see Ennis *v.* Grimes, 80 Kan. 429, 102 Pac. 454.

[a] **The bare assertion** that the defendant has property in the state is not sufficient. McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745.

[b] **The description must be such** that the officer signing the order of publication is able to see that it is such property as is liable to be seized on attachment or execution. Winner *v.* Fitzgerald, 19 Wis. 393.

[c] **A statement that "certain real property" has been attached** is a sufficient showing of property. Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

[d] **A misdescription** will be rejected as surplusage. Sharp *v.* McColm, 79 Kan. 772, 101 Pac. 659.

10. Anderson *v.* Goff, 72 Cal. 65, 72, 13 Pac. 73, 1 Am. St. Rep. 34.

11. Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240. *Compare supra,* VII, E.

Averment of levy as a showing of property in the state, see *supra,* VII, F, 5, f.

12. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

13. **Cal.**—Ligare *v.* California So. R. Co., 76 Cal. 610, 18 Pac. 777, it is only when the defendant is a non-resident or is absent that this averment is necessary. See Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240. **Colo.**—Empire Ranch & Cattle Co. *v.* Coldren, 51 Colo. 115, 117 Pac. 1005; Empire Ranch & Cattle Co. *v.* Saul, 22 Colo. App. 605, 127 Pac. 123, postoffice address must be given. **Ga.**—Gefken *v.* Graef, 77 Ga. 340. **Ill.**—Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Hickenbotham *v.* Blackledge, 54 Ill. 316. **Kan.**—Walkenhorst *v.* Lewis, 24 Kan. 420. **Miss.** Winston & Co. *v.* McLendon, 43 Miss. 254. **Nev.**—Wildes *v.* Lou Dillon Goldfield Min. Co., 41 Nev. 364, 170 Pac. 1046.

But see Moore Realty Co. *v.* Carr, 61 Ore. 34, 120 Pac. 742 (statute does not require it); De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

[a] **The Omission Renders the Judgment Void.**—Empire Ranch & Cattle Co. *v.* Saul, 22 Colo. App. 605, 127 Pac. 123; Atwood *v.* Tucker, 26 N. D. 622, 145 N. W. 587, 51 L. R. A. (N. S.) 597. *Contra,* Carr's Admr. *v.* Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614, it renders the judgment erroneous but not void.

[b] **When the statute requires the order to direct mailing** of the summons when the residence of the party is known, (1) the affidavit must state the residence if known or **it will be insufficient on direct attack,** even though

be stated.[14] But the residence of the plaintiff need not be stated.[15]

6. Execution. — The place where the affidavit is made is not material.[16] The affidavit for publication may be sworn to in any county[17] or state,[18] before any officer qualified to administer oaths in that county or state.[19]

7. Filing. — The affidavit must be filed.[20] But if it is clearly shown

the statute relating to affidavits does not specifically require such an averment. Ricketson *v.* Richardson, 26 Cal. 149; Wildes *v.* Lou Dillon Goldfield Min. Co., 41 Nev. 364, 170 Pac. 1046. (2) But the omission is not fatal on collateral attack in such case. Moore Realty Co. *v.* Carr, 61 Ore. 34, 120 Pac. 742.

[c] **Use of word "address"** does not vitiate the affidavit. San Diego Sav. Bank *v.* Goodsell, 137 Cal. 420, 70 Pac. 299.

[d] **The street and number** need not be stated. Burke *v.* Donnovan, 60 Ill. App. 241, where defendant resided at St. Louis, Mo.

14. **Ark.**—Turnage *v.* Fisk, 22 Ark. 286. **Cal.**—Braly *v.* Seaman, 30 Cal. 610. **Ill.**—Van Pelt *v.* Hutchinson, 114 Ill. 435, 2 N. E. 491. **Kan.**—See Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487, an affidavit to this effect must be filed in divorce cases, but it need not be filed in three days after first publication made. This affidavit is not part of the service, but merely evidence tending to show due service is made. Ensign *v.* Ensign, 45 Kan. 612, 26 Pac. 7. **Miss.**—Foster *v.* Simmons, 40 Miss. 585. **Nev.**—Wildes *v.* Lou Dillon Goldfield Min. Co., 41 Nev. 364, 170 Pac. 1046. **N. Y.**—Ottman *v.* Daly, 17 Civ. Proc. 62, 7 N. Y. Supp. 897. **N. D.**—Krumenacker *v.* Andis, 38 N. D. 500, 165 N. W. 524; Jablonski *v.* Piesik, 30 N. D. 543, 153 N. W. 274.

[a] **A statement that the "whereabouts"** of the defendant are unknown is not a compliance. Krumenacker *v.* Andis, 38 N. D. 500, 165 N. W. 524; Young *v.* Young (Tex. Civ. App.), 127 S. W. 898.

[b] **An averment that defendants "last known postoffice address"** is unknown is insufficient. Atwood *v.* Tucker, 26 N. D. 622, 145 N. W. 587, 51 L. R. A. (N. S.) 597.

[c] **A statute requiring that the postoffice address** of the defendant be stated if known, or that lack of knowledge be shown is not complied with by a recital that the defendant's place of residence is not known. Norris *v.* Kelsey, 23 Colo. App. 555, 130 Pac. 1088; Empire Ranch & Cattle Co. *v.* Saul, 22 Colo. App. 605, 127 Pac. 123.

15. Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559.

16. Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205.

17. Gibson *v.* Austin, 23 Colo. App. 220, 128 Pac. 859.

18. Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205. See Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117.

19. Gibson *v.* Austin, 23 Colo. App. 220, 128 Pac. 859; McDermaid *v.* Russell, 41 Ill. 489.

[a] **An affidavit sworn to before the attorney of the plaintiff** (1) should not be received. Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713. (2) But such an affidavit is sufficient as against a collateral attack. Harris *v.* Burbery, 85 Kan. 201, 116 Pac. 206; Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436.

[b] **An affidavit taken in another state** is required to be taken before an officer authorized to certify the acknowledgment of deeds, and must be certified to in the manner to entitle a deed so acknowledged to be recorded in the state. Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117.

20. Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070; Bradley *v.* Jamison, 46 Iowa 68. *Compare* Virginia & W. Va. Coal Co. *v.* Charles, 251 Fed. 83, 114.

[a] **The fact that the clerk does not keep his office at the county seat,** does not invalidate a filing with him, where no buildings for offices are provided for. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

[b] **Failure to indorse the affidavit filed** is immaterial, when the order recites that the affidavit was filed. Bush *v.* Aldrich (S. C.), 96 S. E. 922. See generally the title **"Filing."**

[c] **Presumption as to time of filing,** see Carey *v.* Reeves, 32 Kan. 718, 5 Pac. 22.

that an affidavit was actually filed, the judgment will not be reversed because it is not in the record.[21] The affidavit is required to be filed before the order of publication is made,[22] or before the first publication of summons.[23] And it has been held that if a sufficient affidavit is presented to the court, it has jurisdiction although the affidavit is not filed until the day of trial.[24]

8. Amendment. — An affidavit which is defective only in stating inferentially matter required by law may be amended.[25] But a total want of averment cannot be supplied.[26] And an omission to file any affidavit at all cannot be cured by a subsequent filing.[27] The amendment may be made after publication of notice has been made,[28] and even after judgment.[29] Such amendment relates back to the time of the commencement of the action.[30]

G. ORDER FOR PUBLICATION. — **1. Necessity for.** — Generally an order for publication is required to be made upon the presentation of an affidavit therefor.[31] But under some statutes[32] no such order is

21. Tibbs *v.* Allen, 27 Ill. 119.

[a] **It will be presumed** that there **was** an affidavit filed, when a judgment of a court of general jurisdiction is attacked because no affidavit is on the record. Atwood *v.* Atwood, 55 Mo. App. 370.

22. Bradley *v.* Jamison, 46 Iowa 68.

[a] **If the affidavit is filed on day of entry of judgment,** the judgment is void. Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836, *followed* in Brown *v.* St. Paul & N. P. Ry. Co., 38 Minn. 506, 38 N. W. 698.

23. Krumenacker *v.* Andis, 38 N. D. 500, 165 N. W. 524; Jablonski *v.* Piesik, 30 N. D. 543, 153 N. W. 274. But see Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075.

[a] **If filed afterwards** the court acquires no jurisdiction. Krumenacker *v.* Andis, 38 N. D. 500, 165 N. W. 524.

24. Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070.

25. Long *v.* Fife, 45 Kan. 271, 25 Pac. 594, 23 Am. St. Rep. 724; Pierce *v.* Butters, 21 Kan. 124; Weaver *v.* Lockwood, 2 Kan. App. 62, 43 Pac. 311; City Nat. Bank *v.* Sparks, 50 Okla. 648, 151 Pac. 225.

[a] **An affidavit on information and belief** may be amended after judgment so as to make the affidavit positive. Harrison *v.* Beard, 30 Kan. 532, 2 Pac. 632.

26. City Nat. Bank *v.* Sparks, 50 Okla. 648, 151 Pac. 225.

27. Osborne *v.* Schlichenmeier, 68 Kan. 421, 75 Pac. 474.

28. Weaver *v.* Lockwood, 2 Kan. App. 62, 43 Pac. 311.

29. Long *v.* Fife, 45 Kan. 271, 25 Pac. 594, 23 Am. St. Rep. 724; City Nat. Bank *v.* Sparks, 50 Okla. 648, 151 Pac. 225.

30. Long *v.* Fife, 45 Kan. 271, 25 Pac. 594, 23 Am. St. Rep. 724.

31. Hahn *v.* Kelly, 34 Cal. 391, 403, 94 Am. Dec. 742; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

[a] **In Kentucky** (1) a warning order is entered by the clerk and an attorney appointed to defend. Northern Bank *v.* Hunt's Heirs, 93 Ky. 67, 19 S. W. 3; Carr's Admr. *v.* Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614. (2) The court may direct the clerk to enter the warning order on the order book, which then becomes as effectual as if made by the clerk in vacation. Northern Bank *v.* Hunt's Heirs, 93 Ky. 67, 19 S. W. 3. (3) The order is not process but is more in the nature of a rule. It need not be styled as process is. Northern Bank *v.* Hunt's Heirs, 93 Ky. 67, 19 S. W. 3. (4) The name of attorney appointed must be stated in warning order. Jones *v.* Griffin, 25 Ky. L. Rep. 117, 74 S. W. 713.

Order as part of judgment roll, see 2 STANDARD PROC. 346.

Order against husband and wife, see 11 STANDARD PROC. 767.

32. **Kan.**—Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559; Ogden *v.* Walters, 12 Kan. 282, 293. **Minn.**—McClymond *v.*

required. And in some states a citation to the sheriff is issued.[33]

2. By Whom Made. — The order for publication is made by the court or judge in some states,[34] and by the clerk in others.[35]

3. Hearing and Determination. — The court or judge to which an affidavit for publication is presented acts judicially when the affidavit is required to show the facts to the satisfaction of the court,[36] and can act upon no other evidence than such as prescribed by the statute.[37]

4. Form of Order. — The order must conform to the affidavit,[38] and to the statutes prescribing its contents.[39] But it need not follow the exact language of the statute.[40] And mere irregularities in the order for publication[41] or clerical errors,[42] or surplusage[43] in the order will not vitiate it.

Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354. **Mont.**—Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706.

[a] **When the Affidavit Is Passed On.**—(1) In some states it is provided that no default judgment shall be entered on service by publication until proof thereof is made and approved by the court and filed. See the statutes and Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559. (2) But the failure of the court to examine or inspect the proof or to further approve it does not defeat or set aside the service. Roberts *v.* Fagan, 76 Kan. 536, 92 Pac. 559; English *v.* Woodman, 40 Kan. 412, 20 Pac. 262.

33. Wyser *v.* Calhoun, 11 Tex. 323.

[a] **Clerk cannot designate a newspaper** in which publication shall be made. But such a designation is surplusage merely. Wyser *v.* Calhoun, 11 Tex. 323.

34. Lowerre *v.* Owens, 14 App. Div. 215, 43 N. Y. Supp. 467, order presumed to have been made by the judge under the facts.

35. **Colo.**—Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043. **Ky.**—Northern Bank *v.* Hunt's Heirs, 93 Ky. 67, 19 S. W. 3. **Mo.**—Van Natta *v.* Harroun Real Est. Co., 221 Mo. 373, 120 S. W. 738; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158, when the court is in vacation the clerk may make the order. But he cannot make the order on a return of non est.

36. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

[a] **Effect of Decision.—The decision** that the facts are sufficiently shown is to be regarded with the same effect as other decisions on matters of fact, if the facts set forth in the affidavit have a legal tendency to show the facts required to be stated. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

[b] **When the affidavit is required to "state" the facts,** no judicial investigation is necessary. On a proper affidavit the order goes as a matter of course. Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Tooker *v.* Leake, 146 Mo. 419, 433, 48 S. W. 638.

37. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. *Compare* Ligare *v.* California S. R. Co., 76 Cal. 610, 18 Pac. 777. But see Cummings *v.* Brown, 181 Mo. 711, 717, 81 S. W. 158, where the order is based on a return of non est.

38. Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663, an order directing publication because the defendant is a nonresident is void when the affidavit alleges that he has absconded.

39. See the statutes.

Forms of order for publication, see 9 STANDARD PROC. 1132. Form of order made on return of not found, see Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638.

40. Smith *v.* Collis, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158.

41. **Cal.**—Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34. **Colo.**—Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043. **Ore.**—Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

[a] **Entry.**—The failure of the clerk to sign his name to the entry is a mere irregularity as against a collateral attack. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60. See Davidson *v.* Laclede Land & Imp. Co., 253 Mo. 223, 161 S. W. 686; McDermott *v.* Gray, 198 Mo. 266, 95 S. W. 431.

42. Kieffer *v.* Victor Land Co., 53 Ore. 174, 90 Pac. 582, 98 Pac. 877.

43. Kansas City *v.* Woerishoeffer, 249 Mo. 1, 22, 155 S. W. 779; Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549.

An order for publication must direct the publication to be made in a newspaper, to be designated,[44] for the length of time prescribed by law.[45] If it appear that the residence of a nonresident or absent defendant is known, the depositing in a post office, forthwith, of a copy of the summons and complaint properly directed to the defendant must be ordered, under some statutes.[46] In some states, the order must direct that the deposit be omitted if the address is not known.[47] The order need not be in the alternative and direct publication or personal service out of the state,[48] although such an order has been held proper.[49] The facts authorizing service need not be recited.[50] The order should be signed.[51]

5. Filing. — The order must be filed within the time required by statute.[52]

44. **U. S.**—Oswald *v.* Kampmann, 28 Fed. 36. **Mo.**—Otis *v.* Epperson, 88 Mo. 131. **Wis.**—Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124, that first publication be made within three months of the order must be directed.

[a] **That the paper designated is one "most likely to give notice** to the person to be served" need not be stated in the order. Seaver *v.* Fitzgerald, 23 Cal. 85.

45. **Cal.**—McCrea *v.* Haraszthy, 51 Cal. 146. **Ore.**—McFarlane *v.* Cornelius, 43 Ore. 513, 524, 73 Pac. 325, 74 Pac. 468. **Wis.**—Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124.

46. **Cal.**—Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007. **Miss.**—Ingersoll *v.* Ingersoll, 42 Miss. 155. **N. Y.**—Littlejohn *v.* Leffingwell, 34 App. Div. 185, 54 N. Y. Supp. 536; Sabin *v.* Kendrick, 2 App. Div. 96, 37 N. Y. Supp. 524, 25 Civ. Proc. 280, 73 N. Y. St. 213. **Utah.** Park *v.* Higbee, 6 Utah 414, 24 Pac. 524. **Wis.**—Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596.

[a] **The omission of the word "forthwith"** is an irregularity at most, not rendering the proceedings void. **Cal.**—Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34. **Colo.** Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043. **Ore.**—Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

47. De Fyn *v.* Power, 167 Wis. 342, 167 N. W. 447; O'Malley *v.* Fricke, 104 Wis. 280, 80 N. W. 436.

[a] **The omission is fatal** on collateral attack even where the affidavit states the fact. O'Malley *v.* Fricke, 104 Wis. 280, 80 N. W. 436.

[b] **An order in the alternative is void** which directs that a copy of the summons be mailed if the same can be ascertained, and if not the mailing be omitted. De Fyn *v.* Power, 167 Wis. 342, 167 N. W. 447.

48. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Banfield Co. *v.* Hollenbeck, 184 App. Div. 618, 172 N. Y. Supp. 377.

49. *In re* Field, 131 N. Y. 184, 30 N. E. 48; Marrone *v.* Tesoriere, 92 Misc. 602, 156 N. Y. Supp. 280.

[a] **But when the order is in the alternative,** defects in its directions with respect to publication are immaterial, when personal service outside the state is had. Sabin *v.* Kendrick, 2 App. Div. 96, 37 N. Y. Supp. 524, 25 Civ. Proc. 280, 73 N. Y. St. 213.

50. William Wilson Co. *v.* **Trainor,** 27 Cal. App. 43, 148 Pac. 954; Goodale *v.* Coffee, 24 Ore. 346, 355, 33 Pac. 990.

51. Jones *v.* Griffin, 25 Ky. L. Rep. 117, 74 S. W. 713, warning order to be signed by clerk.

[a] **Omission of clerk to sign the order** does not invalidate it. McDermott *v.* Gray, 198 Mo. 266, 95 S. W. 431.

52. Fink *v.* Wallach, 109 App. Div. 718, 96 N. Y. Supp. 543; Whiton *v.* Morning Journal Assn., 23 Misc. 299, 50 N. Y. Supp. 899, 27 Civ. Proc. 224.

[a] **Statute Is Mandatory.**—Whiton *v.* Morning Journal Assn., 23 Misc. 299, 50 N. Y. Supp. 899, 27 Civ. Proc. 224.

[b] **Filing at time of taking of judgment** is sufficient. Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075. See 20 STANDARD PROC. 821.

[c] **Must be filed on or before first publication** by virtue of statute. Fink *v.* Wallach, 47 Misc. 247, 95 N. Y. Supp. 872.

[d] **By a nunc pro tunc order, the omission to file the order cannot be**

6. Amendment and Vacation. — The order may be amended,[53] or vacated.[54] A nunc pro tunc entry of the order may be made in fieri.[55]

H. THE PUBLICATION. — **1. Necessity for.** — The appearance of the defendant renders publication unnecessary.[56]

2. Time of Publication. — The statutes vary as to the length of time the notice must be published.[57] Publication for less than the prescribed time prevents jurisdiction from attaching.[58] But publication for a longer period is a good publication.[59]

Where publication for a specified number of weeks is required, publication once a week in a weekly paper for the prescribed number of times is sufficient generally.[60] If publication in a daily or semi-weekly paper is had, publication in all the regular issues of the paper during the week is required.[61] Exactly seven days need not intervene between each weekly publication,[62] unless the statute requires publication at least once a week.[63] That one of the publications is made on a holiday does not invalidate the service.[64]

The "month" mentioned in the statute is the calendar not the lunar month.[65]

The service is deemed complete at the expiration of the time prescribed by the order of publication,[66] or at the expiration of a specified

cured. Fink *v.* Wallach, 47 Misc. 247, 95 N. Y. Supp. 872.

53. Jankovich *v.* Wayne Circ. Judge, 188 Mich. 284, 153 N. W. 1085.

54. McCarthy *v.* McCarthy, 13 Hun (N. Y.) 579. See generally the title "Orders."

[a] **But the order is not an order granting a provisional remedy** within the meaning of a statute providing for vacation of such orders. McCarthy *v.* McCarthy, 13 Hun (N. Y.) 579.

55. Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676.

56. Long *v.* Long, 59 Mich. 296, 26 N. W. 520.

57. See the statutes and **Cal.**—Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742. **Ind.**—Southern Ind. R. Co. *v.* Indianapolis & L. Ry. Co., 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197. **Mont.**—Smith *v.* Collis, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158. **Neb.**—State *ex rel.* Harris *v.* Hanson, 80 Neb. 724, 115 N. W. 294.

58. Claypool *v.* Robb, 90 Neb. 193, 133 N. W. 178; Bumpass *v.* Anderson (Tex. Civ. App.), 51 S. W. 1103.

59. Taylor *v.* Coots, 32 Neb. 30, 48 N. W. 964, 29 Am. St. Rep. 426; Fouts *v.* Mann, 15 Neb. 172, 18 N. W. 64.

[a] **But Does Not Extend Time to Answer.**—Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34.

60. Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549. But *compare* Myakka Co. *v.* Edwards, 68 Fla. 372, 67 So. 217, Ann. Cas. 1917B, 201.

61. Smith *v.* Potter, 90 Neb. 298, 133 N. W. 437; Claypool *v.* Robb, 90 Neb. 193, 133 N. W. 178. See Brown *v.* Howard, 264 Mo. 501, 175 S. W. 54.

[a] **Publication in a semi-weekly paper** issued on Tuesdays and Fridays is insufficient when the first and last publications fall on Fridays four weeks apart, where the statute requires publication four consecutive weeks. Claypool *v.* Robb, 90 Neb. 193, 133 N. W. 178.

62. **Minn.**—Raunn *v.* Leach, 53 Minn. 84, 54 N. W. 1058. **Neb.**—Burr *v.* Finch, 91 Neb. 417, 136 N. W. 72. **N. Y.**—See Doheny *v.* Worden, 75 App. Div. 47, 77 N. Y. Supp. 959.

[a] **But There Must Be a Publication in Each Week.**—Doheny *v.* Worden, 75 App. Div. 47, 77 N. Y. Supp. 959.

63. Hernandez *v.* His Creditors, 57 Cal. 333.

64. Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753.

65. Foster *v.* Vehmeyer, 133 Cal. 459, 65 Pac. 974; Forsman *v.* Bright, 8 Idaho 467, 69 Pac. 473.

66. **Cal.**—Grewell *v.* Henderson, 5 Cal. 465. **N. Y.**—Brooklyn Trust Co.

number of days from the date of last publication.[67] Where the publication is required to be not less than a specified number of days, the day of the first publication must be excluded and the last day included.[68] When publication for a certain number of weeks is required, the publication is deemed complete on the distribution of the last successive weekly insertion, in some states,[69] though some courts hold that publication is not complete until the lapse of a full week from the last publication.[70] Under a statute requiring publication for at least two months, publication is complete at the expiration of two calendar months from the day of the first publication.[71]

3. The Newspaper. — The publication is required to be in some newspaper published in the county where the suit is instituted, unless there be none printed in that county,[72] in a "newspaper of general circulation,"[73] or a newspaper most likely to give notice to the person to be served.[74] But a publication only in a Sunday paper is in-

v. Bulmer, 49 N. Y. 84. **N. C.**—Guilford *v.* Georgia Co., 109 N. C. 310, 13 S. E. 861.

67. Seeley *v.* Taylor, 17 Colo. 70, 28 Pac. 461, 723; Conley *v.* Morris, 6 Colo. 212.

[a] **The ten days commence to run** from the last publication. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

68. Stebbins *v.* Anthony, 5 Colo. 348; Beckwith *v.* Douglas, 25 Kan. 229.

69. **Colo.**—See Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043. **Ia.**—Banta *v.* Wood, 32 Iowa 469. **Mont.**—Smith *v.* Collis, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158, statute so provides in express words. **Neb.**—Claypool *v.* Robb, 90 Neb. 193, 133 N. W. 178; Davis *v.* Huston, 15 Neb. 28, 16 N. W. 820. **Ohio.**—Core *v.* Oil & Oil Land Co., 40 Ohio St. 636.

70. **U. S.**—McDonald *v.* Cooper, 13 Sawy. 86, 32 Fed. 745. **Fla.**—Myakka Co. *v.* Edwards, 68 Fla. 372, 67 So. 217, Ann. Cas. 1917B, 201, note. **N. Y.** Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397, 11 Abb. N. C. 104. **Tex.** Davis *v.* Robinson, 70 Tex. 394, 7 S. W. 749; Odom's Unknown Heirs *v.* Crews (Tex. Civ. App.), 163 S. W. 366.

71. Foster *v.* Vehmeyer, 133 Cal. 459, 65 Pac. 974; Bowen *v.* Harper, 6 Idaho 654, 59 Pac. 179.

[a] **Where publication at least once a week for not less than two months is required,** (1) two full calendar months need not intervene between the first and last publications. But the publication must be once each week for those two months. Therefore, if the first publication is on June 14, the publication is complete on August 13. Foster *v.* Vehmeyer, 133 Cal. 459, 65 Pac. 974. (2) But even if the publication does not expire until the 14th, another publication is not necessary, where that date is in the same week with the 13th, and the summons has been published in that week. Savings & Loan Soc. *v.* Thompson, 32 Cal. 347

72. See the statutes.

[a] **If the court's jurisdiction is not coextensive with the county,** publication should be within the territorial jurisdiction of the court. Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186.

[b] **Although the paper has a "patent inside"** printed in another county or state, it is "printed" in the county where the rest is printed and the paper is distributed. Palmer *v.* McCormick, 30 Fed. 82.

73. See the statutes.

[a] **Purely professional journals,** whether legal, medical, or religious, are not "newspapers of general circulation." Lynn *v.* Allen, 145 Ind. 584, 44 N. E. 646, 57 Am. St. Rep. 223, 33 L. R. A. 779; Beecher *v.* Stephens, 25 Minn. 146.

[b] **Legal Publication.** — A newspaper of general circulation includes a daily newspaper devoted to the general dissemination of legal news, containing other matter of general interest to the public, and having a large general circulation. Lynn *v.* Allen, 145 Ind. 584, 44 N. E. 646, 57 Am. St. Rep. 223, 33 L. R. A. 779.

74. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Wakeley *v.* Nicholas, 16 Wis. 588.

[a] **Court has a discretion as to**

valid.[75] It has been held that a publication in a supplement is insufficient where it is not shown that the supplement is a newspaper.[76] A newspaper printed in a foreign language may be designated,[77] but the notice must be printed in English.[78]

4. Publication Notice. — a. *Generally.* — The notice to be published varies in the different states.[79] In some it is the summons or citation which is published,[80] sometimes with some additional provisions.[81] In others it is the order which is published.[82] And in some states it is a statutory notice.[83] The petition need not be published.[84] The published notice must contain all the statutory specifications, the absence of any is fatal to jurisdiction.[85] And the publication must be in the English language.[86]

b. *Name of Court.* — The notice published is required to state the court in which the petition is filed.[87]

c. *Names of Parties.*—The published notice is required to state[88] the

what newspaper shall be designated. Wakeley *v.* Nicholas, 16 Wis. 588.

[b] **It will be presumed** that the paper designated is most likely to give notice to the person to be served. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

75. Schwed *v.* Hartwitz, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221, publication of notice of tax sale.

76. Eminence Land & Min. Co. *v.* Current River L. & C. Co., 187 Mo. 420, 437, 86 S. W. 145. But *compare* Lent *v.* Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. ed. 419, notice in a condemnation suit.

77. Alfonso *v.* Alfonso, 99 Misc. 550, 165 N. Y. Supp. 1037; Wakeley *v.* Nicholas, 16 Wis. 588.

78. See *infra,* VII, H, 4.

79. See the statutes.

Form of notice for publication, see 9 STANDARD PROC. 1134.

80. Sharp *v.* Daugney, 33 Cal. 505.

[a] **The affidavit is no part of the summons** which is published. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

[b] **Variance.**—(1) Slight variances between the original and the published summons not sufficient to destroy the identity in sense and meaning are not fatal (People *v.* Davis, 143 Cal. 673, 77 Pac. 651; Sharp *v.* Daugney, 33 Cal. 505; McKnight *v.* Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287), but (2) material variances are. McMinn *v.* Whelan, 27 Cal. 300, 311.

[c] **Additional matter** may be treated as surplusage. Guilford *v.* Georgia Co., 109 N. C. 310, 13 S. E. 861.

[d] **The name of the attorney endorsed on the summons** need not be published. People *v.* Wrin, 143 Cal. 11, 76 Pac. 646.

[e] **Formal defects in a summons served by publication will not defeat jurisdiction** any more than in other cases. Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

81. Osburn *v.* Maata, 66 Ore. 558, 135 Pac. 165 (must specify the time prescribed in the order for publication); Borden *v.* Houston, 26 Tex. Civ. App. 29, 62 S. W. 426, brief statement of the cause of action must be given.

82. See the statutes.

For form of order, see *supra,* VII, G.

[a] **The publication of the original order,** although irregular, does not avoid the proceedings on a collateral attack. Groner *v.* Smith, 49 Mo. 318.

[b] **When made in term time, the order of the judge** must be published, not one substituted by the clerk. Otis *v.* Epperson, 88 Mo. 131.

83. **For form of notice,** see *infra,* this section.

84. Borden *v.* Houston, 26 Tex. Civ. App. 29, 62 S. W. 426.

85. Osburn *v.* Maata, 66 Ore. 558, 135 Pac. 165.

86. Alfonso *v.* Alfonso, 99 Misc. 550, 165 N. Y. Supp. 1037.

87. Townsend *v.* Burr, 9 Kan. App. 810, 60 Pac. 477.

88. Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676; Skelton *v.* Sacket, 91 Mo. 377, 3 S. W. 874.

[a] **The notice need not necessarily mention the names of any defendants except** those against whom publication

names of the parties, giving the Christian name[89] as well as the surname,[90] unless it be unknown, in which case a description or identification of the party must be given.[91] But the middle name of a party has been held no part of his name.[92] Care should be exercised to publish the defendant's name correctly,[93] as a mistake in name[94] ren-

is had. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

[b] **Unknown heirs** may be designated as the heirs of G. L. S. deceased, without setting forth their names. Tygart *v.* Peeples, 9 Rich. Eq. (S. C.) 46.

89. Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13; Boynton *v.* Chamberlain, 38 Tex. 604.

[a] **The initials of the Christian** name (1) cannot be used (Gillingham *v.* Brown, 187 Mo. 181, 85 S. W. 1113; Skelton *v.* Sacket, 91 Mo. 377, 3 S. W. 874; Butler *v.* Smith, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. [N. S.] 436), unless (2) there is an estoppel, as where record title is taken by the owner in the initials of his Christian name (Ohlmann *v.* Clarkson Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. [N. S.] 432; Elting *v.* Gould, 96 Mo. 535, 541, 9 S. W. 922. See also McDermott *v.* Gray, 198 Mo. 266, 95 S. W. 431 [where initials are used in contracting a marriage]; Turner *v.* Gregory, 151 Mo. 100, 52 S. W. 234), or (3) where he is commonly known by his initials. Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855. (4) But where no other Christian name than the initials by which the defendant is sued appears in the record, the appellate court cannot presume he has any other Christian name. Scarborough *v.* Myrick, 47 Neb. 794, 66 N. W. 867.

[b] **The use of blanks** (1) for the Christian name renders the notice insufficient (Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13; Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. [N. S.] 676), unless (2) a description of the defendant sufficient to identify him is given. Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549.

[c] Notice to John McC. and ——— McC. his wife, is insufficient notice to the widow of John McC. after his death. Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

[d] **Nicknames and abbreviations** for the Christian name of a party cannot be used. Ohlmann *v.* Clarkson Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. (N. S.) 432, holding the use of "Mike" for "Michael" renders publication insufficient.

90. See *infra*, this section.

91. Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676; Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549.

92. See *infra*, this note.

[a] **The middle name of a person** (1) may be indicated by an initial letter. Keaton *v.* Jorndt, 220 Mo. 117, 119 S. W. 629. (2) But a designation of the wrong initial letter is fatal. D'Autremont *v.* Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236. *Contra*, Illinois Central R. Co. *v.* Hasenwinkle, 232 Ill. 224, 83 N. E. 815, 15 L. R. A. (N. S.) 129; Morgan *v.* Woods, 33 Ind. 23.

93. Fanning *v.* Krapfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293; Ohlmann *v.* Clarkson Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. (N. S.) 432.

[a] **The use of a married woman's maiden name** (1) will not support a judgment against her (Morris *v.* Tracy, 58 Kan. 137, 48 Pac. 571; Freeman *v.* Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769; Watt *v.* Parlin & O. Co., 44 Tex. Civ. App. 439, 98 S. W. 428), except (2) when that is the name in which the record title stands. Emery *v.* Kipp, 154 Cal. 83, 97 Pac. 17, 129 Am. St. Rep. 141, 19 L. R. A. (N. S.) 983, 16 Ann. Cas. 792. See also Jones *v.* Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215.

94. **Kan.**—Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676; Entrekin *v.* Chambers, 11 Kan. 368, Brimford for Binford. **La.**—New Orleans *v.* Cordeviolle, 10 La. Ann. 727, "Cordoviatti" for "Cordeviolle." **Mo.**—Scarry *v.* Bunker-Cullen Lumber Co., 233 Mo.

ders the proceedings void. But absolute accuracy is not requisite,[95] and different tests for determining the sufficiency of the notice are applied.[96] The notice, however, should so clearly identify the defendant that his acquaintances who read the notice will know for whom it is intended.[97] The name used by the party himself and by which he is known,[98] or the name in which the landowner took title,[99] may be used.

686, 136 S. W. 294, "Carrey" for "Scarry."

[a] **It is fatal** (1) to use another Christian name (Burge *v.* Burge, 94 Mo. App. 15, 67 S. W. 703, Emma for Emily), or (2) to invert the initials of the Christian names. Fanning *v.* Krapfl, 68 Iowa 244, 26 N. W. 133, where notice was directed to P. T. B. Hopkins, his true name being T. P. B. Hopkins.

95. **U. S.**—Grannis *v.* Ordean, 234 U. S. 385, 34 Sup. Ct. 779, 58 L. ed. 1363, Guilfuss for Geilfuss. **Ala.**—Gill *v.* More, 76 So. 453. **Cal.**—Seaver *v.* Fitzgerald, 23 Cal. 85, Seavers for Seaver. **Idaho.**—McKnight *v.* Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287, where "Mc" was omitted from the published summons but the name was correctly given in the process mailed to the defendant. **Kan.**—Puckett *v.* Hetzer, 82 Kan. 726, 109 Pac. 285, 136 Am. St. Rep. 127 ("Remer" for "Renner"); Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911. **Minn.**—Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

But see Schoenfeld *v.* Bourne, 159 Mich. 139, 123 N. W. 537, 30 L. R. A. (N. S.) 122, holding notice to Dunton does not bind Denton.

[a] **If in designating a corporation** whose name is F. L. & T. Co. "of Kansas," the words "of Kansas" be omitted, the variance is not fatal (1) where the corporation is commonly known by the name as published. King *v.* Wilson, 86 Kan. 227, 120 Pac. 342, Ann. Cas. 1913B, 1246; Grafton Grocery Co. *v.* Home Brew. Co., 60 W. Va. 281, 54 S. E. 349. *Contra,* Detroit *v.* Detroit City R. Co., 54 Fed. 1. (2) Inserting word "The" before name of corporation is immaterial. Clifford *v.* Thun, 74 Neb. 831, 104 N. W. 1052.

96. See *infra,* this note.

[a] **The doctrine (1) of idem sonans** applies. **U. S.**—Grannis *v.* Ordean, 234 U. S. 385, 395, 34 Sup. Ct. 779, 58 L. ed. 1363. **Kan.**—Puckett *v.* Hetzer, 82 Kan. 726, 109 Pac. 285, 136 Am. St. Rep. 127; Rowe *v.* Palmer, 29 Kan. 337; Entrekin *v.* Chambers, 11 Kan. 368. **Minn.**—Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821. **Va.**—Steinman *v.* Jessee, 108 Va. 567, 62 S. E. 275. *Contra,* Schoenfeld *v.* Bourne, 159 Mich. 139, 123 N. W. 537, 30 L. R. A. (N. S.) 122. (2) Where the discrepancy is immaterial, the doctrine may be invoked. McRee *v.* Brown, 45 Tex. 503, 506.

[b] **Whether the names look substantially the same in print** is the test. Grannis *v.* Ordean, 234 U. S. 385, 396, 34 Sup. Ct. 779, 58 L. ed. 1363; Puckett *v.* Hetzer, 82 Kan. 726, 109 Pac. 285, 136 Am. St. Rep. 127.

[c] **Other tests** are whether a letter addressed as the notice reads, would reach the defendant then a resident of the city; and whether if a summons so mailed or published reached the eye of the true defendant or those knowing him and sufficiently interested in him to acquaint him thereof, it would convey notice that he was intended to be summoned. Grannis *v.* Ordean, 234 U. S. 385, 397, 34 Sup. Ct. 779, 58 L. ed. 1363. See also Gill *v.* More (Ala.), 76 So. 453.

97. **U. S.**—Grannis *v.* Ordean, 234 U. S. 385, 397, 34 Sup. Ct. 779, 58 L. ed. 1363. **Ia.**—Fanning *v.* Krapfl, 68 Iowa 244, 26 N. W. 133. **Kan.**—Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676.

98. **Ind.**—Jones *v.* Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215. **Kan.**—King *v.* Wilson, 86 Kan. 227, 120 Pac. 342, Ann. Cas. 1913B, 1246. **Mo.**—Mosely *v.* Reily, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721.

99. **Cal.**—Emery *v.* Kipp, 154 Cal. 83, 97 Pac. 17, 129 Am. St. Rep. 141, 19 L. R. A. (N. S.) 983, 16 Ann. Cas. 792. **Ind.**—Baugher *v.* Woollen, 147 Ind. 308, 45 N. E. 94. **Minn.**—Blinn *v.* Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536. **Mo.**—Ohlmann *v.* Clarkson Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. (N. S.) 432; Turner *v.* Gregory, 151 Mo. 100, 106, 52 S. W. 234.

d. *Description of Property.* — In actions strictly in rem or quasi in rem the notice should disclose the res toward which the suit is directed.[1] In some states, real property involved in the action or attached, must be described.[2] But it has been held that personal property which has been attached need not be described.[3]

e. *Cause of Action and Judgment Desired.* — Some statutes require the notice to contain a summary statement of the object and prayer of the petition,[4] and the nature of the judgment sought.[5]

f. *Time of Appearance.* — The publication is required to notify the persons to be served when they are required to answer.[6]

5. Substituted Publication. — Upon cause shown, the court in the exercise of its power of amendment, may allow a second publication to be made, after an ineffectual effort to publish notice.[7]

I. MAILING. — If the defendant's residencce is known, a copy of the complaint or petition and a copy of the publication notice must,

1. Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 71 Atl. 605.

2. See *infra*, this note.

[a] **Under a statute requiring that the nature of the judgment to be rendered** be stated. **Kan.**—Caldwell *v.* Bigger, 76 Kan. 49, 90 Pac. 1095; Cackley *v.* Smith, 38 Kan. 450, 17 Pac. 156. **Neb.**—McCormick *v.* Paddock, 20 Neb. 486, 492, 30 N. W. 602. **Okla.** City Nat. Bank *v.* Sparks, 50 Okla. 648, 151 Pac. 225; Ballew *v.* Young, 24 Okla. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084.

[b] **Under a statute requiring the object and general nature of the petition** be stated. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399. But see Core *v.* Oil & Oil Land Co., 40 Ohio St. 636.

[c] **A description is sufficient** if no reasonable person can be misled by the description of the property. Leigh *v.* Green, 64 Neb. 533, 540, 90 N. W. 255, 101 Am. St. Rep. 592. See also Southern Ind. R. Co. *v.* Indianapolis & L. Ry. Co., 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

3. Beckwith *v.* Douglas, 25 Kan. 229. But see Amparo Min. Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197, 71 Atl. 605.

4. **Mo.**—Haywood *v.* Russell, 44 Mo. 252. **Neb.**—McCormick *v.* Paddock, 20 Neb. 486, 30 N. W. 602. **N. M.**—Smith *v.* Montoya, 3 N. M. 13, 1 Pac. 175. **N. C.**—Best *v.* British & American Co., 128 N. C. 351, 38 S. E. 923.

[a] **That the claim is to be enforced by attachment** or garnishment need not be stated. Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825.

[b] **That the action is for partition** is a sufficient statement although the statute authorizes the court either to make partition or to sell the property. McCormick *v.* Paddock, 20 Neb. 486, 491, 30 N. W. 602.

[c] **That an order for sale of attached property** will be entered need not be stated. Rapp *v.* Kyle, 26 Kan. 89; Smith *v.* Montoya, 3 N. M. 13, 1 Pac. 175.

5. Rapp *v.* Kyle, 26 Kan. 89; City Nat. Bank *v.* Sparks, 50 Okla. 648, 151 Pac. 225; Ballew *v.* Young, 24 Okla. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084.

6. Calkins *v.* Miller, 55 Neb. 601, 75 N. W. 1108.

[a] **Notification to appear on a day other than that prescribed** by law (1) renders service irregular. Calkins *v.* Miller, 55 Neb. 601, 75 N. W. 1108. (2) But a defect in this respect is an irregularity not available on collateral attack. Scarborough *v.* Myrick, 47 Neb. 794, 66 N. W. 867, where the day stated was before the first publication.

[b] **Specific day for appearance** need not be fixed, it being sufficient to require an appearance "within four months." Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

[c] **Requiring an answer in the forenoon** of the answer day does not invalidate the service or shorten the time to answer. Armstrong *v.* Middlestadt, 22 Neb. 711, 36 N. W. 151.

7. Bank of New Hanover *v.* Blossom, 92 N. C. 695; Penniman *v.* Daniel, 90 N. C. 154.

under some statutes, be mailed to the defendant[8] forthwith,[9] unless he is personally served without the state.[10] If there are several defendants, copies must be mailed to each.[11] When this is required, the service is not complete until the copies are mailed as directed.[12]

The statute does not prescribe who shall mail the papers and it may be done by any human being competent to make the required proof thereof,[13] except, probably, the party himself.[14]

J. POSTING. — Posting the notice on the court house door is required by some statutes.[15]

K. PERSONAL SERVICE WITHOUT THE STATE. — Statutes generally authorize personal service of process out of the state as a substitute for service by publication.[16] But in the absence of statute permitting it, such service has been held to be void.[17]

Personal service without the state is merely a substitute for service

8. Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487 (in divorce cases); Smith *v.* Wells, 69 N. Y. 600; McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

[a] **A mailing to an address other than named** in the order renders a judgment on such service a nullity. Smith *v.* Wells, 69 N. Y. 600.

[b] **Although the residence stated in the affidavit is erroneous,** a mailing to his true address may be made when the fact is properly shown. Moore Realty Co. *v.* Carr, 61 Ore. 34, 120 Pac. 742.

[c] **The place of the defendant's temporary residence,** not the place of his domicile, is the place to which the summons should be directed. McFarlane *v.* Cornelius, 43 Ore. 513, 73 Pac. 325, 74 Pac. 468.

[d] **Mailing in city where attorney has his office** is proper although the order is obtained elsewhere. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

[e] **The affidavit is no part** of the summons which is mailed. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

9. Cleland *v.* Tavernier, 11 Minn. 194 (a mailing two days later held sufficient); Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

[a] **A deposit made a week** after the order, on the day of the first publication, is made "forthwith." Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664, 679.

[b] **Mailing previous to the order** for publication is insufficient. Rockman *v.* Ackerman, 109 Wis. 639, 85 N. W. 491.

10. McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

As to personal service, see *infra,* VII, K.

11. Wylly *v.* Sanford L. & Trust Co., 44 Fla. 818, 33 So. 453.

12. Schart *v.* Schart, 116 Cal. 91, 47 Pac. 927.

13. Sharp *v.* Daugney, 33 Cal. 505; Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664, 680.

[a] **Plaintiff's attorney** may. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

14. Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664, 680.

15. **Ala.**—Batre *v.* Auze's Heirs, 5 Ala. 173. **Ky.**—Lewis *v.* Hancock, Sneed 151. **Miss.**—MacKey *v.* Cobb, 33 Miss. 533.

16. **Ark.**—Martin *v.* Gwynn, 90 Ark. 44, 117 S. W. 754. **Ia.**—Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030. **Minn.**—Sodini *v.* Sodini, 94 Minn. 301, 102 N. W. 861, 110 Am. St. Rep. 371. **Mont.**—McLean *v.* Moran, 38 Mont. 298, 99 Pac. 836. **N. D.**—Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341. **Okla.**—Culver *v.* Diamond, 167 Pac. 223. **S. C.**—George Norris Co. *v.* Levin's Sons, 81 S. C. 36, 61 S. E. 1103. **Tex.**—Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980. **Va.**—Smith *v.* Chilton, 77 Va. 535.

See 17 STANDARD PROC. 685.

[a] **A province of Canada is not a "state"** within the meaning of the statute. Fair *v.* Kenny, 103 Misc. 412, 171 N. Y. Supp. 694.

17. Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

by publication.[18] It has no greater force than service by publication,[19] and cannot be made except in cases where service may be made by publication.[20] As in the case of service by publication, an affidavit must be filed,[21] and publication ordered,[22] unless the statute specifically dispenses therewith.[23]

By Whom Made. — Service outside of the state must be made by the person or officer designated in the statute.[24]

Manner of Service. — The phrase "personal service," when used to designate service without the state has the same significance as when service within the state is referred to,[25] so that service in the manner required in the state for personal service is necessary.[26] A copy of the summons[27] and the complaint,[28] and the statutory notice of service,[29] must be served on the defendant. It is not necessary to

18. **Minn.**—H. L. Spencer Co. *v.* Koell, 91 Minn. 226, 97 N. W. 974. **Mo.**—Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495. **Neb.**—Anheuser-Busch Brew. Assn. *v.* Peterson, 41 Neb. 897, 60 N. W. 373. **Nev.**—Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514.

19. Case *v.* Bartholow, 21 Kan. 300.

[a] **Will Not Support a Personal Judgment.**—Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030; Spurr *v.* Scoville, 3 Cush. (Mass.) 578. See 17 STANDARD PROC. 686.

20. Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681.

21. **Kan.** — Osborne *v.* Schlichenmeier, 68 Kan. 421, 75 Pac. 474; Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681. **Mo.**—Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495. **Neb.**—Boden *v.* Mier, 71 Neb. 191, 98 N. W. 701. **Okla.**—First State Bank *v.* Latimer, 48 Okla. 104, 149 Pac. 1099.

Contra, Miller *v.* Davison, 31 Iowa 435.

22. **Cal.**—McBlain *v.* McBlain, 77 Cal. 507, 510, 20 Pac. 61. **N. Y.**—Brooklyn Trust Co. *v.* Blumer, 49 N. Y. 84. **S. C.**—Riker *v.* Vaughan, 23 S. C. 187. **Wis.**—Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

23. South Dakota Commercial Assn. *v.* Ramsey, 34 S. D. 48, 147 N. W. 75. See Hedrix *v.* Hedrix, 103 Mo. App. 40, 45, 77 S. W. 495.

24. Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704.

[a] **Disinterested Person.**—Blain *v.* McManus, 2 Posey Unrep. Cas. (Tex.) 314.

[b] **The sheriff of the county** where service is made may make such service. First State Bank *v.* Latimer, 48 Okla. 104, 149 Pac. 1099.

[c] **A service by a deputy is not** authorized when the officer only is named. Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704; Sexton *v.* Bernheimer, 104 Misc. 1, 171 N. Y. Supp. 696.

[d] **"An attorney of the state"** where service was made refers only to the states of the United States, its territories, and the District of Columbia. Fair *v.* Kenny, 103 Misc. 412, 171 N. Y. Supp. 694.

[e] **A sheriff of the other state who serves the process on the defendant is presumed** to be a citizen and over twenty-one years of age although his affidavit follows the form of the other state which is silent as to citizenship and states he is over eighteen years of age. Sherwin *v.* Sherwin, 33 Nev. 321, 331, 111 Pac. 286, 122 Pac. 481, Ann. Cas. 1914A, 108.

25. Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341.

26. Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341. See Hopkins *v.* State (Tex. Civ. App.), 28 S. W. 225, and *supra,* V.

[a] **Delivery of envelope containing process sent by mail,** by a letter carrier, or someone sent for the mail is not personal service. Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341.

27. Coffin *v.* Bell, 22 Nev. 169, 185, 37 Pac. 240, 58 Am. St. Rep. 738.

[a] **The summons served must be that ordered** to be published. Coffin *v.* Bell, 22 Nev. 169, 185, 37 Pac. 240, 58 Am. St. Rep. 738.

28. See Fair *v.* Kenny, 103 Misc. 412, 171 N. Y. Supp. 694, and see *supra,* V, G.

[a] **A copy of exhibits** must be served. Fair *v.* Kenny, 103 Misc. 412, 171 N. Y. Supp. 694.

29. Conklin *v.* Federal Trust Co.,

serve copies of the affidavit and order for service by publication, however.[30]

When Service Is Complete. — Statutes generally provide that personal service without the state is complete, as in the case of service by publication, at the expiration of the time prescribed by the order for publication.[31] But in some states the time for answer is the statutory period from such service, the delivery having the effect of completed publication.[32]

L. JURISDICTION ACQUIRED. — The jurisdiction acquired over nonresidents on service by publication in proceedings quasi in rem does not extend beyond the property within the control of the court, if no appearance is made.[33] But in proceedings against a resident of the state, it has been held that a personal judgment may be rendered on constructive service.[34] This seems to apply also where the defendant has departed from the state, temporarily, intending to return,[35] al-

176 App. Div. 572, 163 N. Y. Supp. 570; Hollender *v.* Wallace, 167 App. Div. 217, 152 N. Y. Supp. 647.

30. Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075.

31. **Idaho.**—Bowen *v.* Harper, 6 Idaho 654, 59 Pac. 179. **Mont.**—McLean *v.* Moran, 38 Mont. 298, 99 Pac. 836. **N. Y.**—Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84.

[a] **The time is computed** from the date of making the personal service out of the state. Bowen *v.* Harper, 6 Idaho 654, 59 Pac. 179.

32. Sherwin *v.* Sherwin, 33 Nev. 321, 330, 111 Pac. 286, 122 Pac. 481, Ann. Cas. 1914A, 108 (refusing to apply Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514, holding otherwise as to justice's court procedure); Wilmot *v.* Smith, 86 Wis. 299, 56 N. W. 873.

33. See 17 STANDARD PROC. 690; 14 STANDARD PROC. 868; 3 STANDARD PROC. 679.

By personal service outside the state, see *supra,* VII, K.

34. **Cal.**—Ware *v.* Robins, 9 Cal. 107 (where the defendant concealed himself); Merchants' Nat. Union *v.* Buisseret, 15 Cal. App. 444, 115 Pac. 58, query. **Ill.**—Nelson *v.* Chicago, B. & Q. R. R. Co., 225 Ill. 197, 209, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186 (service by publication and mailing of a notice); Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782, where the defendant could not be found. **Minn.** Roberts *v.* Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140. **Mo.** Hamill *v.* Talbott, 72 Mo. App. 22. **S. D.**—Straub *v.* Lyman-Land & Inv. Co., 30 S. D. 310, 138 N. W. 957, 31 S. D. 571, 141 N. W. 979, 46 L. R. A. (N. S.) 941, 944, service upon domestic corporation by personal service without the state. **Tex.**—Mabee *v.* McDonald, 107 Tex. 139, 171, 175 S. W. 676; Martin *v.* Burns, 80 Tex. 676, 16 S. W. 1072.

[a] **Where the defendant cannot be served in a county** in which suit is properly brought, as where the defendant is a corporation without officers in that county, the legislature may provide for service by publication and mail, on which a personal judgment may be rendered. Nelson *v.* Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. (N. S.) 1186.

[b] **Where service is by publication only,** without mailing, a personal judgment probably cannot be rendered. Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782, query.

35. **Ill.**—Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782. **Mass.**—See also Henderson *v.* Stanford, 105 Mass. 504, 7 Am. Rep. 551, *distinguished* in McDonald *v.* Mabee, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. ed. 608, L. R. A. 1917F, 458, on the ground that the defendant intended to return to the state. **Tex.**—Mabee *v.* McDonald, 107 Tex. 139, 173, 175 S. W. 676 (*reversed* in 243 U. S. 90, 37 Sup. Ct. 343, 61 L. ed. 608, on the ground the defendant intended to leave the state permanently); Horst *v.* Lightfoot, 103 Tex. 643, 132 S. W. 761; Fernandez *v.* Casey, 77 Tex. 452, 14 S. W. 149; Northcraft *v.* Oliver, 74 Tex. 162, 11 S. W. 1121, holding it is, however,

though some courts have held such judgments against absentees invalid.[36]

VIII. SERVICE BY MAIL. — Statutes authorizing service of notices and papers by mail do not apply to summonses or other process,[37] or to any paper to bring a party into contempt.[38]

IX. SERVICE BY TELEGRAPH AND TELEPHONE. — Service of process by reading over the telephone is insufficient.[39] But statutes sometimes authorize service of any summons, writ, paper or order in a civil suit or proceeding by telegraph.[40] And under statutes requiring written notices in an action, a notice sent by telegraph is sufficient.[41]

a question of residence abroad and not of the acquisition of citizenship in the new domicile.

[a] **This is based on the doctrine of sovereign control,** or control by the state over its absent citizens. Mabee *v.* McDonald, 107 Tex. 139, 173, 175 S. W. 676.

[b] **But where the defendant leaves the estate intending to make his domicile** elsewhere, a personal judgment on service by publication is unauthorized and void. McDonald *v.* Mabee, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. ed. 608, L. R. A. 1917F, 458, *reversing* 107 Tex. 139, 175 S. W. 676. See also Boring *v.* Penniman, 134 Cal. 514, 66 Pac. 739.

36. **Cal.**—De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82; Merchants' Nat. Union *v.* Buisseret, 15 Cal. App. 444, 115 Pac. 58. **Ia.**—Raher *v.* Raher, 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1912D, 680, 35 L. R. A. (N. S.) 292, in this case personal service outside the state was made. **Wis.**—Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477; Jarvis *v.* Barrett, 14 Wis. 591.

See Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; Price *v.* Hickok, 39 Vt. 292, query.

[a] **Some language** in Pennoyer *v.* Neff, 95 U. S. 714, would (1) justify extending to absentees the rule against personal judgments against nonresidents upon service by publication. See McDonald *v.* Mabee, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. ed. 608, L. R. A. 1917F, 458, not deciding the point. (2) Referring to this language, it was said in De la Montanya *v.* De la Montanya, 112 Cal. 101, 114, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82, that when Judge Field "speaks of 'absent defendants' he cannot mean those not domiciled within the state, but must have meant simply those physically absent, and upon whom, therefore, personal service of process could not be made." And Raher *v.* Raher, 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1912D, 680, 35 L. R. A. (N. S.) 292, calls attention (4) to the fact that the judgment in Pennoyer *v.* Neff, *supra,* was held invalid on the broad ground that the defendant was not within the state, and not merely because he was a nonresident.

37. Bennett *v.* Supreme Tent, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

As to service of notices by mail, see *infra,* X, B.

38. Bennett *v.* Supreme Tent, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

39. **Md.**—Sharpless Separator Co. *v.* Brilhart, 129 Md. 82, 89, 98 Atl. 484. **N. C.**—S. Lowman & Co. *v.* Ballard, 168 N. C. 16, 84 S. E. 21, Ann. Cas. 1917B, 899, L. R. A. 1915D, 427, Clark Ch. J., dissenting. **Tex.**—See *Ex parte* Terrell (Tex. Crim.), 95 S. W. 536, subpoena.

[a] **But under a statute requiring "written notice"** to be given, a notice dictated over telephone, and written down and served by the receiver would undoubtedly be sufficient. Western Union Tel. Co. *v.* Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933, dictum.

40. See the statutes.

41. **Ga.**—Western Union Tel. Co. *v.* Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933, notice of granting writ of certiorari. **N. J.**—Cape May & S. L. R. Co. *v.* Johnson, 35 N. J. Eq. 422, notice of granting of injunction. **Eng.** *Ex parte* Langley, L. R. 13 Ch. Div. 110, 49 L. J. Bankr. N. S. 1, 43 L. T.

X. SERVICE OF NOTICES, PLEADINGS AND PAPERS. — A. GENERALLY. — The necessity of serving pleadings on the adverse party is elsewhere treated in this article.[42] It is frequently provided that notices and papers in the action may be served by delivery to the party or his attorney,[43] personally,[44] or in the absence of the attorney from his office by leaving the notice or other papers with his clerk therein or with a person having charge thereof,[45] or if there is no person in the office, by leaving them during office hours in a conspicuous place in the office,[46] or if the office is closed, by leaving them at the attorney's residence with some suitable person.[47] Sometimes

N. S. 181, 28 Wkly. Rep. 174; Heywood *v.* Wait, 18 Wkly. Rep. 205.

42. See *supra*, II, B.

Service of copy of original complaint, see *supra*, V, G.

Delivery of copy of indictment, see *infra*, XII.

43. **Cal.**—Wood *v.* Johnston, 8 Cal. App. 258, 96 Pac. 508. **Idaho.**—Collins *v.* Brown, 19 Idaho 360, 114 Pac. 671; Beck *v.* Lavin, 15 Idaho 363, 97 Pac. 1028. **N. Y.**—Flynn *v.* Bailey, 50 Barb. 73; Johnston *v.* Green, 3 Abb. Pr. (N. S.) 342. **N. C.**—Branch *v.* Walker, 92 N. C. 87. **Wis.**—Union Nat. Bank *v.* Benjamin, 61 Wis. 512, 21 N. W. 523.

Motion papers, see 20 STANDARD PROC. 19, 27 and 32.

[a] **Statute applies to equitable proceedings** under the code. State *ex rel.* Sparks *v.* State Bank & Trust Co., 37 Nev. 55, 139 Pac. 505, 142 Pac. 627.

[b] **An ancillary petition praying equitable relief** may be served on the attorney. Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426.

[c] **Service should be on the attorney,** (1) where there is an attorney. Mercier *v.* Pearlstone, 7 Abb. Pr. (N. Y.) 325. (2) In such a case, service on a party is not authorized. People *ex rel.* Finnegan *v.* Board of Supervisors, 19 Mich. 9. (3) But service on an attorney who never appeared as attorney of record in the cause is insufficient. Powers *v.* Braly, 75 Cal. 237, 17 Pac. 197.

[d] **If service is made on a party personally, the subsequent employment** of an attorney does not necessitate a service of the declaration on him de novo. His time to plead runs from the first service. Kleecke *v.* Styles, 3 Johns. (N. Y.) 250.

[e] **On the death or removal of an attorney** and neglect of the party to appoint another, notices may be served on the party. Hoffman *v.* Rowley, 13 Abb. Pr. (N. Y.) 399; Jewell *v.* Schouten, 1 N. Y. 241.

[f] **Where some parties plaintiff appear by one attorney, and some by another,** service of one answer on one of the attorneys is sufficient. Muller *v.* Whelen, 114 App. Div. 138, 99 N. Y. Supp. 618. See also Union Iron Wks. *v.* Vekal Min. & Mill. Co., 11 Ariz. 47, 89 Pac. 539.

[g] **Although no notice of substitution of attorneys is filed,** service on the last attorney recognized by the court and the parties is sufficient. Roussin *v.* Stewart, 33 Cal. 208.

44. McCaslin *v.* Camp, 26 Mich. 390.

45. **Minn.**—Mies *v.* Thompson, 53 Minn. 273, 55 N. W. 44. **N. Y.**—Smith *v.* Aylesworth, 24 How. Pr. 33; Gelston *v.* Swartwout, Colem. Cas. 76, Colem. & C. Cas. 81, 1 Johns. Cas. 136; Jackson *ex dem.* Payn *v.* Yale, 1 Cow. 215. **Wis.**—Union Nat. Bank *v.* Benjamin, 61 Wis. 512, 21 N. W. 523.

46. **Cal.**—January *v.* Superior Court, 73 Cal. 537, 15 Pac. 108. **Minn.**—Mies *v.* Thompson, 53 Minn. 273, 55 N. W. 44. **N. Y.**—Anonymous, 18 Wend. 578.

[a] **Only when the office is open,** can papers be left in a conspicuous place. Anonymous, 18 Wend. (N. Y.) 578.

[b] **Leaving pleading after office hours** is irregular. Vail *v.* Lane, 67 Barb. (N. Y.) 281.

[c] **A postal box** in the office for the deposit of letters and papers is a conspicuous place. January *v.* Superior Court, 73 Cal. 537, 15 Pac. 108.

47. Timolat *v.* S. J. Held Co., 15 Misc. 630, 37 N. Y. Supp. 221, 72 N. Y. St. 800; Gelston *v.* Swartwout, Colem. Cas. 76, Colem. & C. Cas. 81, 1 Johns. Cas. (N. Y.) 136; Anonymous, 18 Wend. (N. Y.) 578; Moreno *v.* Abril, 10 Porto Rico 484.

Notice of hearing left at dwelling house of attorney, see 11 STANDARD PROC. 14.

the service is required in the same manner as service of a summons.[48] Such statutes are mandatory.[49]

Place of Service. — If a court of chancery has once acquired jurisdiction over the party, the decree or any order in the cause may be served on the defendant out of the jurisdiction.[50]

B. SERVICE BY MAIL. — Statutes sometimes authorize the service of notices, pleadings, and other papers in the case requiring service[51] to be made by mail, under certain circumstances.[52] But such service cannot be legally made in the absence of statute.[53] Any statutory provisions as to place and manner of mailing should be complied with.[54] Where service within a given number of days is required, the service is deemed complete from the day of the deposit in the

[a] **Thrusting under the door inside the office** is not regular, when the office is closed. Rogers *v.* Rockwood, 59 Hun 628, 13 N. Y. Supp. 939, 20 Civ. Proc. 212, 36 N. Y. St. 919; Anonymous, 18 Wend. (N. Y.) 578.

48. Brian *v.* Jeffrey, 5 Kan. App. 98, 48 Pac. 875.

49. Fowler *v.* Mosher, 85 Va. 421, 7 S. E. 542.

50. Dunn *v.* Dunn, 4 Paige (N. Y.) 425.

51. See *infra*, this note.

[a] **Pleadings** may be served by mail. See Carlson *v.* Stuart, 22 S. D. 560, 119 N. W. 41, 18 Ann. Cas. 285.

Service of orders on motion, see 20 STANDARD PROC. 825.

Notice of appeal, 2 STANDARD PROC. 318.

Of notice of adjudication in insolvency, see 13 STANDARD PROC. 655.

52. See the statutes. **Ala.**—Long *v.* Clark, 78 So. 832. **Kan.**—Thisler *v.* Little, 86 Kan. 787, 121 Pac. 1123, as to notice of appeal. **N. Y.**—Van Benthuysen *v.* Stevens, 14 How. Pr. 70; Birdsall *v.* Taylor, 1 How. Pr. 89.

[a] **When the person making the service and the person on whom it is to be made reside** or have their offices in different places, between which there is a regular communication by mail, service by mail may be had. **Cal.**—Linforth *v.* White, 129 Cal. 188, 61 Pac. 910; Hogs Back Consol. Min. Co. *v.* New Basil Consol. Min. Co., 63 Cal. 121; Townsend *v.* Parker, 21 Cal. App. 317, 131 Pac. 766; Koyer *v.* Benedict, 4 Cal. App. 48, 87 Pac. 231. **Mont.**—State *ex rel.* Cohn *v.* District Court, 38 Mont. 119, 99 Pac. 139. **N. Y.** Schenck *v.* McKie, 4 How. Pr. 246, 3 Code Rep. 24.

[b] **The risk of the failure of the mail** is taken by the party to whom the paper is addressed. Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246, 3 Code Rep. 24. But a default judgment may be vacated where the pleading is lost in the mail. See 15 STANDARD PROC. 174.

53. **U. S.**—Farmer *v.* National Life Assn., 50 Fed. 829. **Minn.**—Savings Bank *v.* Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498. **Wash.**—Bennett *v.* Supreme Tent, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

54. See the statutes, and Fitzgerald *v.* Dakin, 101 App. Div. 261, 91 N. Y. Supp. 1003.

[a] **There should not be on the wrapper** any part (1) of the writing constituting any part of the papers served (Birdsall *v.* Taylor, 1 How. Pr. [N. Y.] 89), nor (2) any direction for return in case of nondelivery. Stacy *v.* Jefferson, 69 Wis. 215, 34 N. W. 87. But (3) a direction on the envelope to return if not called for does not vitiate the service, unless because thereof the party failed to receive it. Gaffney *v.* Bigelow, 2 Abb. N. C. (N. Y.) 311.

[b] **Must be sent from the post-office of the attorney** (1) by whom service is sought to be made. Van Aernam *v.* Winslow, 37 Minn. 514, 35 N. W. 381; Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246, 3 Code Rep. 24. (2) But if the paper actually comes into the hands of the person to be served within the time for personal service, the place of mailing is immaterial. Van Aernam *v.* Winslow, 37 Minn. 514, 35 N. W. 381.

[c] **If the postage is short** (1) and there is a postage charge, the attorney need not receive them. Woods *v.* Hartshorn, 2 How. Pr. (N. Y.) 71. (2) But although the postage is short, the actual acceptance of the package from

post office,[55] although the deposit is made on the last day for service and after the mail is closed.[56]

XI. ACKNOWLEDGMENT OF SERVICE OF PROCESS. — A. GENERALLY. — Proof of service of process is sometimes had by an acknowledgment of service signed by the party to be served.[57] This practice is frequently recognized by statute,[58] but is sometimes allowed even when there is no statute on the subject.[59]

B. WHEN MADE. — The acknowledgment must be made after suit brought,[60] and before judgment.[61]

C. BY WHOM MADE. — The acknowledgment may be made by the defendant, or by an agent or attorney authorized by him.[62] The authority of the attorney or agent must be proved,[63] or be shown of record,[64] but some courts hold that the attorney is presumed to be authorized.[65] An infant cannot accept or admit service.[66] But a

the postal authorities completes a valid service. Appeal Print Co. *v.* Sherman, 99 App. Div. 533, 91 N. Y. Supp. 178, 15 N. Y. Ann. Cas. 387.

[d] **Sending by special delivery** is insufficient where a sending by registered mail is required. Moreno *v.* Abril, 10 Porto Rico 484.

55. **Minn.**—Van Aernam *v.* Winslow, 37 Minn. 514, 35 N. W. 381. **Nev.** Lyon *v.* Washoe, 8 Nev. 177. **N. Y.** Smith *v.* Durkee, 20 Wend. 684; Van Horne *v.* Montgomery, 5 How. Pr. 238. **N. D.**—Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512. **S. D.**—Carlson *v.* Stuart, 22 S. D. 560, 119 N. W. 41, 18 Ann. Cas. 285, service of answer. **Wash.** State *ex rel.* Palmer Mountain T. & Power Co. *v.* Superior Court, 63 Wash. 442, 115 Pac. 845, where the statute is silent as to when service is complete.

See Patxot *v.* Nadal, 19 Porto Rico 350.

[a] **An answer mailed on last day allowed for service** is in time, although it cannot in the regular course reach the party until after the expiration of the time for service. Carlson *v.* Stuart, 22 S. D. 560, 119 N. W. 41, 18 Ann. Cas. 285.

56. Noble *v.* Trotter, 4 How. Pr. (N. Y.) 322, 3 Code Rep. 35.

57. **Ind.**—McCoy *v.* Lockwood, 71 Ind. 319, 329. **N. Y.**—Coby *v.* Ibert, 6 Misc. 16, 25 N. Y. Supp. 998, 58 N. Y. St. 117. **S. C.**—Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5. **Tex.** Metz *v.* Bremond, 13 Tex. 394. **Utah.** Culmer *v.* Caine, 22 Utah 216, 227, 61 Pac. 1008. **Wash.**—Powell *v.* Nelan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389.

58. See the statutes.

59. Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324.

60. Philadelphia Underwriters' Agency *v.* Neurenberg (Tex. Civ. App.), 144 S. W. 357, presumption as to time of making.

[a] **Before the declaration is filed,** the acknowledgment may be made. James *v.* Edward Thompson Co., 17 Ga. App. 578, 87 S. E. 842.

[b] May be made (1) after return day (Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324), or (2) after date of service. Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

61. State *ex rel.* McCall *v.* Cohen, 13 S. C. 198.

62. Masterson *v.* Le Claire, 4 Minn. 163.

[a] **Acknowledgment by attorney** of corporation defendant. Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

[b] Special authority is necessary to enable an attorney to waive service of process. In the performance of that duty he acts as attorney in fact, rather than as an attorney of the court. Masterson *v.* Le Claire, 4 Minn. 163.

Attorney cannot waive service upon infant parties, see 12 STANDARD PROC. 748.

63. **Me.**—Segars *v.* Segars, 76 Me. 96. **Mich.**—Hebel *v.* Amazon Ins. Co., 33 Mich. 400. **Minn.**—Masterson *v.* Le Claire, 4 Minn. 163.

See Fails' Admr. *v.* Presley's Admr., 50 Ala. 342.

64. Ashcraft *v.* Powers, 22 Wash. 440, 61 Pac. 161.

65. Hendrix *v.* Cawthorn, 71 Ga. 742 (process); Purcell *v.* Bennett, 68 N. J. L. 519, 53 Atl. 235.

66. See 12 STANDARD PROC. 748.

married woman,[67] or a guardian or guardian ad litem,[68] may accept service on himself.

D. Form and Contents of. — The acknowledgment must be in writing,[69] and must be subscribed by the party.[70] It is sometimes required to state the time, place and manner of service.[71]

E. Filing. — The acknowledgment of service must be filed with the papers of the suit.[72]

F. Proof of Genuineness. — An acknowledgment of service has been held insufficient to warrant a judgment by default unless it is proved or admitted to be genuine.[73] But some courts hold the signature is prima facie evidence of service.[74]

G. Effect of. — An acknowledgment of service is a submission to the jurisdiction of the court,[75] and is as effective as service of process by an officer,[76] so that a judgment by default may be rendered thereon.[77] The acknowledgment of service operates as a waiver of all defects in the summons,[78] or in the manner of its service.[79] But

67. See 11 Standard Proc. 767.

68. See 12 Standard Proc. 749.

69. **Cal.**—Montgomery *v.* Tutt, 11 Cal. 307. **N. C.**—Godwin *v.* Mounds, 106 N. C. 448, 10 S. E. 1044. **Tex.** Jewett *v.* Miller, 19 Tex. 290.

70. Montgomery *v.* Tutt, 11 Cal. 307.

71. **N. Y.**—Read *v.* French, 28 N. Y. 285. **Ore.**—Heatherly *v.* Hadley, 4 Ore. 1. **S. D.**—Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891. **Wash.**—Powell *v.* Nolan, 27 Wash. 318, 330, 67 Pac. 712, 68 Pac. 389.

But see Alderson *v.* Bell, 9 Cal. 315 (place need not be stated); Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556, when the summons is returnable to a term of court, this is not required.

[a] **Process Must Be Identified.** McKeever *v.* Supreme Court I. O. F., 122 App. Div. 465, 106 N. Y. Supp. 1041.

[b] **On collateral attack,** the failure to state the place of service is an irregularity. Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891.

72. Jewett *v.* Miller, 19 Tex. 290.

[a] **Filing petition to which acknowledgment is attached** is sufficient. Jewett *v.* Miller, 19 Tex. 290.

73. **Ala.**—O'Neal *v.* Garrett, 3 Ala. 276. **Ark.**—*Ex parte* Gibson, 10 Ark. 572. **Cal.**—Alderson *v.* Bell, 9 Cal. 315; Shirran *v.* Dallas, 21 Cal. App. 405, 132 Pac. 454, 462. **Mich.**—Johnson *v.* Delbridge, 35 Mich. 436. **Minn.** Masterson *v.* Le Claire, 4 Minn. 163. **Miss.**—Bacon *v.* S. Bevan & Co., 44 Miss. 293.

[a] **From a recital in the decree of a waiver of service by acknowledgment,** it will be presumed that the requisite proof of the genuineness of the signature was made. Alderson *v.* Bell, 9 Cal. 315; Shirran *v.* Dallas, 21 Cal. App. 405, 132 Pac. 454, 462; Johnson *v.* Monell, 13 Iowa 300.

74. Johnson *v.* Monell, 13 Iowa 300; Andrews *v.* Townshend, 1 N. Y. Supp. 421, 16 N. Y. St. 876, 24 Jones & S. 140. But see Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341, 1 Code R. (N. S.) 42.

[a] **An acknowledgment signed by the plaintiff and introduced in evidence by his own attorney** will be treated as genuine. Cheney *v.* Harding, 21 Neb. 65, 31 N. W. 255.

75. **Cal.**—Sharp *v.* Brunnings, 35 Cal. 528. **N. C.**—Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556. **R. I.** Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324. **S. C.**—People's Bldg. & L. Assn. *v.* Mayfield, 42 S. C. 424, 20 S. E. 290.

76. Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324.

77. White *v.* White, 66 W. Va. 79, 66 S. E. 2, 135 Am. St. Rep. 1013, 24 L. R. A. (N. S.) 1279. See 14 Standard Proc. 868.

78. Ward *v.* Manly, 113 Ala. 631, 21 So. 307; Ayres *v.* Hill, 82 Ala. 401, 2 So. 892.

79. **U. S.**—Franklin *v.* Conrad-Stanford Co., 137 Fed. 737, 70 C. C. A. 171. **Ala.**—Ward *v.* Manly, 113 Ala. 631, 21 So. 307. **Ga.**—Laramore *v.* Chastian, 25 Ga. 592. **Wash.**—McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062.

it is not a waiver of process itself.[80] It is not of itself an appearance.[81]

H. ACKNOWLEDGMENT OUTSIDE TERRITORIAL JURISDICTION OF THE COURT. — There is some conflict as to the effect of an acceptance of service made outside of the state.[82] Unless otherwise specifically stipulated in the admission,[83] such an acceptance of service, it has been held, amounts to no more than personal service without the state.[84] But such service has been held sufficient in a number of cases such as attachment suits,[85] foreclosure suits,[86] or proceedings in rem not

[a] **The defendant is estopped** from denying the truth of his admission. Franklin *v.* Conrad-Stanford Co., 137 Fed. 737, 70 C. C. A. 171.

[b] **Where Service Is Made on a Non-judicial Day.**—McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062.

80. Seisel *v.* Wells, 99 Ga. 159, 25 S. E. 266.

[a] **But by acknowledging service and waiving "copy, process,** etc.," the defendant waives process. Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896.

81. See 2 STANDARD PROC. 500.

[a] **But where the acknowledgment contains a stipulation,** there is an appearance. Keeler *v.* Keeler, 24 Wis. 522.

82. See *infra,* this section. See also Hebel *v.* Amazon Ins. Co., 33 Mich. 400, holding an admission of the service of process of a justice made in another county shows that it is made in a county where the process has no legal force and is therefore without effect.

[a] **Although the admission shows it was made out of the state,** it is sufficient. Cheney *v.* Harding, 21 Neb. 65, 31 N. W. 255. See Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475, query.

83. White *v.* White, 66 W. Va. 79, 66 S. E. 2, 135 Am. St. Rep. 1013, 24 L. R. A. (N. S.) 1279; Keeler *v.* Keeler, 24 Wis. 522. See also Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285.

[a] **An admission of service accompanied by an agreement** to enter an appearance is sufficient to confer jurisdiction, even though made outside the state. Keeler *v.* Keeler, 24 Wis. 522.

[b] **A bare admission of service** (1) beyond the territorial jurisdiction of the court should not be deemed a waiver of service of process. But an admission so worded as to clearly evidence an intent to waive further service should be held a waiver. Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475. See Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285. (2) An admission of "due personal service" is an admission of service sufficient to confer jurisdiction on the court. Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475.

84. **N. Y.**—Litchfield *v.* Burwell, 5 How. Pr. 341, 1 Code R. (N. S.) 42. **Va.**—Smith *v.* Chilton, 77 Va. 535. **Wis.**—Weatherbee *v.* Weatherbee, 20 Wis. 499.

Compare Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475. *Contra,* Cheney *v.* Harding, 21 Neb. 65, 31 N. W. 255, and see cases in notes following.

[a] **Reason.** — The admission of service is but evidence of service, having the same force as proof of service in some other manner. In either case the court acquires jurisdiction through the service, and if no order of publication is made, the court acquires no jurisdiction by an admission in another state. Keeler *v.* Keeler, 24 Wis. 522; Weatherbee *v.* Weatherbee, 20 Wis. 499.

As to personal service outside the state, see *supra,* VII, K.

[b] **Does Not Authorize a Judgment in Personam.**—Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341, 1 Code R. (N. S.) 42.

[c] **An order for publication must precede** an acceptance of service without the state. Riker *v.* Vaughan, 23 S. C. 187; Weatherbee *v.* Weatherbee, 20 Wis. 499.

[d] **A nonresident may obtain a rehearing or show cause against the judgment,** notwithstanding an acceptance of service. White *v.* White, 66 W. Va. 79, 66 S. E. 2, 135 Am. St. Rep. 1013, 24 L. R. A. (N. S.) 1279. But see Cheney *v.* Harding, 21 Neb. 65, 31 N. W. 255.

85. Richardson *v.* Smith, 11 Allen (Mass.) 134.

86. Cheney *v.* Harding, 21 Neb. 65, 31 N. W. 255.

[a] **The acknowledgment is the equivalent** in all respects of a legal

necessarily requiring personal service.[87]

XII. DELIVERY OF COPY OF INDICTMENT OR INFORMATION. — A. NECESSITY FOR AND WAIVER. — It is sometimes required by statute that a true copy of the indictment or information and of the indorsements thereon be delivered to a defendant accused of crime,[88] unless he is at large or on bail.[89] This right is one which may be waived,[90] and unless the defendant demands a copy before going to trial, he will be deemed to have waived his right thereto.[91]

After Amendment. — A copy of the amended indictment or information need not be served, if the amendment is not material.[92] But on the substitution of a new indictment,[93] or on the filing of a new indictment or information after loss of the original,[94] or after a

service of the summons by the sheriff to whom it is addressed made in his proper bailiwick. Cheney *v.* Harding, 21 Neb. 65, 31 N. W. 255.

87. **U. S.**—Vermont Farm Mach. Co. *v.* Marble, 20 Fed. 117, an admission of service "to have the same effect as if duly served on him by the proper officer." **Mich.**—Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475, ejectment. **N. Y.**—Dunn *v.* Dunn, 4 Paige 425, divorce.

[a] **If the court has jurisdiction of the subject matter,** a non-resident who thinks proper to waive objection by voluntary appearance or by accepting as regular service on him where he is found cannot afterwards object to the regularity of the proceedings against him founded on such service. Dunn *v.* Dunn, 4 Paige (N. Y.) 425, a divorce action.

88. **Cal.**—People *v.* Goldenson, 76 Cal. 328, 347, 19 Pac. 161. **Neb.**—Zink *v.* State, 34 Neb. 37, 51 N. W. 294. **Okla.**—Robbins *v.* State, 12 Okla. Crim. 294, 155 Pac. 491; Koontz *v.* State, 10 Okla. 553, 139 Pac. 842, Ann. Cas. 1916A, 689; Blair *v.* State, 4 Okla. Crim. 359, 111 Pac. 1003. **Tex.**—Holden *v.* State, 44 Tex. Crim. 382, 71 S. W. 600.

[a] **A failure to deliver a copy is reversible error,** if the court proceeds to trial over objection made. Koontz *v.* State, 10 Okla. Crim. 553, 139 Pac. 842, Ann. Cas. 1916A, 689; Harris *v.* State, 32 Tex. Crim. 279, 22 S. W. 1037.

[b] **Proceedings for violation of municipal ordinances** are not within the application of the statute. O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189.

89. Robbins *v.* State, 12 Okla. Crim. 294, 155 Pac. 491; Blair *v.* State, 4 Okla. Crim. 359, 111 Pac. 1003.

[a] **But a defendant released on bail for a few hours** only must be served. Holden *v.* State, 44 Tex. Crim. 382, 71 S. W. 600.

90. **Ill.**—Bartley *v.* People, 156 Ill. 234, 40 N. E. 831. **La.**—State *v.* Anderson, 136 La. 261, 66 So. 966. **Tex.** Collins *v.* State, 77 Tex. Crim. 156, 178 S. W. 345.

[a] **Although an infant,** the accused may waive service of a copy. Powell *v.* State, 74 Ark. 355, 85 S. W. 781 (by pleading on arraignment and going to trial without objection); Bartley *v.* People, 156 Ill. 234, 40 N. E. 831.

[b] **By Waiving a Special Venire.** McSwean *v.* State, 175 Ala. 21, 57 So. 732.

91. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; Robbins *v.* State, 12 Okla. Crim. 294, 155 Pac. 491.

[a] **But where on the reading of the indictment to the jury,** the accused first discovers the substitution of a new indictment, there is no waiver. Harris *v.* State, 32 Tex. Crim. 279, 22 S. W. 1037.

[b] **It is too late** (1) after verdict (Collins *v.* State, 77 Tex. Crim. 156, 178 S. W. 345), or (2) when a part of the jury has been accepted (State *v.* Anderson, 136 La. 261, 66 So. 966), to object to a failure to serve a copy of the indictment.

92. State *v.* Sweeney, 135 La. 566, 65 So. 743.

[a] **The abandonment of aggravated circumstances** enlarging the crime does not require a new service of the indictment. State *v.* Evans, 40 La. Ann. 216, 3 So. 838.

93. Harris *v.* State, 32 Tex. Crim. 279, 22 S. W. 1037.

94. Stepp *v.* State (Tex. Crim.), 77 S. W. 787.

material amendment,[95] the defendant has a right to a copy.

B. TIME OF SERVICE. — The time of service is regulated by statute,[96] which generally require service to be made a specified time before arraignment,[97] or trial,[98] or on arraignment.[99]

C. BY WHOM SERVED. — Generally the statutes do not designate the person or officer by whom the service shall be made.[1]

D. THE MANNER OF SERVICE is not prescribed by statute.[2] The copy may be delivered to the defendant or his attorney,[3] but not by leaving it at his residence in the manner provided in civil cases.[4]

E. THE COPY SERVED. — The defendant is entitled to have a "true" copy of the indictment.[5] Mere clerical omissions in the copy do not prejudice the accused.[6] If the copy served is not a true copy, the defendant may move for a postponement until a proper copy can be served.[7] But neither a motion to quash the indictment,[8] a demur-

95. See *infra*, this note.

[a] **Where a new party is added,** the accused must be served with the second bill. Stokes *v.* State, 35 Tex. Crim. 279, 33 S. W. 350.

[b] **If the information insufficient to charge an offense** is amended after arraignment the accused must be furnished with a copy of the amended information. Zink *v.* State, 34 Neb. 37, 51 N. W. 294.

96. See the statutes.

[a] **Statute Is Mandatory.**—Haisten *v.* State, 5 Ala. App. 56, 59 So. 361.

[b] **In Alabama,** the indictment must be served forthwith. Kirby *v.* State, 5 Ala. App. 128, 59 So. 374; Haisten *v.* State, 5 Ala. App. 56, 59 So. 361.

97. United States *v.* Dow, Taney 34, 25 Fed. Cas. No. 14,990; Zink *v.* State, 34 Neb. 37, 51 N. W. 294, one day shall have elapsed after service of a copy before the accused shall be arraigned.

[a] **The time is computed** by excluding the day of delivery and day of arraignment, when the statute requires service "two entire days before his arraignment." United States *v.* Dow, Taney 34, 25 Fed. Cas. No. 14,990.

98. United States *v.* Curtis, 4 Mason 232, 25 Fed. Cas. No. 14,905.

[a] **The word "trial"** means the actual trial of the prisoner by the jury. United States *v.* Curtis, 4 Mason 232, 25 Fed. Cas. No. 14,905.

[b] **Sunday** should be counted. Payton *v.* State, 35 Tex. Crim. 508, 34 S. W. 615.

99. See People *v.* Goldenson, 76 Cal. 328, 347, 19 Pac. 161.

1. See the statutes and Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

[a] **Although the statute provides that a certified copy shall be delivered to the sheriff** with a writ directing him to deliver the copy, the service need not be made by the sheriff in person. Hargrove *v.* State (Tex. Crim.), 51 S. W. 1124.

2. State *v.* Stewart, 47 La. Ann. 410, 425, 16 So. 945.

3. Henderson *v.* State, 98 Ala. 35, 13 So. 146; People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

[a] **A delivery to the attorney of the defendant is a delivery to the defendant,** where no objection is made. People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

4. State *v.* Stewart, 47 La. Ann. 410, 425, 16 So. 945.

5. Luster *v.* State, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089; Lightfoot *v.* State (Tex. Crim.), 77 S. W. 792.

[a] **A failure to certify the copy** as being a true copy is immaterial where the copy is a true copy. Luster *v.* State, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

[b] **A copy of the affidavit** on which the information is based need not be served. Paragon Paper Co. *v.* State, 19 Ind. App. 314, 49 N. E. 600.

6. Glover *v.* State, 116 Ark. 588, 172 S. W. 876.

7. Glover *v.* State, 116 Ark. 588, 172 S. W. 876; Collins *v.* State, 77 Tex. Crim. 156, 178 S. W. 345; Luster *v.* State, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

8. Glover *v.* State, 116 Ark. 588,

rer,[9] nor a motion in arrest of judgment,[10] is a proper objection.

F. NUMBER OF COPIES SERVED. — The court is not bound to supply the defendant with a second copy,[11] or to supply counsel with a copy after the defendant has been served.[12]

G. RECORD AND RETURN. — It is not required that the record show the service of a copy of the indictment.[13] The return of the officer is evidence only to show a compliance with the statute,[14] and any defects therein are cured by an admission of service made in court.[15]

XIII. MANDAMUS. — Mandamus will lie to compel the performance of ministerial duties of an officer in connection with service of process.[16] But discretionary acts will not be controlled in the absence of an abuse of discretion.[17]

XIV. OBJECTIONS AND WAIVER. — A. BY WHOM OBJECTION MADE. — Only the party as to whom service of process is defective, or his successor in interest can make objection on this ground.[18] Where the defendants are severally liable, those served cannot object that the others are not served.[19] But defendants having a joint interest may jointly object to a defect of service as to one only.[20]

B. WHEN OBJECTION MADE. — When the lack of proper service appears on the face of the record, a defendant who has done nothing to waive the defects, may raise objections thereto either before or after judgment.[21] But a traverse to the officer's return must be filed at the first term and before pleading to the merits.[22]

After removal of the cause to the federal court, a motion to quash the service or return may be made.[23]

C. MANNER OF RAISING OBJECTION. — **1. Plea in Abatement.** — A plea in abatement is the ancient and formal manner of objecting to

172 S. W. 876; Collins *v.* State, 77 Tex. Crim. 156, 178 S. W. 345.

9. See 12 STANDARD PROC. 651.

10. Powell *v.* State, 74 Ark. 355, 85 S. W. 781.

11. People *v.* Goldenson, 76 Cal. 328, 347, 19 Pac. 161.

12. People *v.* Goldenson, 76 Cal. 328, 347, 19 Pac. 161.

13. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

14. Griffin *v.* State, 90 Ala. 596, 8 So. 670.

15. Griffin *v.* State, 90 Ala. 596, 8 So. 670.

16. See the title "Mandamus."

[a] To compel a court to reinstate a cause erroneously dismissed because the affidavit for publication is not on record. Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070.

Mandamus to compel a levy of execution, see 15 STANDARD PROC. 918.

17. See the title, "Mandamus."

[a] A mandate compelling the court to make an order for publication on an affidavit which, although formally sufficient, does not satisfy him, will not be granted in the absence of an abuse of discretion. Bender *v.* Hutton, 160 Cal. 372, 117 Pac. 322.

18. **Cal.**—Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712. **Ill.**—Fergus *v.* Tinkham, 38 Ill. 407. **Ia.**—Semple *v.* Lee, 13 Iowa 304. **La.**—Tinney *v.* Vittur, 134 La. 549, 64 So. 407. **Nev.** Coffin *v.* Bell, 22 Nev. 169, 185, 37 Pac. 240, 58 Am. St. Rep. 738. **N. Y.** Johnson *v.* Putnam Foundry & Mach. Co., 167 App. Div. 99, 152 N. Y. Supp. 792.

19. Butts *v.* Francis, 4 Conn. 424; McKenzie *v.* Hackstaff, 2 E. D. Smith (N. Y.) 75.

20. Draper *v.* Moriarty, 45 Conn. 476; Butts *v.* Francis, 4 Conn. 424.

21. Bell *v.* New Orleans & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102.

Waiver, see *infra*, XIV, D.

22. Rawlings *v.* Brown, 15 Ga. App. 162, 82 S. E. 803.

23. Collins *v.* American Spirit Mfg. Co., 96 Fed. 133.

irregularities in the service of process.[24] This is the proper remedy in some states when the objection is founded upon extrinsic facts.[25] But this remedy has fallen into disuse in some states even when the defect relied on is not apparent on the record.[26]

2. Setting Aside Service or Return. — To attack a defect in the service of process apparent on the face of the return the defendant may appear specially,[27] and move to quash or set aside the service or return.[28] When the service appears to be valid upon the face of the

24. **Conn.**—Butts *v.* Francis, 4 Conn. 424. **Pa.**—Park Bros & Co. *v.* Oil City Boiler Wks., 204 Pa. 453, 54 Atl. 334. **Va.**—Lane Bros. & Co. *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872.

Where corporation is served, see 5 STANDARD PROC. 629.

[a] Averments should be (1) direct and positive. Morse *v.* Nash, 30 Vt. 76. (2) Stating that "it does not appear by the officers return" that proper service was made is objectionable as being argumentative. Hill *v.* Powers, 16 Vt. 516.

[b] **Other service either by the same or another officer must be negatived in the plea.** Morse *v.* Nash, 30 Vt. 76.

[c] **The court will not look beyond the plea** unless the return is referred to and made a part of the case. Hill *v.* Powers, 16 Vt. 516.

25. **Fla.**—Putnam Lumb. Co. *v.* Ellis-Young Co., 50 Fla. 251, 39 So. 193. **Ga.**—Georgia Ry. & Powder Co. *v.* Davis, 14 Ga. App. 790, 82 S. E. 387; Bell *v.* New Orleans & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102. **Haw.** Mossman *v.* Damon, 15 Hawaii 401. **Ill.**—Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107; Greer *v.* Young, 120 Ill. 184, 11 N. E. 167. **Miss.**—Lamb *v.* Russell, 81 Miss. 382, 32 So. 916.

[a] **The sheriff's return may be contradicted** by a plea in abatement. Chicago Sectional Elec. U. Co. *v.* Congdon Brake Shoe Mfg. Co., 111 Ill. 309. *Contra,* McDaniels *v.* De Groot, 77 Vt. 160, 59 Atl. 166.

[b] **The sheriff's return must be traversed** in connection (1) with the plea in abatement. Citizens Bank *v.* Fort, 15 Ga. App. 427, 83 S. E. 678; Georgia Ry. & Pow. Co. *v.* Davis, 14 Ga. App. 790, 82 S. E. 387; Bell *v.* New Orleans & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102. (2) An affidavit of illegality will not take the place of a traverse. Rawlings *v.* Brown, 15 Ga. App. 162, 82 S. E. 803.

[c] **The officer making the return is a necessary party** (1) to the traverse. Southern Ry. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585; Citizens Bank *v.* Fort, 15 Ga. App. 427, 83 S. E. 678; Southern Express Co. *v.* National Bank, 4 Ga. App. 399, 61 S. E. 857. (2) If the return is made by a deputy, both the sheriff and the deputy must be made parties to the traverse. Georgia Ry. & Pow. Co. *v.* Davis, 14 Ga. App. 790, 82 S. E. 387; Bell *v.* New Orleans & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102.

26. Benton *v.* McIntosh, 96 Fed. 132, ordering that the plea stand as a motion to quash and that affidavits be filed.

27. **Ga.**—Bell *v.* New Orleans & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102. **Neb.**—Stelling *v.* Peddicord, 78 Neb. 779, 111 N. W. 793. **N. C.**—Brown *v.* Taylor, 174 N. C. 423, 93 S. E. 982, L. R. A. 1918B, 293.

See 17 STANDARD PROC. 902, et seq.

Motion to quash service as an appearance, see 2 STANDARD PROC. 493, and 527.

Effect of a general appearance after a motion to quash, see 2 STANDARD PROC. 533.

28. **U. S.**—Wall *v.* Chesapeake & O. Ry. Co., 95 Fed. 398, 37 C. C. A. 129; Scott *v.* Stockholders' Oil Co., 122 Fed. 835; American Cereal Co. *v.* Eli Pettyjohn Cereal Co., 70 Fed. 276. **Cal.** See Southern Pac. R. Co. *v.* Superior Court, 59 Cal. 471. **Haw.**—Mossman *v.* Damon, 15 Hawaii 401. **Ill.**—Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107. **Kan.**—Ogden *v.* Walters, 12 Kan. 282, 294. **Ky.**—Brumleve *v.* Cronan, 176 Ky. 818, 827, 197 S. W. 498; Gainesboro Tel. Co. *v.* Buckner, 160 Ky. 604, 169 S. W. 1000. **N. H.**—Crawford *v.* Crawford, 44 N. H. 428. **N. C.**—Brown *v.* Taylor, 174 N. C. 423, 93 S. E. 982, L. R. A. 1918B, 293. **Tenn.**—Padgett *v.* Ducktown S. C. & Iron Co., 97 Tenn. 690, 37 S. W. 698. **Va.**—Lane Bros. & Co. *v.* Bauserman, 103 Va. 146, 48 S. E.

return, the objection cannot be raised by motion in some jurisdictions, but must be raised by plea in abatement,[29] or by an answer stating the extrinsic facts,[30] though in other jurisdictions a contrary rule prevails.[31] In some states, service may be set aside on a rule to show cause.[32] And the court may vacate an order for publication on its own motion if later it deems the affidavit insufficient.[33]

Grounds. — Illustrative of the defects in the service attackable by motion, it has been held that service may be quashed or set aside when a copy of the complaint is not served with the summons,[34] where service upon a resident is procured by force,[35] when a nonresident is inveigled into the state for purpose of seizure,[36] or is brought into the state by force,[37] when the copy is not left at the place prescribed by law,[38] where the affidavit for publication is false,[39] and where the publication notice is irregular.[40] But service by publication[41] will not

857, 106 Am. St. Rep. 872; Norfolk & W. R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

Affidavits in support of motion are unnecessary when the motion is based upon matters apparent on the record. See 20 STANDARD PROC. 30.

Effect of failure to give notice of motion, see 20 STANDARD PROC. 28.

29. **U. S.**—Forrest *v.* Union Pac. R. Co., 47 Fed. 1. **Mich.**—Yund *v.* Excelsior Wrapper Co., 185 Mich. 143, 151 N. W. 653; Daniels *v.* Detroit G. H. & M. R. Co., 163 Mich. 468, 128 N. W. 797. **Mo.**—Thomasson *v.* Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 S. W. 1092. **N. H.**—Crawford *v.* Crawford, 44 N. H. 428. **Tenn.**—Padgett *v.* Ducktown S. C. & Iron Co., 97 Tenn. 690, 37 S. W. 698.

[a] **But if the affidavits present no disputed questions** of fact, the motion will be considered. Yund *v.* Excelsior Wrapper Co., 185 Mich. 143, 151 N. W. 653; Daniels *v.* Detroit G. H. & M. R. Co., 163 Mich. 468, 128 N. W. 797.

As to conclusiveness of the return, see the title "**Returns**" and 15 STANDARD PROC. 296.

30. Aetna Ins. Co. *v.* Black, 80 Ind. 513.

31. **U. S.**—Benton *v.* McIntosh, 96 Fed. 132; Forrest *v.* Union Pac. R. Co., 47 Fed. 1. **N. J.**—Sweeney *v.* Miner, 88 N. J. L. 361, 95 Atl. 1014. See Missell *v.* Hayes, 86 N. J. L. 348, 91 Atl. 322, the motion should be supported by depositions instead of ex parte affidavits. **Ohio.**—Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768.

[a] **Counter-affidavits** may be filed. Benton *v.* McIntosh, 96 Fed. 132.

Quashing return, see the title "**Returns.**"

32. Missell *v.* Hayes, 86 **N. J. L.** 348, 91 Atl. 322; Park Bros. & Co. *v.* Oil City Boiler Wks., 204 **Pa.** 453, 54 Atl. 334.

33. Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070.

[a] **Because the Order Is Void.** Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070. See 20 STANDARD PROC. 829, note 21.

34. W. W. Kimball Co. *v.* **Brown,** 73 Minn. 167, 75 N. W. 1043.

35. Mason *v.* Libbey, 1 Abb. N. C. (N. Y.) 354, 51 How. Pr. 436, where plaintiff had a key to the house of his defendant mother and unlocked the door.

36. **U. S.**—Commercial Mut. Acc. Co. *v.* Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. ed. 782; Blandin *v.* Ostrander, 239 Fed. 700, 152 C. C. A. 534; Jewett *v.* Garrett, 47 Fed. 625. **Ia.**—Crandall *v.* Trowbridge, 170 Iowa 155, 150 N. W. 669, Ann. Cas. 1916C, 608. **N. Y.**—Graves *v.* Graham, 19 Misc. 618, 44 N. Y. Supp. 415. **Wis.** Saveland *v.* Connors, 121 Wis. 28, 98 N. W. 933; Townsend *v.* Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793.

37. Blair *v.* Turtle, 1 McCrary (U. S.) 372, 5 Fed. 394; Ziporkes *v.* Chmelniker, 47 Hun 639, 15 N. Y. St. 215.

38. Grady *v.* Gosline, 48 **Ohio St.** 665, 29 N. E. 768.

39. Ogden *v.* Walters, 12 **Kan.** 282, 295.

40. Calkins *v.* Miller, 55 **Neb.** 601, 75 N. W. 1108, where it requires appearance on a day other than that prescribed by law.

41. South Dakota Commercial Assn.

be set aside because the property attached does not belong to the defendant.

Hearing and Determination. — A motion to set aside service or return is addressed to the discretion of the court,[42] and will be denied unless the substantial rights of the defendant are affected.[43] Statutes sometimes provide that the service of process shall not be adjudged insufficient where there is sufficient to inform the defendant of the action.[44] The rendition of a judgment against the plaintiff does not follow as a necessary consequence of granting the motion,[45] as the plaintiff may apply for an alias summons.[46] When determining the sufficiency of an order of publication, the court cannot compel the filing of a new affidavit as its jurisdiction is confined to the determination of the original order.[47] After a denial of the motion, the defendant cannot have the issue again tried by answer.[48]

Review. — Orders setting aside service are sometimes held to be final appealable orders.[49] But an order overruling a motion to quash is merely interlocutory and non-appealable.[50]

3. Demurrer. — Want of jurisdiction over the person of the defendant by reason of defective service cannot be raised by demurrer as this does not appear on the pleading.[51]

4. Dismissal of Action. — The action need not be dismissed because the service is defective.[52] But unreasonable delay in serving process is ground for dismissal.[53] And the court may refuse to render any judgment on the service obtained if the affidavit for publication is defective.[54]

5. Relief Against the Judgment. — For defects in the service, the judgment in a proper case may be vacated,[55] or enjoined in equity,[56]

v. Ramsey, 34 S. D. 48, 147 N. W. 75.

42. Timolat *v.* S. J. Held Co., 17 Misc. 556, 40 N. Y. Supp. 692, 75 N. Y. St. 97.

43. McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52.

44. See the statutes.

[a] **The statute applies** both where the summons is served personally and by publication. Jones *v.* Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215.

45. Southern Pac. R. Co. *v.* Superior Court, 59 Cal. 471.

46. See 21 STANDARD PROC. 760, et seq.

47. Zumbusch *v.* Superior Court, 21 Cal. App. 76, 130 Pac. 1070.

48. Foye *v.* Guardian Printing & Pub. Co., 109 Fed. 368.

49. See 2 STANDARD PROC. 172.

50. Sweeney *v.* Miner, 88 N. J. L. 361, 95 Atl. 1014.

51. Reynolds *v.* La Crosse & M. Packet Co., 10 Minn. 178.

52. **Ark.**—Hughes *v.* Martin, 1 Ark. 386, where service is made by wrong officer. **N. H.**—Chase *v.* Chase, 61 N. H. 123, where service by publication is defective. **Wis.**—De Fyn *v.* Power, 167 Wis. 342, 167 N. W. 447.

As a continuance to perfect new service may be granted. See 5 STANDARD PROC. 472.

53. See 7 STANDARD PROC. 677, and Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638, when served after the appearance term.

54. Ogden *v.* Walters, 12 Kan. 282, 294.

55. See 15 STANDARD PROC. 159, 183, 6 STANDARD PROC. 829.

[a] **But trivial differences in the complaint on file and the one served** cannot be objected to in this manner. McGinn *v.* Rees, 33 Cal. App. 291, 165 Pac. 52.

56. See 15 STANDARD PROC. 295, 300.

Where affidavit for order of publication is false, see 15 STANDARD PROC. 326.

or subjected to collateral attack.[57]

6. By Return of Pleading. — A copy of pleading served, which may be treated as a nullity, should be immediately or promptly returned,[58] and the attention of opposing counsel called to the defect,[59] or the error will be deemed waived,[60] unless the defect is otherwise properly objected to.[61]

Compelling Acceptance of Pleading.— On an improper refusal to accept a pleading, or on an improper return of a pleading, the proper remedy has been held to be by motion for an order requiring the pleading to be received.[62]

D. Waiver. — An objection to lack of jurisdiction[63] over the person

57. See 15 Standard Proc. 442.

Presumptions.—See 15 Standard Proc. 429, et seq, and 459.

58. Wilkin *v.* Gilman, 13 How. Pr. (N. Y.) 225; Levi *v.* Jakeways, 4 How. Pr. (N. Y.) 126, 2 Code Rep. 69; Boykins Buggy Co. *v.* Lightsey, 102 S. C. 283, 86 S. E. 639.

[a] **To treat the pleading as a nullity and have judgment** entered is not proper. Levi *v.* Jakeways, 4 How. Pr. (N. Y.) 126, 2 Code Rep. 69.

[b] **Where Pleading Is Improperly Verified.**—Abendroth & Root Mfg. Co. *v.* W. S. Frazier & Co., 140 App. Div. 922, 125 N. Y. Supp. 293.

[c] **When the Pleading Is Improperly Served.**—Fitzgerald *v.* Dakin, 101 App. Div. 261, 91 N. Y. Supp. 1003.

[d] **On Failure To Serve Pleading in Time.—Minn.**—Smith *v.* Mulliken, 2 Minn. 319. **N. Y.**—Rogers *v.* Rockwood, 59 Hun 628, 13 N. Y. Supp. 939, 20 Civ. Proc. 212, 36 N. Y. St. 919. **N. D.** Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512. **S. C.**—Sanders *v.* Sanders, 31 S. C. 604, 9 S. E. 813. **Wis.**—Moore *v.* Ellis, 89 Wis. 108, 61 N. W. 291; Pritchard *v.* Huntington, 16 Wis. 569.

[e] **Due diligence** in the return of a pleading means within twenty-four hours under ordinary circumstances. Paddock *v.* Palmer, 32 Misc. 426, 66 N. Y. Supp. 743. See Lange *v.* Hirsch, 38 App. Div. 176, 56 N. Y. Supp. 649, a delay of three days is too great. *Compare* Boykins Buggy Co. *v.* Lightsey, 102 S. C. 283, 86 S. E. 639.

[f] **To Whom Returned.**—If no attorney's name appears on the papers, they should be returned to the party, unless the party is a municipal corporation having a counsel. Taylor *v.* New York, 11 Abb. Pr. (N. Y.) 255.

Effect of variance of copy from original complaint, see *supra*, V, G.

59. Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

60. See *infra*, this note.

[a] **Where a Pleading Is Served Out of Time.—Minn.**—Smith *v.* Mulliken, 2 Minn. 319. **N. D.**—Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512. **Wis.**—Moore *v.* Ellis, 89 Wis. 108, 61 N. W. 291.

[b] **Irregularity in Manner of Service.**—Rogers *v.* Rockwood, 59 Hun 628, 13 N. Y. Supp. 939, 20 Civ. Proc. 212, 36 N. Y. St. 919.

[c] **Where an Unverified Answer Is Filed to a Verified Complaint.**—Smith *v.* Mulliken, 2 Minn. 319.

61. See Lange *v.* Hirsch, 38 App. Div. 176, 56 N. Y. Supp. 649, holding that on failure to return an amended pleading for nonconformity to the order granting leave to amend, the proper remedy is by motion to strike out the objectionable parts.

62. Paddock *v.* Palmer, 32 Misc. 426, 66 N. Y. Supp. 743; Howard *v.* Curran, 8 Civ. Proc. 262, form of order. See Fitzgerald *v.* Dakin, 101 App. Div. 261, 91 N. Y. Supp. 1003.

[a] **An affidavit of merits** is not required on this motion. Paddock *v.* Palmer, 32 Misc. 426, 66 N. Y. Supp. 743.

[b] **A copy of the pleading need not be served** with the motion papers. Paddock *v.* Palmer, 32 Misc. 426, 66 N. Y. Supp. 743.

63. See 17 Standard Proc. 914.

By general appearance, see 2 Standard Proc. 536.

[a] **By Demanding a Copy of the Petition.**—Anderson *v.* Kerr, 10 Iowa 233.

may be waived, as may objection to a copy of a pleading which has been served.[64]

By taking an appeal, when the trial on appeal is de novo, see 18 STANDARD PROC. 263.

[b] **Failure to raise objection by answer** is not a waiver, if shown by any other proper pleading. Brumleve *v.* Cronan, 176 Ky. 818, 826, 197 S. W. 498.

64. See *supra,* XIV, C, 6.

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SET-OFF, COUNTERCLAIM AND RECOUPMENT

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CROSS-REFERENCES:

Answers;
Bills and Answers;
Confession and Avoidance;
Cross-Bill;
Cross-Complaint;
Declaration and Complaint;
Pleas.

In justice's court, see 17 STANDARD PROC. 971, et seq.

Set-off of judgments, see 16 STANDARD PROC. 560, et seq.

For forms, see 9 STANDARD PROC. 1136 et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION, NATURE AND SCOPE OF REMEDIES. — ... CROSS-DEMANDS IN GENERAL. — **1. Defined and Explained.** — Set-off, counterclaim and recoupment are different species of cross-demands or demands preferred by one party to an action in opposition to those already preferred against him by his adversary.[1] They are in effect declarations or complaints by a defendant against the plaintiff[2] in the nature of independent actions deferred until the defendant is brought into court,[3] and must be causes of action upon which an independent suit might be maintained by the defendant against the plaintiff.[4]

2. Purpose. — Cross-demands promote justice and prevent circuity of litigation and multiplicity of suits[5] by adjusting in a single suit

1. Drover's State Bank *v.* Elliott, 97 Kan. 64, 154 Pac. 255; Monongahela Tie & Lumb. Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

2. **Ala.**—Carolina Portland Cem. Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332. **Ark.**—White *v.* Reagan, 32 Ark. 281. **Conn.**—Holcomb Co. *v.* Clark, 86 Conn. 319, 85 Atl. 376. **Ill.** Peck *v.* Brewer, 48 Ill. 54; Lloyd & Co. *v.* Manufacturers & Merchants Warehouse Co., 102 Ill. App. 551; Barker *v.* Barth, 88 Ill. App. 23; Mendel *v.* Fink, 8 Ill. App. 378; Breen *v.* Sullivan, 5 Ill. App. 449. **Ind.**—Indiana Mut. Bldg. & L. Assn. *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Houston *v.* Young, 7 Ind. 200; Clark *v.* Wildridge, 5 Ind. 176. **Mich.**—Aplin *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847; Widrig *v.* Taggart, 51 Mich. 103, 16 N. W. 251. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **Tex.**—Dixon *v.* Watson, 52 Tex. Civ. App. 412, 115 S. W. 100.

[a] **A plea of set-off is as direct** an exercise of affirmative jurisdiction as is a suit. Aplin *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847.

3. **Conn.**—Holcomb Co. *v.* Clark, 86 Conn. 319, 85 Atl. 376. **Ind.**—Clark *v.* Wildridge, 5 Ind. 176. **Mass.**—Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494. **Mo.**—Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545. **N. Y.**—Walker *v.* American Cent. Ins. Co., 143 N. Y. 167, 38 N. E. 106; Vassear *v.* Livingston, 13 N. Y. 248, 257; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267; Strathman *v.* Williams & Morford Co., 133 N. Y. Supp. 650. **S. C.**—Inman & Co. *v.* Hodges, 80 S. C. 455, 61 S. E. 958.

4. **U. S.**—Marconi Wireless Telegraph Co. *v.* National E. S. Co., 206 Fed. 295; Williams Patent Crusher & Pulverizer Co. *v.* Kinsey Mfg. Co., 205 Fed. 375. **Ill.**—Tully *v.* Excelsior-Iron Works, 115 Ill. 544, 5 N. E. 83. **Ind.** Kahle *v.* Crown Oil Co., 180 Ind. 131, 100 N. E. 681; Duffy *v.* England, 176 Ind. 575, 96 N. E. 704. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **Ky.**—Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641. **Me.**—Thayer *v.* Jewett, 22 Me. 190. **Mass.**—Graham *v.* Middleby, 213 Mass. 437, 100 N. E. 750, Ann. Cas. 1914A, 384; McCarthy *v.* Henderson, 138 Mass. 310; Sawyer *v.* Wiswell, 9 Allen 39. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Simpson *v.* Jennings, 15 Neb. 671, 19 N. W. 473. **N. Y.** Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600; Durham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267. **Okla.**—Hurford *v.* Norvall, 39 Okla. 496, 135 Pac. 1060. **Ore.**—First Nat. Bank *v.* Seaward, 78 Ore. 567, 152 Pac. 883; Templeton *v.* Cook, 69 Ore. 313, 138 Pac. 230. **Va.** Kinzie *v.* Riely's Exr., 100 Va. 709, 42 S. E. 872.

5. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Groc. Co., 77 So. 748; Huddleston *v.* Askey, 56 Ala. 218; Bowen *v.* Snell, 9 Ala. 481; Hall *v.* Cook's Admr., 1 Ala. 629. **Ark.**—Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; White *v.* Reagan, 32 Ark. 281; Leach *v.* Lambeth, 14 Ark. 668. **Cal.** Story *v.* Story & Isham Com. Co., 100 Cal. 30, 34 Pac. 671; Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516. **Colo.** Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298. **Conn.**—Talbot *v.* Ellis, 33 Conn. 235; Avery *v.* Brown, 31 Conn. 398; Bulkeley *v.* Welch, 31 Conn. 339. **Del.**—Edgemoor Iron Co. *v.*

all the matters in dispute between the parties.[6]

Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858; Penn Steel C. & M. Co. *v.* Wilmington M. I. Co., 1 Penne. 337, 41 Atl. 236. **D. C.**—Fitzgerald *v.* Wiley, 22 App. Cas. 329. **Fla.**—Bates *v.* Lanier, 77 So. 628. **Ga.**—Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Well *v.* Mooney, 30 Ga. 413; Meriwether *v.* Bird, 9 Ga. 594. **Idaho.** Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Ill.**—Scott *v.* Kenton, 81 Ill. 96; Burroughs *v.* Clancey, 53 Ill. 30; Stow *v.* Yarwood, 14 Ill. 424; Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484; Geo. E. Lloyd & Co. *v.* Mfgrs. & Merchant's Warehouse Co., 102 Ill. App. 551; Beam *v.* Cleveland C. C. & St. L. Ry. Co., 97 Ill. App. 24. **Ind.**—Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477; Houston *v.* Young, 7 Ind. 200. **Ia.**—Campbell *v.* Fox, 11 Iowa 318. **Kan.**—Danielson *v.* Scott, 88 Kan. 789, 129 Pac. 1190; St. Louis Ft. S. & W. R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Stevens *v.* Able, 15 Kan. 584. **Ky.**—Slone *v.* Slone, 2 Metc. 339. **La.**—Bliss *v.* Patrick, 6 La. Ann. 546. **Me.**—Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Warfield *v.* Booth, 33 Md. 63; Dowler *v.* Cushwa, 27 Md. 354; Clarke *v.* Magruder, 2 Har. & J. 77. **Mass.**—Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. 146; Home Sav. Bank *v.* Boston, 131 Mass. 277. **Mich.**—Pierce *v.* Underwood, 103 Mich. 62, 61 N. W. 344; Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; Platt *v.* Brand, 26 Mich. 173; Allen *v.* McKibbin, 5 Mich. 449; Ward *v.* Fellers, 3 Mich. 281. **Minn.** Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; Barker *v.* Walbridge, 14 Minn. 469. **Miss.** Fowler *v.* Payne, 49 Miss. 32; Kershaw *v.* Merchant's Bank, 7 How. 386, 40 Am. Dec. 17. **Mo.**—Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839; Barnes *v.* McMullins, 78 Mo. 260; Mortland *v.* Holton, 44 Mo. 58; Kamerick *v.* Castleman, 23 Mo. App. 481. **Mont.** Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Neb.**—Hier *v.* Anheuser-Busch Brewing Assoc., 60 Neb. 320, 83 N. W. 77; Raymond *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **Nev.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. H.** Cole *v.* Colburn, 61 N. H. 499; Chase *v.* Strain, 15 N. H. 535. **N. J.**—Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206; Smock *v.* Warford, 4 N. J. L. 306. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Universal Audit Co. *v.* Cameron, 169 App. Div. 879, 155 N. Y. Supp. 1025; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58; Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566. **N. C.**—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Battle *v.* Thompson, 65 N. C. 406; Pearsall *v.* Mayers, 64 N. C. 549. **N. D.** Emerson-Brantingham Co. *v.* Brennan, 35 N. D. 94, 159 N. W. 710; Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Peter *v.* Farrel Foundry & Mach. Co., 53 Ohio St. 534, 42 N. E. 690. **Ore.**—Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661. **Pa.**—Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004; Montz *v.* Morris, 89 Pa. 392; Ahl *v.* Rhoads, 84 Pa. 319; Halfpenny *v.* Bell, 82 Pa. 128; Com. *v.* Clarkson, 1 Rawle 291. **R. I.**—Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022; Bell *v.* Ward, 10 R. I. 503. **S. C.** Cooke *v.* Rhine, 1 Bay 16. **S. D.** McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. **Tenn.**—Galbraith *v.* East Tennessee V. & G. R. Co., 11 Heisk. 169; Flint *v.* Tillman, 2 Heisk. 202. **Tex.**—Holliman *v.* Rogers, 6 Tex. 91; Thomas *v.* Hill, 3 Tex. 270; Reeves *v.* White (Tex. Civ. App.), 161 S. W. 43. **Vt.** Keyes *v.* Western Vermont Slate Co., 34 Vt. 81; Lapham *v.* Green, 9 Vt. 407. **Va.**—New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351; Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Wartman *v.* Yost, 22 Gratt. (63 Va.) 595; Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460. **W. Va.** Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775, 782. **Wis.** Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Sprout *v.* Crowley, 30 Wis. 187. **Eng.**—Charles *v.* Altin, 15 C. B. 46, 80 E. C. L. 44, 139 Eng. Reprint 335; Isberg *v.* Bowden, 1 C. L. R. 722, 8 Exch. 852.

6. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Groc. Co., 77 So. 748; Bean *v.* Cabbaness, 6 Ala. 343; Pierce

3. Favored Remedies. — In view of the purpose which cross-

v. Hickenburg, 2 Port. 196. **Ark.** Coats *v.* Milner, 203 S. W. 701; White *v.* Reagan, 32 Ark. 281; Wheat *v.* Dotsen, 12 Ark. 699; Field *v.* Ringo, 7 Ark. 435. **Cal.**—Story *v.* Story, & Isham Com. Co., 100 Cal. 30, 34 Pac. 671; Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516. **Colo.**—Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298. **Conn.** Talbot *v.* Ellis, 33 Conn. 235; Bulkeley *v.* Welch, 31 Conn. 339; Ripley *v.* Bull, 19 Conn. 53. **Del.**—Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 42 L. R. A. (N. S.) 858. **D. C.**—Fitzgerald *v.* Wiley, 22 App. Cas. 329. **Ga.**—Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Mell *v.* Moony, 30 Ga. 413. **Ill.** Scott *v.* Kenton, 81 Ill. 96; Lathrop *v.* Hayes, 57 Ill. 279; Peck *v.* Brewer, 48 Ill. 54; Stow *v.* Yarwood, 14 Ill. 424; Geo. E. Lloyd & Co. *v.* Mfgr's & Merchants Warehouse Co., 102 Ill. App. 551. **Ind.**—Curtis *v.* Chicago & E. Ry. Co., 119 N. E. 723; Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477; Shannon *v.* Wilson, 19 Ind. 112; Houston *v.* Young, 7 Ind. 200. **Kan.**—St. Louis Ft. S. & W. R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Stevens *v.* Able, 15 Kan. 584. **Ky.**—Slone *v.* Slone, 2 Metc. 339. **La.** Bliss *v.* Patrick, 6 La. Ann. 546; Succession of Durnford, 8 Rob. 488. **Me.** Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56; Rogers *v.* Humphrey, 39 Me. 382; Banks *v.* Pike, 15 Me. 268. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Lee *v.* Rutledge, 51 Md. 311; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Clarke *v.* Magruder, 2 Harr. & J. 77. **Mass.**—Home Sav. Bank *v.* Boston, 131 Mass. 277; Campbell *v.* Somerville, 114 Mass. 334; Carey *v.* Guillaw, 105 Mass. 18, 7 Am. Rep. 494; Stacy *v.* Kemp, 97 Mass. 166; Galligan *v.* Fannan, 9 Allen 192; Dorr *v.* Fisher, 1 Cush. 271. **Mich.** Pierce *v.* Underwood, 103 Mich. 62, 61 N. W. 344; Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; Platt *v* Brand, 26 Mich. 173. **Minn.**—Barker *v.* Walbridge, 14 Minn. 469; Mason *v.* Heyward, 3 Minn. 182. **Miss.**—Fowler *v.* Payne, 49 Miss. 32; Myers *v.* Estell, 47 Miss. 4; Graves *v.* Hull, 27 Miss. 419. **Mo.**—Graham Paper Co. *v.* National Newspapers Assn. (Mo. App.), 193 S. W. 1003; Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839; Ritchie *v.* Hayward, 71 Mo. 560; Mortland *v.* Holton, 44 Mo. 58; Kamerick *v.* Castleman, 23 Mo. App. 481. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Neb.**—Hier *v.* Anheuser-Busch Brewing Assoc., 60 Neb. 320, 83 N. W. 77; Raymond *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **Nev.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. H.**—Cole *v.* Colburn, 61 N. H. 499; Chase *v.* Strain, 15 N. H. 535. **N. J.**—Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206; Smock *v.* Warford, 4 N. J. L. 306. **N. Y.**—Ives *v.* Van Epps, 22 Wend. 155; Hinsdell *v.* Weed, 5 Denio 172; Batterman *v.* Pierce, 3 Hill 171; Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566. **N. C.**—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Battle *v.* Thompson, 65 N. C. 406; Mizell *v.* Moore, 29 N. C. 255. **N. D.** Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Needham *v.* Pratt, 40 Ohio St. 186; Allen *v.* Sackelton, 15 Ohio St. 145; Upton & Co. *v.* Julian & Co., 7 Ohio St. 95. **Ore.**—Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661. **Pa.**—Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004; Halfpenny *v.* Bell, 82 Pa. 128; Mangle *v.* Stiles, 31 Pa. 72; Com. *v.* Clarkson, 1 Rawle 291. **R. I.**—Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022; Bell *v.* Ward, 10 R. I. 503. **S. C.**—Cooke *v.* Rhine, 1 Bay 16. **S. D.**—McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. **Tenn.**—Galbraith *v.* East Tennessee V. & G. R. Co., 11 Heisk. 169; Moore *v.* Weir, 3 Sneed 46. **Tex.**—Holliman *v.* Rogers, 6 Tex. 91. **Vt.**—Keyes *v.* Western Vermont Slate Co., 34 Vt. 81; Lapham *v.* Green, 9 Vt. 407. **Va.**—Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460. **Wash.**—Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Wis.**—Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113; Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167. **Eng.**—Caswell *v.* Coare, 2 Campb. 82, 1 Taunt. 566, 127 Eng. Reprint 954; Isberg *v.* Bowden, 1 C. L. R. 722, 8 Exch. 852.

[a] **A cross-demand ought to be permitted** when by doing so would obviate another trial between the

demands serve,[7] they are favored in the law,[8] and courts are prone to permit them to be set up whenever entire justice can be done to both parties without the violation of any of the settled rules of law.[9]

4. Distinguished From Defenses. — a. *In General.* — Set-off, counterclaim and recoupment are quite often spoken of as defenses, but in reality they are not true defenses,[10] they do not attack the

same parties depending in part, at least, upon the same evidence, which, in proving the contention of one of the parties disproves that of the other. Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382. See also Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41; Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360.

[b] **That such is the design** of these remedies is made plain by the provisions of certain statutes to the effect that, if the defendant omit to set up a counterclaim arising out of the contract or transaction sued on neither he nor his assignee can afterwards maintain an action against the plaintiff thereon. See *infra*, VIII, B, 2.

7. See *supra*, I, A, 2.

8. **Del.**—Penn Steel C. & M. Co. *v.* Wilmington M. I. Co., 1 Penne. 337, 41 Atl. 236. **Ill.**—Scott *v.* Kenton, 81 Ill. 96; Peck *v.* Brewer, 48 Ill. 54, 63; Stow *v.* Yarwood, 14 Ill. 424; Beam *v.* Cleveland C. C. & St. L. Ry. Co., 97 Ill. App. 24. **Ind.**—Houston *v.* Young, 7 Ind. 200. **La.**—Succession of Durnford, 8 Rob. 488. **Mass.**—Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. 146; Dorr *v.* Fisher, 1 Cush. 271; Harrington *v.* Stratton, 22 Pick. 510. **Mich.** Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; Platt *v.* Brand, 26 Mich. 173. **Miss.**—Myers *v.* Estelle, 47 Miss. 4, 23. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381; Cram *v.* Dresser, 2 Sandf. 120. **Ohio.**—The Wellsville *v.* Geisse, 3 Ohio St. 333. **Pa.**—Good *v.* Good, 5 Watts. 116. **R. I.**—McPhillips *v.* Durkin, 103 Atl. 929; Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022. **Tex.**—Bodman *v.* Harris, 20 Tex. 31. **Vt.**—Stewart *v.* Knight, 83 Vt. 201, 75 Atl. 12. **Va.** New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351; Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864. **Wis.**—Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113.

9. **Ark.**—Wheat *v.* Dotson, 12 Ark. 699. **Conn.**—Avery *v.* Brown, 31 Conn. 398. **Del.**—Edgemoore Iron Co. *v.* Brown Hoisting Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858. **Ga.** Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015. **Ill.**—Streeter *v.* Streeter, 43 Ill. 155; Kelley Maus & Co. *v.* Caffrey, 79 Ill. App. 278. **Ind.**—Slayback *v.* Jones, 9 Ind. 470; Houston *v.* Young, 7 Ind. 200. **La.**—Succession of Durnford, 8 Rob. 488. **Mass.**—Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. 146; Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494; Dorr *v.* Fisher, 1 Cush. 271. **Mich.**—Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170. **Mo.**—Graham Paper Co. *v.* National Newspaper Assn. (Mo. App.), 193 S. W. 1003; Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Neb.**—Hier *v.* Anheuser-Busch Brewing Assoc., 60 Neb. 320, 83 N. W. 77. **N. Y.**—Cram *v.* Dresser, 2 Sandf. 120. **Pa.**—Mangle *v.* Stiles, 31 Pa. 72; Good *v.* Good, 5 Watts 116. **R. I.** — Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022. **Tex.**—Bodman *v.* Harris, 20 Tex. 31. **Va.**—Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. 864.

10. **Ind.**—Indiana Mutual Bldg. & Loan Assn. *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Kennedy *v.* Richardson, 70 Ind. 524; Boil *v.* Simms, 60 Ind. 162. **Ia.**—Secor *v.* Siver, 165 Iowa 673, 146 N. W. 845; Medart Pull Co. *v.* Dubuque T. & R. M. Co., 121 Iowa 244, 96 N. W. 770; Reed *v.* Darlington, 19 Iowa 349; Lewis *v.* Denton, 13 Iowa 441. **Mo.**—Jones *v.* Moore, 42 Mo. 413. **N. H.**—Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. Y.** Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511; McElroy *v.* Floral Park Villa Co., 176 App. Div. 106, 162 N. Y. Supp. 467; Wood *v.* Glens Falls Automobile Co., 174 App. Div. 830, 161 N. Y. Supp. 808; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267; Walker *v.* James J. Matchett Co., 167 N. Y. Supp. 600. **Ohio.**—Roots *v.* Nye,

adverse claim itself as do defenses,[11] but on the contrary admit plaintiff's cause of action[12] and set up a cause of action in favor of defendant against the plaintiff[13] to partly or wholly extinguish plaintiff's

2 Handy 229, 12 Ohio Dec. 417. **Ore.** Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190; Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115. **Utah.**—Dunham *v.* Travis, 25 Utah 65, 69 Pac. 468. **W. Va.**—Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. 291.

[a] **Neither set-off nor counterclaim is an answer** within the ordinary meaning of answer as a statement of a defense to the plaintiff's cause of action. Duffy *v.* England, 176 Ind. 575, 96 N. E. 704.

[b] "**A 'set-off'** is not technically a mere matter of defense; it does not sound in damages whether liquidated or unsettled, but is a money demand by the defendant against the plaintiff arising upon contract and constituting a debt independent of and unconnected with the cause of action set forth in the complaint." Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

[c] **Matter which shows that the plaintiff never had a cause** of action against the defendant which the law would aid him in enforcing is not a counter demand. Walker *v.* American Cent. Ins. Co., 143 N. Y. 167, 38 N. E. 106; Prouty *v.* Eaton, 41 Barb. (N. Y.) 409; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267.

11. Smith *v.* Bellrose, 200 Ill. App. 368; Secor *v.* Siver, 165 Iowa 673, 146 N. W. 845.

[a] **Facts which merely negative plaintiff's claim** should be pleaded as a defense and not as a counterclaim. Wood *v.* Glens Falls Automobile Co., 174 App. Div. 830, 161 N. Y. Supp. 808.

[b] **Whenever the facts pleaded are merely in bar** of the action and the relief demanded by the defendant is only what would be the legal judgment in his favor upon those facts, the answer is not a counterclaim. Bledsoe *v.* Rader, 30 Ind. 354.

[c] **Payment** is a defence and not a cross-demand. Burke *v.* Thorne, 44 Barb. (N. Y.) 363.

[d] **Usury** not a cross-demand. Prouty *v.* Eaton, 41 Barb. (N. Y.) 409.

[e] **Defence of Reduction Distinguished.**—"Another species of defence which existed at the common law and still exists, is sometimes confounded with recoupment or with counterclaim, although it bears no real resemblance to either, and should be carefully distinguished from both; namely, the reduction of the amount claimed to be due in suits for the price of goods sold or of services rendered in most instances when the action is on a quantum meruit or quantum valebant. In set-off and in recoupment, the essence of the defence consists in a cause of action against the plaintiff or some other person. . . . In the defence referred to, there is no such right: it is simply a process of subtracting from the amount of the adverse claim, and therefore operates directly upon that demand." Pomeroy, Remedies and Remedial Rights, 2nd Ed., § 733. And see Moffett *v.* Sackett, 18 N. Y. 522.

[f] "**Facts pleaded which controvert the plaintiff's claim** and serve merely to defeat it as a cause of action are inconsistent with the legal idea of a counterclaim, which is a separate and distinct cause of action, balancing in whole or in part that proved by the plaintiff. Prouty *v.* Eaton, 41 Barb. 409. It meets the latter, not only by a denial of it, or an attack upon its existence, but by opposing to it an equal or over-balancing demand on the part of the defendant." Walker *v.* American C. Ins. Co., 143 N. Y. 167, 169, 38 N. E. 106.

[g] **A demand for breach of warranty set** up in an action for the price of the goods sold, is not a defense but a counterclaim. Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177.

12. Smith *v.* Bellrose, 200 Ill. App. 368.

13. Secor *v.* Siver, 165 Iowa 673, 146 N. W. 845. See *supra*, I, A, 1.

[a] **When it falls short of constituting a cause of action,** it belongs to the class of partial defenses in reduction or mitigation of damages and ought to go by the name of reduction of damages. Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545; Moffett *v.* Sackett, 18 N. Y. 522.

claim,[14] or even entitle defendant to a money judgment for any surplus.[15]

b. *In Respect to Necessity of Pleading.* — Defenses which defendant might have interposed in an action are usually barred by the judgment,[16] but a judgment is not as a rule determinative of a ccounterclaim or set-off which might have been interposed in a suit but in fact was not.[17]

B. SET-OFF. — **1. Defined.** — A set-off is a counter demand which a defendant holds against a plaintiff, arising out of a contract or transaction extrinsic to plaintiff's cause of action.[18]

14. **Krausse** *v.* **Greenfield**, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

15. See *infra*, XII.

16. See 15 STANDARD PROC. 546.

17. See *infra*, 15 STANDARD PROC. 548.

18. **Ala.**—St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Ansley *v.* Bank of Piedmont, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59. **Conn.**—Avery *v.* Brown, 31 Conn. 398. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Ill.**—Geo. E. Lloyd & Co. *v.* Mfgr's & Merchants Warehouse Co., 102 Ill. App. 551. **Ind.** Blount *v.* Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Kennedy *v.* Richardson, 70 Ind. 524. **Mass.**—Stone *v.* Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. 218; Stowers *v.* Barnard, 15 Pick. 221. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **Mo.** Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545. **Neb.**—Citizens State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **N. C.** Hurst Miller & Co. *v.* Everett, 91 N. C. 399. **N. D.**—Emerson-Brantingham Co. *v.* Brennan, 35 N. D. 94, 159 N. W. 710. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115. **W. Va.** Monongahela Tie & Lumb. Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

[a] **Other Definitions.**—(1) A set-off is a final demand, growing out of an independent transaction, liquidated or unliquidated, not sounding in damages merely, substituting between the parties at the commencement of the suit. Theo. Poull & Co. *v.* Foy-Hays Const. Co., 159 Ala. 453, 48 So. 785. (2) "A set-off means a cross claim for which an action might be maintained by the defendant against the plaintiff." Chitty on Contracts, 8th Am. ed. p. 733. (3) "A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim." Bouvier, Law Dict. 988. (4) "A counter-claim or cross-demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, whereby he may extinguish the plaintiff's demand, either in whole or in part, according to the amount of the set-off." Black's Law Dict. 1079. (5) "A demand, growing out of a distinct transaction, which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim." Cyc. Law Dic. 844, citing Mitchell *v.* McLean, 7 Fla. 329. (6) "Any counter-balance or counterclaim," Wharton Law Lexicon. (7) "A set-off is when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counter-balance that of the plaintiff, either in the whole, or in part." 2 Burns. Law Dict. [Ency. 1792] 329. (8) "A counter-claim or demand; a demand set up against another demand, for the purpose of reducing or extinguishing it; the subtraction of the one demand from the other." Kinney, Law Dict. (9) "In an action to recover money, a set-off in a cross claim for money by the defendant, for which he might maintain an action against the plaintiff, and which has the effect of extinguishing the plaintiff's claim pro tanto so that he can only recover against the defendant the balance of his claim, after deducting what is due by him to the defendant." Sweet, Law Dict. [Ency. 1882] 755. (10) "A mode of defence, whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own to counter-

2. Origin and History. — The right of set-off is a natural equity,[19] and a rule of convenience[20] which the civil law recognized,[21] and the courts of chancery practiced.[22] At common law, however, no right of set-off existed,[23] and it is only by virtue of statutes and within

balance it, either in the whole or in part.'' 6 Jacob's Law Dict. [Eng. 1811] 66. (11). ''A set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other.'' Lamar, J. in Studley *v.* Boylston Nat. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. ed. 1313.

19. People *v.* Remington & Sons, 19 Abb. N. C. (N. Y.) 350, 353; New Amsterdam Sav. Bank *v.* Tartter, 4 Abb. N. C. (N. Y.) 215; In re Globe Ins. Co., 6 Paige (N. Y.) 102.

[a] **It proceeds upon the theory** that, in the case of mutual debts the actual indebtedness is the excess of one debt over the other. Com. *v.* Clarkson, 1 Rawle (Pa.) 291.

[b] ''**The injustice** of the common law in not allowing one debt to be set off against another was glaring. . . . It shocked 'the natural sense of mankind' as was said by Lord Mansfield in Green *v.* Farmer, 4 Burr. 2221. Where there are mutual credits between two persons, each of them being debtor and creditor to the other, good sense and even-handed justice suggest that each be permitted 'to retain in payment of what is due him that which he owes on his part.''' Stewart *v.* Knight, 83 Vt. 201, 75 Atl. 12.

20. New Amsterdam Sav. Bank *v.* Tartter, 4 Abb. N. C. (N. Y.) 215.

21. Story's Eq. Jur., § 1438. See the following: **Cal.**—Naglee *v.* Palmer, 7 Cal. 543. **Ga.**—Meriwether *v.* Bird, 9 Ga. 594. **Md.**—Milburn *v.* Guyther, 8 Gill. 92, 50 Am. Dec. 681. **Mo.** Grand Lodge of Masons *v.* Knox, 20 Mo. 433. **N. Y.**—Reab *v.* McAllister, 8 Wend 109; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Carpenter *v.* Butterfield, 3 Johns. Cas. 145. **N. D.** Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312. **Tex.** Brown *v.* Montgomery, 19 Tex. Civ. App. 548, 47 S. W. 803. **Vt.**—Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701.

Compensation is the term by which set-off is known in the civil law. See *infra*, I, E.

22. **Equitable set-off,** see *infra*, I, G.

[a] **The statute of set-off was** ''a **graft from equity** on the law.'' Wellsville *v.* Geiser, 3 Ohio St. 333, 340.

23. **U. S.**—United States *v.* Eckford, 6 Wall. 484, 18 L. ed. 920, 3 Ct. Cl. 454, 7 Ct. Cl. 18. **Ala.**—St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Sledge *v.* Swift, Murphy & Co., 53 Ala. 110; White *v.* Governor, 18 Ala. 767; Brown *v.* Chambers, 12 Ala. 697; Slaughter *v.* Martin, 9 Ala. App. 285, 63 So. 689. **Cal.** Stoddard *v.* Treadwell, 26 Cal. 294; Naglee *v.* Palmer, 7 Cal. 543. **Conn.** Fitch *v.* Gates, 39 Conn. 366; Henry *v.* Butler, 32 Conn. 140. **D. C.**—Dale *v.* Ritchards, 10 Mackey 312. **Ga.** Jordan *v.* Jordan, 12 Ga. 77; Meriwether *v.* Bird, 9 Ga. 594. **Ill.**—Steere *v.* Brownell, 124 Ill. 27, 15 N. E. 26. **Ind.**—Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258; Bail *v.* Simms, 60 Ind. 162; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672. **Ia.**—Allen *v.* Maddox, 40 Iowa 124. **Me.**—Robinson *v.* Safford, 57 Me. 163; Call *v.* Chapman, 25 Me. 128. **Md.** Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133. **Mass.**—Stone *v.* Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. 218; Stowers *v.* Barnard, 15 Pick. 221. **Mich.**—Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396. **Miss.** Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Henry *v.* Hoover, 6 Smed. & M. 417. **Mo.**—State *v.* Eldridge, 65 Mo. 584; Frowein *v.* Calvird, 75 Mo. App. 567. **Neb.**—Raymond *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763; Boyer *v.* Clark, 3 Neb. 161. **N. H.**—Chase *v.* Strain, 15 N. H. 535; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. J.**—Roseville Trust Co. *v.* Barney, 88 N. J. L.

the limitations therein prescribed that law courts entertain the remedy.[24] Set-off is found in the federal statutes,[25] and most, if not

146, 96 Atl. 69; Godkin *v.* Bailey, 74 N. J. L. 655, 65 Atl. 1032, 9 L. R. A. (N. S.) 1134. **N. Y.**—Coffin *v.* McLean, 80 N. Y. 560; Hackett *v.* Connett, 2 Edw. Ch. 73; Burgess *v.* Tucker, 5 Johns. 105; Wolcott *v.* Sullivan, 1 Edw. Ch. 399. **N. C.**—Boyett *v.* Vaughan, 79 N. C. 528. **Ohio.**—Haines *v.* Lytle, 1 Ohio Dec. 198, 4 West. Law. J. 1. **Pa.** Irish *v.* Johnston, 11 Pa. 483; Garner *v.* Price, 4 Kulp 10; Seybert *v.* Hicks, 1 Kulp 45. **Tenn.**—East Tennessee & V. R. Co. *v.* Galbraith, 1 Heisk. 482; Brazelton *v.* Nashville & C. R. Co., 3 Head 570. **Tex.**—Hart *v.* Davis, 21 Tex. 411; Holliman *v.* Rogers, 6 Tex. 91. **Va.**—Stimmel *v.* Benthall, 108 Va. 141, 60 S. E. 765. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Wis.**—Pierce *v.* Hoffman, 4 Wis. 277. **Eng.**—Greene *v.* Farmer, 4 Burr. 2214, 98 Eng. Reprint 154; Collins, Sen. *v.* Collins, Jr., 2 Burr. 820, 97 Eng. Reprint 579.

[a] **Prior to the statute** demands available as set-off could be enforced only by an original action or bill in chancery against the plaintiff. **Ala.** White *v.* Governor, 18 Ala. 767; Slaughter *v.* Martin, 9 Ala. App. 285, 63 So. 689. **Ga.**—Jordan *v.* Jordan, 12 Ga. 77. **Md.**—Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. **Mo.**—Ferguson *v.* Huston, 6 Mo. 407. **N. H.**—Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

24. **U. S.**—Blount *v.* Windley, 95 U. S. 173, 24 L. ed. 424. **Ala.**—Sledge *v.* Swift, Murphy & Co., 53 Ala. 110; Brown *v.* Chambers, 12 Ala. 697. **Conn.** Fitch *v.* Gates, 39 Conn. 366. **D. C.** Dale *v.* Richards, 10 Mackey 312. **Ga.** Meriwether *v.* Bird, 9 Ga. 594. **Ind.** Boil *v.* Simms, 60 Ind. 162; Jones *v.* McGraw, 1 Blackf. 192. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1. **Mass.**—Stone *v.* Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. 218; Stowers *v.* Barnard, 15 Pick. 221. **Mich.**—Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256; Hendricks *v.* Toole, 29 Mich. 340; Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256. **Mo.**—Ferguson *v.* Huston, 7 Mo. 407; Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545; Frowein *v.* Calvird, 75 Mo. App. 567. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **N. J.** Roseville Trust Co. *v.* Barney, 88 N. J. L. 146, 96 Atl. 69; Godkin *v.* Bailey, 74 N. J. L. 655, 65 Atl. 1032, 9 L. R. A. (N. S.) 1134. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. **Tex.**—Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 5 Sup. Ct. 895, 29 L. ed. 172.

[a] **The obligation of contract** is not impaired by statutes as to set-off. Blount *v.* Windley, 95 U. S. 173, 24 L. ed. 424.

[b] **The right of recoupment was originally so limited** that the statutes of set-off were enacted to fill the demands of the occasion. Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

[c] **Set-off was created in England by St. 2, Geo. 2, ch. 22,** which provided that where there are mutual debts between plaintiff and defendant, one debt may be set off against the other. Sec. 13 of this act provides: "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue." It having been doubted whether mutual debts of a different nature could be set off against each other under the above clauses of the Act of the 2nd of George II, it was enacted by 8th George II, that by virtue of the said clause mutual debts may be set off against each other, notwithstanding such debts are deemed in law to be of a different nature.

25. Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972.

[a] **The Bankruptcy Act,** §68, was

all the states, have enacted laws upon the subject of set-off,[26] some prior to the English statute.[27] In some states it is embraced within the code definition of counterclaim.[28] Under such code practice, it is questionable whether set-off any longer exists,[29] and, at any rate, it can be there pleaded only as a counterclaim.[30] Elsewhere it has been made the subject of separate legislation.[31]

3. Nature and Scope. — Set-off is not technically a mere matter of defense,[32] but is in the nature of a cross-action,[33] or strictly speaking

not intended to enlarge the doctrine of set-off in cases where the principles of legal or equitable set-off did not previously authorize it. Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972. See also Western Tie & Timber Co. *v.* Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. ed. 571; Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731.

26. See the statutes.

27. **See** *infra*, this note and Doering *v.* Davenport, 45 Ind. App. 465, 91 N. E. 43.

[a] **Pennsylvania.** — From a statement in the opinion in Himes *v.* Barnitz, 8 Watts 39, it appears that the right of statute was given by an Assembly Act of 1705, thus antedating the English statute. A statute of Virginia, enacted in February, 1645, appears to be the earliest on this subject. This act was amended by later statutes. By the last of these it was provided that where a suit should be commenced for a debt if the defendant have a bill, home or account of the plaintiff, such debt of the plaintiff shall be discounted out of the debt he claimeth of the defendant. See Virginia statutes referred to in opinion in Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

[b] **Virginia.**—In Wartman *v.* Yost, 22 Gratt. (63 Va.) 595, 607, the court refers to a Virginia statute of set-off enacted in 1705. From the opinion in Turberville *v.* Self, 4 Call (8 Va.) 580, it appears that a statute providing for "discount" was in force in Virginia in 1795, having been enacted in 1748, reference being made to "Old Virginia Laws," 249.

28. See *infra*, I, D, 2.

29. Brandt *v.* New York, 99 App. Div. 260, 90 N. Y. Supp. 929; Goodman *v.* Benjamin Rutchick, 171 N. Y. Supp. 152.

30. Barber *v.* Ellingwood, 137 App. Div. 704, 122 N. Y. Supp. 369; Rando *v.* National Park Bank, 137 App. Div. 190, 121 N. Y. Supp. 1048.

31. **Ark.**—Southern Telephone Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158; Bloom *v.* Lehman Newgrass & Co., 27 Ark. 489. **Ill.**—The Quality Car Company *v.* Corkill, 187 Ill. App. 2. **Ind.** Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Lovejoy *v.* Robinson, 8 Ind. 399; Conner *v.* Winton, 7 Ind. 523; Doering *v.* Davenport, 45 Ind. App. 465, 91 N. E. 43; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672. **Kan.**—Carver *v.* Shelly & Co., 17 Kan. 474. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Raymond *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

32. **Ark.**—Robinson *v.* Mace, 16 Ark. 97. **Ind.**—Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Kennedy *v.* Richardson, 70 Ind. 524; Doering *v.* Davenport, 45 Ind. App. 465, 91 N. E. 43. **Ore.**—Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

[a] **The subject matter** of a set-off (1) is an much a matter of legal controversy as if an action were commenced and founded thereon. Barker *v.* Barth, 88 Ill. App. 23, *affirmed*, 192 Ill. 460, 61 N. E. 388; Chase *v.* Strain, 15 N. H. 535. (2) It is to be regarded in all respects as if it were a separate action by defendant against plaintiff. Everson *v.* Fry, 72 Pa. 326.

33. **Ala.** — Washington *v.* Timberlake, 74 Ala. 259; Brazier *v.* Fortune, 10 Ala. 516. **Fla.**—Robinson *v.* L'Engle, 13 Fla. 482. **Ga.**—McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Kinard *v.* Sanford, 64 Ga. 630. **Ill.**—Pettis *v.* Westlake, 4 Ill. 535; Barker *v.* Barth, 88 Ill. App. 23. **Ind.**—Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Duffy *v.* England, 176 Ind.

a cause of action against the opposite party,[34] based on a money demand by the defendant against the plaintiff arising upon contract and constituting a debt independent of and unconnected with the cause of action set forth in the complaint.[35] It can only arise or attach when there is a mutuality of debts of such a certain and ascertained character as to be capable of set-off or of being applied in compensation of each other.[36] The object of a set-off is to liquidate the whole, or a part of the plaintiff's demand,[37] and if the set-off allowed be more than plaintiff's claim, judgment for the excess will be rendered in favor of defendant.[38]

575, 96 N. E. 704; Kennedy *v.* Richardson, 70 Ind. 524. **Ia.**—Reed *v.* Darlington, 19 Iowa 349. **Ky.**—Banton *v.* Hoomes' Exrs., 1 A. K. Marsh. 19. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; State *v.* Baltimore & O. R. Co., 34 Md. 344; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133. **Mass.** Cook *v.* Mills, 5 Allen 36; Cutler *v.* Middlesex Factory Co., 14 Pick. 483. **Mo.**—Russell *v.* Owens, 61 Mo. 185; Brady's Admr. *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503. **N. H.**—Chase *v.* Strain, 15 N. H. 535. **N. Y.**—People *v.* Dennison, 84 N. Y. 272. **N. C.**—Battle *v.* Thompson, 65 N. C. 406. **Pa.**—Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. 640, 64 Atl. 398; Everson *v.* Fry, 72 Pa. 326; Union Nat. Bank *v.* Canonsburg Iron Co., 4 Cent. Rep. 263. **Tenn.**—Galbraith *v.* East Tennessee V. & G. R. Co., 11 Heisk. 169. **Va.**—Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460.

34. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Blount *v.* Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Kennedy *v.* Richardson, 70 Ind. 524; Daly *v.* National Life Ins. Co., 64 Ind. 1; Boil *v.* Simms, 60 Ind. 162.

35. **Ala.**—Ansley *v.* Bank of Piedmont, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; Lawton *v.* Rickets, 104 Ala. 430, 16 So. 59; St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Washington *v.* Timberlake, 74 Ala. 259; T. L. Farrow Mercantile Co. *v.* Riggins, 14 Ala. App. 529, 71 So. 963. **Ill.**—Geo. E. Lloyd & Co. *v.* Mfgrs.' & Merchants Warehouse Co., 102 Ill. App. 551; Barker *v.* Barth, 88 Ill. App. 23. **Ind.**—Duffy *v.* England, 176 Ind. 575, 96 N. E. 704. **Miss.** Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **N. J.**—Roseville Trust Co. *v.* Barney, 88 **N. J. L.** 146, 96 Atl. 69. **Okla.**—Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. **Ore.**—Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

[a] **Where in an action to recover for services** as a saw filer, the defendant pleaded that the plaintiff was employed by the defendant upon his representation that he was a skillful saw filer, that he was immediately placed in full charge of the defendant's saw-filing department and intrusted with the filing of four hand saws, of the value of $90 each, that the plaintiff was not a skillful saw filer and through want of skill and carelessness, he so filed said saws that they were wholly ruined and worthless to the defendant and that through the fault of plaintiff, defendant lost the value of said saws, $360, and defendant is willing to set off, and offers to set off, so much of said amount as equals plaintiff's claim, such plea is one of recoupment rather than set-off. Jarrett Lumb. Co. *v.* Reese, 66 Fla. 317, 63 So. 581.

36. Hackett *v.* Connett, 2 Edw. Ch. (N. Y.) 73.

[a] **The distinction between mutual debts and mutual credits** is simply that obligations for the payment of money, at least when connected with each other by arising out of the same transaction, are mutual debts if they are both due, and mutual credits if each remains to be paid at a future day. Pardo *v.* Osgood, 5 Robt. (N. Y.) 348, 363.

37. **Conn.**—Avery *v.* Brown, 31 Conn. 398. **Ga.**—Meriwether *v.* Bird, 9 Ga. 594. **N. C.**—Hurst Miller & Co. *v.* Everett, 91 N. C. 399.

38. Geo. E. Lloyd & Co. *v.* Mfgr's. & Merchants Warehouse Co., 102 Ill. App. 551; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

[a] Set-off is a payment by opera-

C. RECOUPMENT. — **1. Defined.** — Recoupment is the right of a defendant in the same action to claim damages from the plaintiff, either because the latter has not complied with some obligation of the contract upon which he sues or because he has violated some duty which the law imposed upon him in the making or performance of that contract.[39]

tion of law. Swasey *v.* Wilmot, 4 N. H. 233.

See further *infra*, XII, A, 2.

39. Houghton & Co. *v.* Alpha Process Co., 5 Boyce (Del.) 383, 93 Atl. 669. See also the following: **U. S.**—Michigan Yacht & Power Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109. **Ala.**—Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59; Robertson *v.* Davenport, 27 Ala. 574. **Ark.**—White *v.* Reagan, 32 Ark. 281; Brunson *v.* Martin, 17 Ark. 270. **Ill.**—Higgins *v.* Lee, 16 Ill. 495; Geo. E. Lloyd & Co. *v.* Mfgr's. & Merchants Warehouse Co., 102 Ill. App. 551. **Ind.** Heaston *v.* Colegrove, 3 Ind. 265. **Mo.** Nelson *v.* Johnson, 25 Mo. 430. **N. J.** Parker *v.* Hartt, 32 N. J. Eq. 225. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; New York *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **Tenn.**—Scatchard *v.* Memphis T. B. & D. Co., 102 Tenn. 282, 52 S. W. 153.

[a] "**Recoupment is** the right of a defendant to have a reduction from the amount of plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligation or independent covenants arising under the same contract." Georgia Civ. Code, §4350; Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846. See also Finney *v.* Cadwallader, 55 Ga. 75.

[b] "**In plain language** it means that if a person performs work and labor for another, and in its performance damages the other party to an amount as great as the performer claims for his services, there can be no recovery. In such case the defendant is allowed to recoup his damages so as to avoid the trouble and expense of another action." Heite *v.* Cowgill, 5 Boyce (Del.) 197, 91 Atl. 652.

[c] "**Recoupment in its truest sense** means a right of deduction from the amount of the plaintiff's claim by reason of either a payment thereon or some loss sustained by the defendant by reason of the plaintiff's wrongful or defective performance of the contract out of which his claim originated." Michigan Y. & P. Co. *v.* Busch, 143 Fed. 929, 936, 75 C. C. A. 109.

[d] "**The keeping back** of something that is due, because there is an equitable reason to withhold it." **U. S.**—Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232. **Ark.** Wheat *v.* Dotson, 12 Ark. 699. **N. Y.** Ives *v.* Van Epps, 22 Wend. 155.

[e] **By the code** recoupment is defined as a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract. Weaver *v.* Roberson, 134 Ga. 149, 67 S. E. 662; Atlantic Coast Line R. Co. *v.* A. T. Snodgrass & Co., 14 Ga. App. 668, 82 S. E. 153.

[f] "The act of (1) abating or recouping a part of a claim upon which one is sued by reason of a legal or equitable right resulting from a counter-claim arising out of the same transaction. The right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract." Bouvier Law Dict. 851. (2) "In practice. Defalcation or discount from a demand. A keeping back something which is due, because there is an equitable reason to withhold it." Black's Law Dict. 1000. (3) "Defalcation or discount from a demand; a keeping back of something which is due, because there is an equitable reason to withhold it; a reduction or diminution of damages in an action in satisfaction of a claim arising out of the matter out of which the action arises, as in an action on a contract for breach of warranty or defects in the performance." Kinney's Law Dict. 579. (4) "Something held back to satisfy a counter-claim. The right of a defendant to have the amount of plaintiff's damages for breach of con-

2. Origin and History. — Recoupment, unlike set-off,[40] is a common law right,[41] or rather an innovation upon the strict rules of the common law.[42] The doctrine of recoupment was recognized in the civil law,[43] and had been adopted in courts of equity long before it

tract reduced because of failure on part of the latter to comply with certain covenants in the same contract." English Law Dict. 675. (5) "That right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract." Cyclopedic Law Dict. 777.

[g] **"Equitable Recoupment."** This expression was used by the U. S. Cir. Court of Appeals in Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232, in deciding that a vendee of land may enjoin suit on a purchase-money note upon showing to the court that vendor had covenanted to convey a clear title, and the land was subject to liens. For another case of equitable recoupment, see Harper *v.* Coleman, 4 Litt. (Ky.) 156. A executed to B a note for the price of labor and services. B obtained judgment on the note. A sued to enjoin enforcement of this judgment, alleging that the work in question was not performed in a workmanlike manner, to A's injury; and that A did not discover this fact in time. The proof showed that the work was not done in a workmanlike manner. *Held,* A was entitled to an injunction.

[h] **Defalk, Discount.**—These words have been used in several cases in defining or describing recoupment. (1) "Defalk" is not defined in any modern law dictionary. The Standard Dictionary states that "defalk" is a variant of "defalcation" which is defined "to cut off or take away as a part of something; hence to curtail or reduce." Also "The reduction of the claim of one of the contracting parties against the other by deducting from it a smaller claim due from the former to the latter." Bouvier Law Dict. (2) "Defalked" is defined as "A lopping off, or a reduction, to some extent, of a claim which is proved, whether it be from a claim made and proved by the plaintiff, or from a set-off made and proved by the defendant." 13 Cyc. 758. In Pepper *v.* Warren, 2 Marv. (Del.) 225, 43 Atl. 91, the court uses the language lastly herein quoted, and adds "The word 'defalked' implies proof of an alleged claim, proof of some amount from which the defalkation is to be made," which is an approach to a definition of recoupment.

40. See *supra,* I, B.

41. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Groc. Co., 77 So. 748; Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514. **Ark.**—State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. **Ill.** Geo. E. Lloyd & Co. *v.* Mfgr's. & Merchants Warehouse Co., 102 Ill. App. 551. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447.

42. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Grocery Co., 77 So. 748. **Ill.**—Geo. E. Lloyd & Co. *v.* Mfgrs. & Merchants Warehouse Co., 102 Ill. App. 551. **N. J.**—Price's Exrs. *v.* Reynolds, 39 N. J. L. 171. **W. Va.**—Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

[a] **A relaxation of the common law rule** requiring defendant to seek his damages in a separate action. Desha's Exrs. *v.* Robinson, 17 Ark. 228, 244.

43. See *infra,* this note.

[a] **Originated in Civil Law.**—In State *v.* Gaillard, 2 Bay (S. C.) 11, 1 Am. Dec. 628, in which a contract was *rescinded* for fraud, the court says, "That the principles of our discount act of the legislature, passed in 1759, and made perpetual by the act of 1783 (Public Laws, p. 246), coincided with the rules of the civil law, by permitting a defendant to set off by way of discount against the plaintiff's demand, any cause, matter, or thing in his own right, and springing out of the same transaction, which went either to defeat the plaintiff's right, or to require an abatement in his demand, which renders it highly presumable that the legislators of that day had the principles of the civil law in

was introduced by statute into the practice of courts of law,[44] and from chancery it crept at an early date[45] into the practice of the law[46] to enable courts of law to avoid circuity of action and multiplicity of suits,[47] and for the purpose of presenting the defense of failure of consideration for a contract alleged as plaintiff's cause of action;[48] or a defense based upon defect in quantity or quality of real property, the purchase price of which is sued for by vendor.[49] Of limited application at the outset,[50] it has been developed by judicial

view when they passed that act." To same effect, see Abercrombie *v.* Owings, 2 Rich. L. (S. C.) 127.

44. **U. S.**—Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232. **Mass.**—Stacy *v.* Kemf, 97 Mass. 166. **N. J.**—Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

[a] **"The defense of recoupment is an equitable one** not dependent on R. L. c. 174, relating to set-off, and under the allegations of the answer the rights of the defendants in equity as well as at law may be considered." Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. 146.

[b] **A defense based on the maxim:** "He who demands justice, must first do justice, in the whole matter or contract which he seeks to enforce." Abercrombie *v.* Owings, 2 Rich. L. (S. C.) 127.

45. See Coulter's Case, 5 Coke 30a, 77 Eng. Reprint 98.

[a] "Though the term, recoupment of damages by the defendant in a certain class of cases was known and well understood in England as early as the reign of Henry the Eighth, and occurs in Dyer and Coke's Reports, it was not until about the commencement of the present century that it began to assume, even in England, the character and application which it now has both in the courts of that country and this, and of our own State. It had been, however, a work of progressive development in the meanwhile which has led to this result." Shimp *v.* Siedel, Hastings & Co., 6 Houst. (Del.) 421.

46. Geo. E. Lloyd & Co. *v.* Mfgrs. & Merchants Warehouse Co., 102 Ill. App. 551.

47. **U. S.**—Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232. **Ark.**—White *v.* Reagan, 32 Ark. 281; Wheat *v.* Dotson, 12 Ark. 699. **Colo.**—Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298. **Del.**—Edge Moor Iron Co. *v.* Brown H. M. Co., 6 Penne. 10, 62 Atl. 1054. **Ill.**—Burroughs *v.* Clancey, 53 Ill. 30; Peck *v.* Brewer, 48 Ill. 54, 63; Beam *v.* Cleveland, C., C. & St. L. Ry. Co., 97 Ill. App. 24. **Mass.**—Home Sav. Bank *v.* Boston, 131 Mass. 277. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **Mo.**—Grand Lodge *v.* Knox, 20 Mo. 433. **N. Y.**—M'Allister *v.* Reab, 4 Wend. 483, 492; Batterman *v.* Pierce, 3 Hill 171; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **R. I.**—Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

48. **U. S.**—Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232. **Ark.**—Rotan *v.* Nichols, 22 Ark. 244; Wheat *v.* Dotson, 12 Ark. 699. **N. J.**—Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **Tenn.**—Gibson, Lee & Co. *v.* Carlin, 13 Lea 440, 447.

[a] The doctrine of recoupment "is but a liberal and beneficient improvement upon the old doctrine of failure of consideration." **Ga.**—Lufburrow *v.* Henderson, 30 Ga. 482; Mell *v.* Mooney, 30 Ga. 413. **Miss.**—Myers *v.* Estell, 47 Miss. 4, 18. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

[b] **"But the rebutting of a consideration** has no affinity to recoupment." Price's Exrs. *v.* Reynolds, 39 N. J. L. 171. So stated in deciding that recoupment could not be pleaded in an action upon a sealed instrument, when a statute limited that defense to actions on unsealed instruments, although the state practice permitted the presumption created by a seal to be rebutted.

49. Wheat *v.* Dotson, 12 Ark. 699, 710.

50. **Ill.**—Waterman *v.* Clark, 76 Ill. 428. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **N. Y.**—Cram *v.* Dresser, 2 Sandf. 120. **W. Va.**—Baltimore & O. R. Co.

decision,[51] and has attained a wider and more extended application in America than in England.[52]

Under Codes and Statutes. — Except in a few states,[53] the remedy of recoupment finds no express recognition in the codes. And although the counterclaim provided by the codes is broad enough to embrace recoupment,[54] it is not exclusive and does not abolish or impair the former remedy.[55]

3. Nature and Scope. — The term recoupment is of French origin and signifies cutting again or cutting back on the plaintiff's claim by defendant,[56] and is simply the keeping back and stopping something which is due[57] because there is an equitable reason to withhold

v. Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

51. **Ark.**—Desha's Exrs. *v.* Robinson, 17 Ark. 228; Wheat *v.* Dotson, 12 Ark. 699. **Mass.**—Carey *v.* Guillaw, 105 Mass. 18, 7 Am. Rep. 494; Harrington *v.* Stratton, 22 Pick. 510. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Myers *v.* Estell, 47 Miss. 4. **Mo.**—Grand Lodge *v.* Knox, 20 Mo. 433. **N. J.**—Bouker *v.* Randles Helm & Co., 31 N. J. L. 335. **N. Y.** Reab *v.* McAlister, 8 Wend. 109. **Ohio.** Wellsville *v.* Geisse, 3 Ohio St. 333; Timmons *v.* Dunn, 4 Ohio St. 680. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Eng.**—Basten *v.* Butter, 7 East 479, 103 Eng. Reprint 185; Farnsworth *v.* Gerrard, 1 Campb. 38, 10 R. R. 624.

[a] **Rise of the Doctrine.**—"From the notion of absolute non-performance as a total defense, the progress was easy and natural, through the partial defences of a part performance and a reduction of damages by means of unskilled or negligent performance, to the admission of a cross-demand in favor of the defendant for damages resulting from the acts or omissions of the plaintiff that amounted to a breach of the contract sued upon. In this manner the doctrine of recoupment took its rise, and it was developed by decision after decision until it became established in the courts of England and of the American states,—a defence as well known and as widely admitted within its scope as the statutory set-off." Pomeroy's Remedies and Remedial Rights, 2nd ed., §731.

52. **Del.**—Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858. **Mo.**—Grand Lodge *v.* Knox, 20 Mo. 433. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

53. Weaver *v.* Roberson, 134 Ga. 149, 67 S. E. 662; Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846; Atlantic Coast Line R. Co. *v.* A. T. Snodgrass & Co., 14 Ga. App. 668, 82 S. E. 153; Babbitt *v.* Moore, 51 N. J. L. 229, 17 Atl. 99; Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

54. See *infra*, I, D, 2.

55. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376; Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Vassear *v.* Livingston, 13 N. Y. 248; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

[a] "**The whole spirit and plan of the code** was to liberalize the procedure and to extend, instead of curtailing, remedial rights. If express warrant for recoupment in the letter of the code should be contended for, it can well be found in the right to plead 'new matter constituting a defense.'" State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376.

56. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **Ohio.**—Wellsville *v.* Geisse, 3 Ohio St. 333. **Vt.**—Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620.

57. **Ill.**—Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14. **Ind.**—Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254. **Md.**—Strike's Case, 1 Bland 57. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **N. Y.**—Nichols *v.* Dusenbury, 2 N. Y. 283; Ives *v.* Van Epps, 22 Wend. 155. **Ore.**—Caples *v.* Morgan, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760; Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

[a] "**The right of recoupment is in the nature of a lien,** or of a right of a party who has performed his con-

it.[58] In substance and effect it may be likened to the reduction of the amount recoverable on a contract because of failure of consideration,[59] and is a species of common law set-off for damages due the defendant growing out of the same contract or transaction.[60] Recoupment is in the nature of a cross-action[61] arising as heretofore stated[62] out of the breach of some other part of the contract upon which the action is based or for some other cause connected with[63] the contract or transaction, and is allowed not only in actions ex contractu but also ex

tract to withhold the benefits thereof earned by the defaulting party, until his damages for the breach of the contract are made good, and such right is recognized in this state in actions at law." Salt Fork Coal Co. *v.* Eldridge Coal Co., 170 Ill. App. 268.

[b] **Synonymous With Defalk or Discount.**—The term recoup "is synonymous with defalk or discount." It is now "uniformly applied where a man brings an action for breach of a contract between himself and the defendant; and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated, the defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff whether they be liquidated or not." Ives *v.* Van Epps, 22 Wend. (N. Y.) 155.

58. **U. S.**—Michigan Yacht & Power Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109. **Ala.**—Mayberry *v.* Leech, 58 Ala. 339. **Ark.**—Wheat *v.* Dotson, 12 Ark. 699. **Colo.**—Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298. **Ill.** Wadhams *v.* Swan, 109 Ill. 46; Kingman *v.* Draper, 14 Ill. App. 577. **Ind.** Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254. **Mass.**—Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. 146; Home Sav. Bank *v.* Boston, 131 Mass. 277. **Miss.**—Grand Lodge *v.* Knox, 20 Mo. 433. **N. J.**—Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506. **N. Y.** Ives *v.* Van Epps, 22 Wend. 155; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **Tenn.**—Gibson Lee & Co. *v.* Carlin, 13 Lea 440; Pettee *v.* Tennessee Mfg. Co., 1 Sneed 381. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

59. **U. S.**—Michigan Yacht & Power Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109. **Ga.**—Lufborrow *v.* Henderson, 30 Ga. 482; Mell *v.* Moony, 30 Ga. 413. **N. J.**—Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506.

60. Fidelity & Deposit Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652; Lee *v.* Rutledge, 51 Md. 311.

61. **Conn.**—Merrill *v.* Everett, 38 Conn. 40. **Ill.**—Peck *v.* Brewer, 48 Ill. 54; Mendel *v.* Fink, 8 Ill. App. 378. **Ind.**—Houston *v.* Young, 7 Ind. 200; Clark *v.* Wildridge, 5 Ind. 176. **Mich.** Widrig *v.* Taggart, 51 Mich. 103, 16 N. W. 251; Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; Allen *v.* McKibbin, 5 Mich. 449. **Mo.**—Jones *v.* Moore, 42 Mo. 413. **N. Y.**—Deeves & Son *v.* Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395; Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570; Nichols *v.* Dusenbury, 2 N. Y. 283; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

[a] **Damages to which defendant is entitled** on recoupment are the same as would be allowed him in an independent action against plaintiff. Overton *v.* Phelan, 2 Head (Tenn.) 445; Whitaker *v.* Pullen, 3 Humph. (Tenn.) 466.

62. See *supra*, I, A, 1.

63. **U. S.**—Dietrich *v.* Ely, 63 Fed. 413, 11 C. C. A. 266. **Ala.**—Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Moore *v.* Westinghouse Electric Mfg. Co., 112 Ala. 452, 20 So. 487. **Ark.** Desha's Exrs. *v.* Robinson, 17 Ark. 228, 246; Wheat *v.* Dotson, 12 Ark. 699. **Del.**—Moore *v.* Speal, 6 Boyce 101, 97 Atl. 237; Houghton & Co. *v.* Alpha Process Co., 5 Boyce 383, 93 Atl. 669; Heite *v.* Cowgill, 5 Boyce 197, 91 Atl. 652; Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858; Penn Steel C. & M. Co. *v.* Wilmington M. I. Co., 1 Penne. 337, 41 Atl. 236. **Ga.**—Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846. **Ill.**—Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Stow *v.* Yarwood, 14 Ill. 424.

Mich.—Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; McHardy *v.* Wadsworth, 8 Mich. 349. **Mo.**—Jones *v.* Moore, 42 Mo. 413. **N. H.**—Currier *v.* Davis, 68 N. H. 596, 41 Atl. 239. **N. Y.** Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Deeves & Son *v.* Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395; Elwell *v.* Skiddy, 77 N. Y. 282; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115. **W. Va.** Clark's Cove Guano Co. *v.* Appling, 33 W. Va. 470, 10 S. E. 809.

[a] **Recoupment at common law,** as has been said by the Supreme Court of Alabama in Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514, is "in some sense a means of enforcing a cause of action by the defendant against plaintiff, either wholly or partially, as the defendant's claim for damages may or may not be less than plaintiff's demand, yet such cause of action is enforced not as an independent claim or debt of the defendant, but by way merely of cutting off, reducing the plaintiff's claim, so that the effect and result of a plea of recoupment sustained is an adjudication that to the extent of the sum recouped the plaintiff had no claim or debt. 'For' as said by Mr. Parsons 'the essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims; but that a part or the whole of the debt is paid in reason and justice by the distinct and unconnected debt which the plaintiff owes him' . . . while on a plea of recoupment, 'a defendant may deduct from the plaintiff's claim all just demands or claims owned by him or payments made by him, in the very same transaction, or even in other but closely connected transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff on that cause of action so much as he seeks, and not that he ought not to pay the plaintiff so much, because on another cause of action the plaintiff owes him. If he can so present and use his claims, he diminishes the plaintiff's claim by way of reduction.' 2 Parsons on Contr., pp. 862-3. And this doctrine that recoupment goes, not to the effectuation of a counterclaim as a set-off against plaintiff's demand, but in diminution, reduction and, it may be, to the destruction of plaintiff's claim or cause of action has been long recognized in this state." Peden *v.* Moore, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649.

[b] **The defense of recoupment means** "that when the defendant in a suit has sustained injury or damage because of the failure of the plaintiff to perform his part of the contract the defendant may set off against the plaintiff's claim any such damage that he may prove in a suit brought against him by the plaintiff." Moore *v.* Speal, 6 Boyce (Del.) 101, 97 Atl. 237.

[c] **"The right of recoupment is in the nature of a lien,** or of a right of a party who has performed his contract to withhold the benefits thereof earned by the defaulting party, until his damages for the breach of the contract are made good." Salt Fork Coal Co. *v.* Eldridge Coal Co., 170 Ill. App. 268.

[d] **It has been stated that the theory of recoupment** is to provide a method of determining plaintiff's quantum meruit. **Ind.**—Epperly *v.* Bailey, 3 Ind. 72. **N. J.**—Wakeman *v.* Illingsworth, 40 N. J. L. 431. **Tenn.** Gibson, Lee & Co. *v.* Carlin, 13 Lea 440, 447. To same effect, see Horn *v.* Batchelder, 41 N. H. 86.

[e] **The default of plaintiff** must cause the damages sought to be recouped. Moore *v.* Speal, 6 Boyce (Del.) 101, 97 Atl. 237.

[f] **It is properly applicable to a case** where the same contract imposes mutual duties and obligations on the two parties, and one seeks a remedy for the breach of duty by the second and the second meets the demand by a claim for a breach of the duty by the first. Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381; Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620.

[g] **It looks through the whole contract,** treating it as an entirety, and regarding the things done and stipulated to be done on the one side as the consideration for things done or stipulated to be done on the other. Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

delicto.[64] Except as extended by statute, recoupment is purely defensive in character,[65] and except as modified by statute[66] goes only in abatement or reduction of plaintiff's demand.[67] It cannot exceed plaintiff's claim so as to entitle the party setting it up to an affirmative judgment for the excess,[68] though statutes in some states extend the

[h] **Recoupment implies that plaintiff has a cause of action,** and defendant has a cause arising out of the breach of some other part of the contract upon which the action is based or for some other cause connected with the contract, and is in the nature of a cross-action. Deeves & Son *v.* Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395.

[i] **Damages for fraud in inducing purchase of automobile** counter demand in an action on note for purchase price of the machine, considered matter of recoupment instead of counterclaim or set-off. Morbrose Inv. Co. *v.* Flick, 187 Mo. App. 528, 174 S. W. 189.

64. Fidelity & Deposit Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652. See also *infra*, V, B.

[a] **Recoupment is in law a mitigation of damages,** and the defense is of such a nature as will permit a claim originating in contract to be interposed as against one suing in tort; likewise damages for a tort may be recouped against a claim predicated upon a contract. Spurgin *v.* Kruse, 125 Ill. App. 507.

65. **Ala.**—Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332. **Ark.**—State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. **N. Y.**—Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. **W. Va.** Monongahela Tie & Lumb. Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

[a] **If not strictly a defense,** it is customarily spoken of as such or at least as a partial defense. Medart Pully Co. *v.* Dubuque T. & R. M. Co., 121 Iowa 244, 96 N. W. 770.

66. See *infra*, this subsection.

67. **Del.**—Houghton & Co. *v.* Alpha Process Co., 5 Boyce 383, 93 Atl. 669; Heite *v.* Cowgill, 5 Boyce 197, 91 Atl. 652. **Ill.**—Wadhams *v.* Swan, 109 Ill. 46; Waterman *v.* Clark, 76 Ill. 428; Kingman *v.* Draper, 14 Ill. App. 577. **Ia.**—Medart Pulley Co. *v.* Dubuque T. & R. M. Co., 121 Iowa 244, 96 N. W. 770. **Md.**—Fidelity & Deposit Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652. **Mass.**—Bennett *v.* Kupfer Bros. Co., 213 Mass. 218, 100 N. E. 332. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **Mo.**—Grand Lodge of Masons *v.* Knox, 20 Mo. 433. **N. J.**—Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506. **N. Y.**—Deeves & Son *v.* Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381; Cram *v.* Dresser, 2 Sandf. 120. **Tenn.**—Gibson, Lee & Co. *v.* Carlin, 13 Lea 440; Pettee *v.* Tennessee Mfg. Co., 1 Sneed 381. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

[a] **Recoupment signifies reduction,** and originally a defendant could only secure reduction of the amount of recovery by recouping. Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254, 261; Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506.

[b] Doctrine is limited, as a defense, to defeating plaintiff's action in whole or in part. Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. (Del.) 10, 62 Atl. 1054, 42 L. R. A. (N. S.) 858.

[c] The doctrine "was firmly established by the name of mitigation of damages, on diminution of the plaintiff's recovery, in Reab *v.* McAlister (8 Wend. 109)." Cram *v.* Dresser, 2 Sandf. (N. Y.) 120.

68. **Ala.**—T. L. Farrow Mercantile Co. *v.* Riggins, 14 Ala. App. 529, 71 So. 963. **Del.**—Moore *v.* Speal, 6 Boyce 101, 97 Atl. 237; Houghton & Co. *v.* Alpha Process Co., 5 Boyce 383, 93 Atl. 669; Heite *v.* Cowgill, 5 Boyce 197, 91 Atl. 652. **Fla.**—Jarrett Lumber Co. *v.* Reese, 66 Fla. 317, 63 So. 581. **Ill.**—Wadhams *v.* Swan, 109 Ill. 46, 62. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1; Beall *v.* Pearre, 12 Md. 550. **Mass.**—Bennett *v.* Kupfer Bros. Co., 213 Mass. 218, 100 N. E. 332. **N. Y.**—Boston Silk & Woollen Mills *v.* Eull, 37 How. Pr. 299, 6 Abb. Pr. (N. S.) 319, 1 Sweeney 359; Seymour *v.* Davis, 2 Sandf. 239. **Ohio.** Wellsville *v.* Geisse, 3 Ohio St. 333, 341.

remedy to embrace such a recovery.[69]

D. COUNTERCLAIM. — **1. Defined.** — A counterclaim is a demand or cause of action existing in favor of the defendant against the plaintiff upon which he might have sued the plaintiff and obtained affirmative relief in a separate action.[70]

2. Origin, Nature and Scope. — Counterclaim is a remedy introduced by the codes,[71] and its nature and scope are determined and regulated by the statutory provisions.[72] It closely corresponds to the

[a] **"Reduction" and "recoupment"** are often used as synonymous. Like reduction it is of necessity limited to the amount of the plaintiff's claim. Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381.

69. **Ga.**—Weaver *v.* Roberson, 134 Ga. 149, 67 S. E. 662; Atlantic Coast Line R. Co. *v.* A. T. Snodgrass & Co., 14 Ga. App. 668, 82 S. E. 153. **N. J.** Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373, Pr. Act, 1882, §129. **N. Y.**—Boston Silk & Woollen Mills *v.* Eull, 37 How. Pr. 299, 6 Abb. Pr. (N. S.) 319, 1 Sweeney 359; Ogden *v.* Coddington, 2 E. D. Smith (N. Y.) 317, 326.

[a] **These statutes do not enlarge the class of demands** which may be the subject of recoupment. T. L. Farrow Mercantile Co. *v.* Riggins, 14 Ala. App. 529, 71 So. 963.

70. **Ark.**—Kilgore Lumber Co. *v.* Thomas, 95 Ark. 43, 128 S. W. 62. **Cal.**—Belleau *v.* Thompson, 33 Cal. 495. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Kan.**—Campbell *v.* Board of County Comrs., 97 Kan. 68, 154 Pac. 257, Ann. Cas. 1918D, 533. **Ky.**—Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641. **Mo.**—Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438. **Okla.**—Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

[a] **"A counterclaim is any matter arising out of, or connected with** the cause of action which might be the subject of an action in favor of the defendant or which would tend to reduce the plaintiff's claim or demand for damages." §353, Burns' Ann. St. 1901. Kahle *v.* Crown Oil Co., 180 Ind. 131, 100 N. E. 681; Duffy *v.* England, 176 Ind. 575, 96 N. E. 704; Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208.

[b] **"The ordinary meaning** of counterclaim is a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff. It is also defined as a claim, which, if established, will defeat or in some way qualify a judgment to which plaintiff is otherwise entitled. It is the claim of a defendant to recover from a plaintiff by setting up and establishing any cross-demand that may exist in his favor as against plaintiff." Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

[c] **"A species of set-off or recoupment,** introduced by the Codes of Civil Procedure in several of the states, of a broad and liberal character." Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832.

[d] **"It is something of a legal or equitable nature** . . . arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, giving the defendant a right to relief necessarily involved, or properly involved in the action to the end that a complete determination thereof may be had." Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105.

71. **Ark.**—Bloom *v.* Lehman, Newgrass & Co., 27 Ark. 489. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Mo.**—Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447. **N. C.**—Valentine *v.* Holloman, 63 N. C. 475; Teague *v.* James, 63 N. C. 91. **S. C.**—Farmers Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422.

72. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Fulton County G. & E. Co. *v.* Hudson River T. Co., 200 N. Y. 287, 93 N. E. 1052; Deeves & Son *v.* Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395; Vassear *v.* Livingston, 13 N. Y. 248. **S. C.**—Farmers' Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422.

cross-bill of the old chancery practice but is more comprehensive.[73] It includes recoupment in all states,[74] and in some it embraces both recoupment and set-off,[75] the scope of which remedies it enlarges.[76] Like

73. Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254; Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438. See the title "**Cross-Bill.**"

[a] "**There are two elements** found in our statutory counter-claim; from the common law is derived the element of recoupment, and the other element is taken from the chancery rule respecting cross-bills." Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254. See also Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

[b] "**The statutory counterclaim embraces a cross-bill** in equity, but is not limited to that, because, under the statute, in an action on a contract, the defendant may plead any other cause of action he may have against the plaintiff arising on a contract." Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438.

74. **Ark.**—Bloom *v.* Lehman, Newgrass & Co., 27 Ark. 489. **Cal.**—St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876. **Colo.**—Hyman *v.* Jockey Club W. L. & C. Co., 9 Colo. App. 299, 48 Pac. 671. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Mo.** Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438; Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314. **Mont.** Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Goodman *v.* Benjamin Rutchick, 171 N. Y. Supp. 152. **N. C.**—Slaughter Co. *v.* Standard Machine Co., 148 N. C. 471, 62 S. E. 599. **Okla.**—Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. C.** Farmers' Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422. **S. D.**—McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766. **Wash.**—Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167.

[a] **Recoupment** "**is confessedly covered by the definition of counterclaim** given in all the codes without exception. In those forming the two principal groups according to the classification heretofore made, it is described by the express language 'a cause of action arising out of the contract set forth in the complaint [or petition] as the foundation of the plaintiff's claim;' in that of Indiana it is described by the language, 'any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages;' and in that of Iowa by the language, 'a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract set forth in the petition.' It is beyond dispute, then, that the recoupment of damages, as the same was authorized by the courts under the old practice, is made a species of counter-claim by all the codes." Pomeroy's Remedies and Remedial Rights, 2nd ed., §736.

75. **Ark.**—White *v.* Reagan, 32 Ark. 281. **Cal.**—St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876. **Colo.** First Nat. Bank *v.* Lewis, 57 Colo. 124, 139 Pac. 1102; Hyman *v.* Jockey Club W. L. & C. Co., 9 Colo. App. 299, 48 Pac. 671. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Mont.** Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Vassear *v.* Livingston, 13 N. Y. 248; Cohn *v.* Hussen, 66 How. Pr. 150; Brandt *v.* New York, 99 App. Div. 260, 90 N. Y. Supp. 929; Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152. **N. C.**—Slaughter Co. *v.* Standard Machine Co., 148 N. C. 471, 62 S. E. 599; Smith & Co. *v.* French, 141 N. C. 1, 53 S. E. 435; Hurst, Miller & Co. *v.* Everett, 91 N. C. 399; Neal *v.* Lea, 64 N. C. 678. **Ore.** Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. C.**—Farmers' Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422. **S. D.**—McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766. **Wash.**—Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; McArthur *v.* Green Bay & M. C. Co., 34 Wis. 139.

76. **Ark.**—White *v.* Reagan, 32 Ark. 281. **Cal.**—St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876. **Colo.** First Nat. Bank *v.* Lewis, 57 Colo. 124,

set-off[77] and recoupment[78] it is in effect a cross-action by a defendant against the plaintiff[79] between whom a separate judgment might be had.[80] A counterclaim must tend in some way to diminish or defeat the plaintiff's recovery,[81] and must be one of the causes of action designated in the statute, the nature of which will be discussed at length in a subsequent section of this article.[82]

E. COMPENSATION. — Compensation, which is a civil law remedy,[83] is "the extinction of debts of which two persons are reciprocally debtors to one another by the credits by which they are reciprocally creditors to one another."[84]

F. RECONVENTION. — A reconventional demand is defined by the statutes as one which the defendant brings against the plaintiff, in consequence of the demand which the plaintiff has brought against him,[85] and must be a claim connected with and incidental to the main action.[86] The remedy is derived from the civil law,[87] and is used in practice in two states of the United States, Louisiana[88] and Tex-

139 Pac. 1102. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Ind.** Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254. **Kan.**—Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Mo.**—Emery *v.* St. Louis, K. & N. W. Ry. Co., 77 Mo. 339; Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545. **N. Y.**—Vasseär *v.* Livingston, 13 N. Y. 248; Leavenworth *v.* Packer, 52 Barb. 132; Beardsley *v.* Stover, 7 How. Pr. 294. **Ore.**—Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661.

77. See *supra*, I, B. 3.

78. See *supra*, I, C, 3.

79. **Ind.**—Indiana Mutual Building & Loan Assn. *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Walker *v.* American Cent. Ins. Co., 143 N. Y. 167, 38 N. E. 106; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267; Vasseur *v.* Livingston, 4 Duer 285; McKensie *v.* Farrell, 4 Bosw. 192. **N. C.**—McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Hurst, Miller & Co. *v.* Everett, 91 N. C. 399. **Okla.**—Hurford *v.* Nowall, 39 Okla. 496, 135 Pac. 1060. **Ore.**—First Nat. Bank *v.* Seaward, 78 Ore. 567, 152 Pac. 883; Templeton *v.* Cook, 69 Ore. 313, 138 Pac. 230. **S. C.**—Inman & Co. *v.* Hodges, 80 S. C. 455, 61 S. E. 958; Kentucky Refining Co. *v.* Saluda Oil Mill Co., 70 S. C. 89, 48 S. E. 987; Union Bank *v.* Heyward, 15 S. C. 296.

80. See *infra*, VII, D, a, (II).

81. See *infra*, VII, C, 2, b, (I), (C).

82. See *infra*, VII, C, 2, b.

83. See the following: **Ia.**—Tuttle *v.* Bisbee, 144 Iowa 53, 120 N. W. 699. **La.**—Nolan *v.* Shaw & Co., 6 La. Ann. 40. **Ohio.**—Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312.

84. 2 Story, Eq. Jur., §1437. See also **Ia.**—Tuttle *v.* Bisbee, 144 Iowa 53, 120 N. W. 699. **La.**—Mutual Nat. Bank *v.* Keenan, 35 La. Ann. 1129; State Bank *v.* Fowler, 10 Rob. 196; Arbonneaux *v.* Letorey, 6 Rob. 456; Low *v.* Thomas, 4 Rob. 183. **Ohio.** Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312. **Tex.**—Holliman *v.* Rogers, 6 Tex. 91.

85. Andrews *v.* Sheehy, 125 La. 217, 51 So. 122.

[a] **Where in a suit by nonresident to annul a judgment** for want of citation and of jurisdiction, the party by whom such judgment was obtained answers, defending its validity and praying that it may be maintained, there is nothing inconsistent in his assuming the character of plaintiff in reconvention, and, in the alternative, asserting, and praying for judgment on the original demand in the event the validity of the judgment attacked is not sustained. Andrews *v.* Sheehy, 125 La. 217, 51 So. 122.

86. Duncan *v.* Magette, 25 Tex. 245.

87. Duncan *v.* Magette, 25 Tex. 245; Britton *v.* Thrash, 1 White & W. Civ. Cas. (Tex.) §1237.

88. Texas & P. R. Co. *v.* Chatwin Bros., 135 La. 143, 64 So. 1017; Andrews *v.* Sheehy, 125 La. 217, 51 So. 122; Suberville *v.* Adams, 47 La. Ann.

as.[89] It is a remedy broader in its scope than either set-off or recoupment.[90]

G. SET-OFF IN EQUITY. — **1. In General.** — The doctrine of set-off, while originally not recognized at common law,[91] had its origin in equity, where the power to compel a set-off of cross-demands or of judgments has been exercised whenever necessary for the proper administration of justice.[92] It is enforced in equity where there are mutual debts or mutual credits and some equitable consideration or agreement between the parties exists which would render it unjust not to allow a set-off.[93] The practice grew out of the desire of chancery courts to remedy the injustice resulting from a party's inability in a law court to set up counter-demands not growing out of the con-

68, 16 So. 652; Pool *v.* Alexander, 26 La. Ann. 669; Lanusse *v.* Pimpienella, 4 Mart. (N. S.) (La.) 439.

89. Duncan *v.* Magette, 25 Tex. 245.

90. State Nat. Bank *v.* Evans, 32 La. Ann. 464; Spinney *v.* Hyde, 16 La. Ann. 250; Walcott *v.* Hendrick, 6 Tex. 406.

91. See *supra*, I, B, 2.

92. **U. S.**—Sydney *v.* Mugford Printing & Engraving Co., 214 Fed. 841. **Ark.**—Wheat *v.* Dotson, 12 Ark. 699. **Cal.**—Naglee *v.* Palmer, 7 Cal. 543. **Conn.**—Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288; Hubley Mfg. & Supply Co. *v.* Ives, 81 Conn. 244, 70 Atl. 615, 129 Am. St. Rep. 209. **Ill.** Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753; Smith *v.* Billings, 170 Ill. 543, 49 N. E. 212; Hughes *v.* Trahern, 64 Ill. 48. **Ky.**—Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24; Hughes *v.* McCoun's Admr., 3 Bibb 254; Tribble *v.* Taul, 7 T. B. Mon. 455. **Me.**—Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 102 N. E. 653; Stone *v.* Old Colony St. R. Co., 212 Mass. 459, 99 N. E. 218; Holbrook *v.* Bliss, 9 Allen 69. **Neb.** Richardson *v.* Doty, 44 Neb. 73, 62 N. W. 254. **N. Y.**—Jordan *v.* National Shoe & L. Bank, 74 N. Y. 467, 30 Am. Rep. 319. **Pa.**—Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003; Garner *v.* Price, 4 Kulp. 10. **Tenn.**—Howe Sewing Machine Co. *v.* Zachary, 2 Tenn. Ch. 478. **Vt.**—Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Wis.**—Piotrowski *v.* Czerwinski, 138 Wis. 396, 120 N. W. 268; Jones *v.* Piening, 85 Wis. 264, 55 N. W. 413. **Eng.**—Earl of Oxford's Case, 2 White & Tudor's Lead. Cas. in Eq. (4th Am. Ed.) 1291, 1 Ch. Rep. 1, 13 Jac. 1.

[a] **"Courts of equity exercised jurisdiction** upon the subject of set-off before the statute of 2 Geo. II, which first conferred upon courts of law the power to do so. The enactment of that and following statutes in England and this country made the occasions rare when equity courts were called upon to exercise their jurisdiction. But they retained it, and upon proper occasion exercised it, where the law courts were unable to accomplish what equity demanded by reason of their being circumscribed in their power by the statutes." Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288.

93. **U. S.**—Gray *v.* Rollo, 18 Wall. 629, 21 L. ed. 927; Williams Patent Crusher & P. Co. *v.* Kinsey Mfg. Co., 205 Fed. 375. **Ala.**—Tate *v.* Evans, 54 Ala. 16; Simmons *v.* Williams, 27 Ala. 507; Tuscumbia C. & D. R. Co. *v.* Rhodes, 8 Ala. 206. **Cal.**—Naglee *v.* Palmer, 7 Cal. 543. **Ga.**—Moody *v.* Ellerbie, 36 Ga. 666; Meriwether *v.* Bird, 9 Ga. 594. **Ill.**—Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Union Nat. Bank *v.* Hines, 177 Ill. 417, 53 N. E. 83; Raleigh *v.* Raleigh, 35 Ill. 512. **Ky.**—Patrick *v.* Langston, 5 J. J. Marsh. 653. **Minn.**—Wallrich *v.* Hall, 19 Minn. 383. **N. J.**—Van Buskirk *v.* Bayonne (N. J. Ch.), 38 Atl. 458. **Pa.**—Morgan *v.* Bank of North America, 8 Serg. & R. 73, 11 Am. Dec. 575. **Tenn.**—Caldwell *v.* Powell, 6 Baxt. 82.

[a] **The rule is stated by the Supreme Court of the United States** thus: "Courts of equity do not act upon the subject of set-off in respect to distinct and unconnected debts, unless some other peculiar equity has intervened, calling for relief; as for example in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the

tract or transaction sued upon.[94] In such cases chancery interfered to enforce the natural equity arising where there had been mutual dealings between the parties in regard to which it was their intention that one debt should be set off against another.[95]

2. Equity Follows the Law. — Although the matter of set-off and counterclaim in equity is sometimes regulated by statutes or rules of court,[96] the power to allow such cross-demands exists independent of statute,[97] and is not impaired by statutory provisions permitting set-off and counterclaim.[98] It is true, of course, that equity will, as a rule, follow the course adopted by courts of law in the construction

other.'' Dade *v.* Irwin, 2 How. (U. S.) 383, 11 L. ed. 308.

Setting-off judgments, see 16 STANDARD PROC. 570.

94. Hawkins *v.* Freeman, 8 Viners Abr. (Eng.) 560; Hawkins *v.* Freeman, 2 Eq. Cas. Abr. 10, 22 Eng. Reprint 8; Chapman *v.* Derby, 2 Vern. 117, 23 Eng. Reprint 684.

[a] **The right to set-off of other independent claims** not growing out of the contract or transaction was prior to set-off statutes, not known to the common law, but was a head of equity jurisdiction. Nichols *v.* Dusenbury, 2 N. Y. 283; Worcester-Brooklyn Realty Co. *v.* Bailey, 161 App. Div. 935, 146 N. Y. Supp. 59.

[b] **Joinder of Actions.**—An action may be maintained which combines the remedies of an action to remove a cloud upon title and an action in equity for a set-off. Worcester-Brooklyn Realty Co. *v.* Bailey, 161 App. Div. 935, 146 N. Y. Supp. 59.

[c] **Equitable Set-off in Replevin.** Equitable set-off can not be pleaded in an action of replevin, at least in jurisdiction where the distinction between actions at law and suits in equity is still maintained. Zimmerman *v.* Sunset Lumber Co., 57 Ore. 309, 111 Pac. 690, Ann. Cas. 1913A, 103, 32 L. R. A. (N. S.) 123.

95. Hawkins *v.* Freeman, 8 Viners Abr. (Eng.) 560; Chapman *v.* Derby, 2 Vern. 117, 23 Eng. Reprint 684.

96. Williams Patent Crusher & Pulverizer Co. *v.* Kinsey Mfg. Co., 205 Fed. 375.

[a] **In Federal Courts.**—Rule 30 of the new equity rules (198 Fed. xxvi, 115 C. C. A. xxvi) provides in part as follows: ''The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff, which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims.'' Williams Patent Crusher & P. Co. *v.* Kinsey Mfg. Co., 205 Fed. 375.

97. **Ark.**—Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271. **Cal.**—Hobbs *v.* Duff, 23 Cal. 596. **Conn.**—Hubley Mfg. & Supply Co. *v.* Ives, 81 Conn. 244, 70 Atl. 615, 129 Am. St. Rep. 209. **Ga.**—Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43. **Ill.** Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753. **Ia.**—Tuttle *v.* Bisbee, 144 Iowa 53, 120 N. W. 699. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Jeffries *v.* Evans, 6 B. Mon. 119, 43 Am. Dec. 158. **Me.**—Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053. **Md.** Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965. **Mass.**—Merrill *v.* Cape Ann Granite Co., 161 Mass. 212, 36 N. E. 797, 23 L. R. A. 313. **Miss.**—McIntyre *v.* E. E. Forbes Piano Co., 100 Miss. 517, 56 So. 457. **Mont.**—Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715. **N. Y.**—Crary *v.* Goodman, 12 N. Y. 266, 64 Am. Dec. 506. **Pa.**—Garner *v.* Price, 4 Kulp. 10. **Tenn.**—Edminson *v.* Baxter, 4 Hayw. 112, 9 Am. Dec. 75. **Vt.**—Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Wis.**—Spear *v.* Dey, 5 Wis. 193.

98. **Ga.**—Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43. **Ill.**—Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753. **Ky.** Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Tribble *v.* Taul, 7 T. B. Mon. 455. **Md.**—Willson *v.* Williams, 108 Md. 522, 70 Atl. 409. **Neb.**—Richardson *v.* Doty, 44 Neb. 73, 62 N. W. 254. **N. Y.** Weeks *v.* Pryor, 27 Barb. 79. **Vt.** McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837.

of such statute.[99] Yet notwithstanding this, equity will grant relief by way of set-off beyond the decisions at law where the nature of the claim and the situation of the parties justify such course.[1] The remedy

99. **U. S.**—Gray *v.* Rollo, 18 Wall. 629, 21 L. ed. 927; Greene *v.* Darling, 5 Mason 201, 10 Fed. Cas. No. 5,765. **Ala.**—Brown *v.* Scott, 87 Ala. 453, 6 So. 384; Goldthwaite *v.* National Bank, 67 Ala. 549; Jones *v.* Brevard, 59 Ala. 499; McKinley *v.* Winston, 19 Ala. 301. **Ark.**—Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271; Ewing-Merkle Electric Co. *v.* Lewisville Light & Water Co., 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21; West *v.* Williams, 15 Ark. 682. **Cal.** Hobbs *v.* Duff, 23 Cal. 596. **Conn.** Goodwin *v.* Keney, 49 Conn. 563. **Del.** Small *v.* Collins, 6 Houst. 273. **Ga.** Jordan *v.* Jordan, 12 Ga. 77; Ruckersville Bank *v.* Hemphill, 7 Ga. 396; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ill.**—Voorhees *v.* Mason, 182 Ill. App. 569; Morris *v.* Calumet & C. Canal & D. Co., 91 Ill. App. 437. **Ia.** Tuttle *v.* Bisbee, 144 Iowa 53, 120 N. W. 699. **Md.**—Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Scott *v.* Scott, 17 Md. 78. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 102 N. E. 653; Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391. **Mich.**—First Nat. Bank *v.* E. T. Barnum Wire & Iron Works, 58 Mich. 124, 24 N. W. 543, 55 Am. Rep. 660; Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69. **Minn.**—Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; Wallrich *v.* Hall, 19 Minn. 383. **Miss.**—McIntyre *v.* E. E. Forbes Piano Co., 100 Miss. 517, 56 So. 457; Condon *v.* Shehan, 46 Miss. 710; Kershaw *v.* Merchants' Bank, 7 How. 386. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260; Reppy *v.* Reppy, 46 Mo. 571. **N. J.**—Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423. **N. Y.**—Jordan *v.* National S. & L. Bank, 74 N. Y. 467, 30 Am. Rep. 319; Bathgate *v.* Haskin, 59 N. Y. 533; Armstrong *v.* McKelvey, 39 Hun 213. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Pa.**—Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003; Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004. **R. I.**—Bell *v.* Ward, 10 R. I. 503. **Vt.**—Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Va.**—Ford's Admr. *v.* Thornton, 3 Leigh (30 Va.) 695. **Wis.**—Johnston *v.* Humphrey, 91 Wis. 76, 64 N. W. 317, 51 Am. St. Rep. 873.

1. **Ala.**—Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552; Gafford *v.* Proskauer, 59 Ala. 264; Tate *v.* Evans, 54 Ala. 16; Cave *v.* Webb, 22 Ala. 583. **Ark.** Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271; Ewing-Merkel Electric Co. *v.* Lewisville Light & Water Co., 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21. **Cal.**—Naglee *v.* Palmer, 7 Cal. 543. **Conn.**—Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288; Hubley Mfg. & Supply Co. *v.* Ives, 81 Conn. 244, 70 Atl. 615, 129 Am. St. Rep. 209; Goodwin *v.* Keney, 49 Conn. 563. **D. C.**—Carver *v.* Hall, 3 App. Cas. 170. **Ga.**—Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43; Jordan *v.* Jordan, 12 Ga. 77; Ruckersville Bank *v.* Hemphill, 7 Ga. 396; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677; Geer *v.* Cowart, 5 Ga. App. 251, 62 S. E. 1054. **Ill.**—Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753; Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Ehrat *v.* Marrone, 191 Ill. App. 121; Hughes *v.* Trahern, 64 Ill. 48. **Ind.**—Keightley *v.* Walls, 24 Ind. 205. **Ia.**—Tuttle *v.* Bisbee, 144 Iowa 53, 120 N. W. 699. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Wathen's Exr. *v.* Chamberlin, 8 Dana 164; Turpin *v.* Turpin, 7 J. J. Marsh. 33; Markham *v.* Todd, 2 J. J. Marsh. 364; Jeffries *v.* Evans, 6 B. Mon. 119, 43 Am. Dec. 158. **Me.**—Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053. **Md.**—Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49; State *v.* Northern Cent. R. Co., 18 Md. 193. **Mass.**—Merrill *v.* Cape Ann Granite Co., 161 Mass. 212, 36 N. E. 797, 23 L. R. A. 313. **Mich.**—Hendricks *v.* Toole, 29 Mich. 340; Lockwood *v.* Beckwith, 6 Mich. 168; Flanders *v.* Chamberlain, 2 Mich. N. P. 132. **Minn.**—Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579; Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543. **Miss.**—McIntyre *v.* E. E. Forbes Piano Co., 100 Miss. 517, 56 So. 457. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260; Fulkerson *v.* Davenport, 70 Mo. 541; Field *v.* Oliver, 43 Mo. 200; Gemmell *v.* Hueben, 71 Mo. App. 291. **Neb.** Richardson *v.* Doty, 44 Neb. 73, 62 N. W. 254. **N. J.**—Norton *v.* Sinkhorn, 63

will be granted, however, only for the purpose of securing an equitable result and not where its allowance would work an injustice to others having equal equities.[2]

3. Grounds for Invoking Jurisdiction. — a. *Necessity for.* — Equity will assume jurisdiction to allow a set-off or other cross-demand only where some sufficient ground for exercising such power appears.[3]

N. J. Eq. 313, 50 Atl. 506; Hewitt *v.* Kuhl, 25 N. J. Eq. 24; Brewer *v.* Norcross, 17 N. J. Eq. 219. **N. Y.**—Pond *v.* Harwood, 139 N. Y. 111; 34 N. E. 768; Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350; Elliott *v.* Gibbons, 30 Barb. 498; Schermerhorn *v.* Anderson, 2 Barb. 584; Worcester-Brooklyn Realty Co. *v.* Bailey, 161 App. Div. 935, 146 N. Y. Supp. 59. **N. C.**—Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889; Riddick *v.* Moore, 65 N. C. 382. **Ohio.** Barbour *v.* National Exch. Bank, 50 Ohio St. 90, 33 N. E. 542, 20 L. R. A. 192; Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466. **Pa.** Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003. **R. I.**—Bell *v.* Ward, 10 R. I. 503. **Tenn.**—Knaffle *v.* Knoxville Banking & Trust Co., 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167; Parker *v.* Britt, 4 Heisk. 243; Howe Sewing Machine Co. *v.* Zachary, 2 Tenn. Ch. 478. **Tex.**—Duncan *v.* Magette, 25 Tex. 245. **Vt.**—McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837; Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Wis.**—Piotrowski *v.* Czerwinski, 138 Wis. 396, 120 N. W. 268; Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766. **Eng.**—Middleton *v.* Pollack, L. R. 20 Eq. Cas. 29, 44 L. J. Ch. 584, 33 L. T. Rep. N. S. 240; Rawson *v.* Samuel, Cr. & Ph. 161, 3 Jur. 947, 10 L. J. Ch. 214, 41 Eng. Reprint 451; McKelvey *v.* McLean, 34 U. C. Q. B. (Can.) 635.

2. **Ill.**—Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753. **Ky.**—Markham *v.* Todd, 2 J. J. Marsh. 364. **Mass.** Graham *v.* Middleby, 213 Mass. 437, 100 N. E. 750, Ann. Cas. 1914A, 384, 43 L. R. A. (N. S.) 977. **Miss.**—Pass *v.* McRea, 36 Miss. 143. **Pa.**—Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003; Tustin *v.* Cameron, 5 Whart. 379. **Tenn.**—Knaffle *v.* Knoxville Banking & Trust Co., 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167; Catron *v.* Cross, 3 Heisk. 584; Howe Sewing Machine Co. *v.* Zachary, 2 Tenn. Ch. 478. **Va.**—Childress *v.* Jordan, 107 Va. 275, 58 S. E. 563.

3. **U. S.**—North Chicago Rolling Mill Co. *v.* St. Louis Ore, & S. Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565. **Ala.**—Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552; Knight *v.* Drane, 77 Ala. 371; Martin *v.* Mohr, 56 Ala. 221; Tate *v.* Evans, 54 Ala. 16; Simmons *v.* Williams, 27 Ala. 507; Cave *v.* Webb, 22 Ala. 583; French *v.* Garner, 7 Port. 549. **Ark.**—Menifee's Admrs. *v.* Ball, 7 Ark. 520. **Cal.**—Lyon *v.* Petty, 65 Cal. 322, 4 Pac. 103; Naglee *v.* Palmer, 7 Cal. 543. **Colo.**—Plattner Implement Co. *v.* Bradley, Alderson & Co., 40 Colo. 95, 90 Pac. 86. **Conn.** Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288; Bulkeley *v.* Welch, 31 Conn. 339; Bowen *v.* Bowen, 20 Conn. 127. **Del.**—Small *v.* Collins, 6 Houst. 273. **D. C.**—Carver *v.* Hall, 3 App. Cas. 170. **Ga.**—Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43; Collins *v.* Clayton, 53 Ga. 649; Moody *v.* Ellerbie, 36 Ga. 666; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ill.**—Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753; Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Smith *v.* Billings, 170 Ill. 543, 49 N. E. 212; Raleigh *v.* Raleigh, 35 Ill. 512; Downs *v.* Jackson, 33 Ill. 464, 85 Am. Dec. 289; Voorhees *v.* Mason, 182 Ill. App. 569. **Ind.**—Hannon *v.* Hilliard, 83 Ind. 362; Keightley *v.* Walls, 24 Ind. 205. **Ia.**—Davis *v.* Milburn, 3 Iowa 163. **Ky.** Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Wathen's Exr. *v.* Chamberlin, 8 Dana 164; Blackwell *v.* Oldham & Co., 4 Dana 195; Tribble *v.* Taul, 7 T. B. Mon. 455; Collins *v.* Farquar, 4 Litt. 153; Lamme *v.* Saunders, 1 T. B. Mon. 263. **Md.**—Spencer *v.* Almoney, 56 Md. 551; Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49; Smith *v.* Donnell, 9 Gill. 84; Hutchins *v.* Hope, 7 Gill 119. **Mass.**—Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391. **Mich.** Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260; Hendricks *v.* Toole, 29 Mich. 340; Lockwood *v.* Beckwith, 6 Mich. 168; Flanders *v.* Chamberlain, 2 Mich. N. P. 132. **Minn.**—Barker *v.* Walbridge, 14 Minn. 469. **Miss.**—Pollock & Co. *v.* Okolona Sav. Inst., 61 Miss. 293; Graves *v.* Hull, 27 Miss. 419. **Mo.** Barnes *v.* McMullins, 78 Mo. 260; Hopkins *v.* Fechter, 47 Mo. 331; Field *v.*

It must appear that the defendant has no adequate and complete remedy at law,[4] and that such relief is necessary to enable the party to collect his claim.[5]

Oliver, 43 Mo. 200; Gemmell *v.* Hueben, 71 Mo. App. 291. **N. J.**—Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506; Hewitt *v.* Kuhl, 25 N. J. Eq. 24; Brewer *v.* Norcross, 17 N. J. Eq. 219; Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423. **N. Y.**—Bathgate *v.* Haskin, 59 N. Y. 533; Worcester-Brooklyn Realty Co. *v.* Bailey, 161 App. Div. 935, 146 N. Y. Supp. 59; Clark *v.* Vilas Nat. Bank, 22 App. Div. 605, 48 N. Y. Supp. 192; Peyman *v.* Bowery Bank, 14 App. Div. 432, 43 N. Y. Supp. 826; Van Pelt *v.* Boyer, 8 How. Pr. 319. **N. C.**—Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889; Riddick *v.* Moore, 65 N. C. 382. **Ohio.**—Cincinnati Second Nat. Bank *v.* Hemingway, 34 Ohio St. 381. **Pa.** Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003. **R. I.**—Bell *v.* Ward, 10 R. I. 503. **S. C.**—Enter *v.* Guesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891. **Tenn.**—Hough *v.* Chaffin, 4 Sneed 238; Smith *v.* Ross, 3 Humph. 220; Ragsdale *v.* Buford's Exrs., 3 Hayw. 192. **Tex.**—Henderson *v.* Gilliam, 12 Tex. 71. **Vt.**—Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Va.**—Morgan *v.* Carson, 7 Leigh (34 Va.) 238; Hudson *v.* Kline, 9 Gratt. (50 Va.) 379. **Wis.**—Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766; Linderman *v.* Disbrow, 31 Wis. 465. **Eng.**—Stimson *v.* Hall, 1 H. & N. 831, 26 L. J. Exch. 212.

[a] **The surety on a note held by a receiver** of an insolvent bank is not entitled to have set off against the same the amount of an individual deposit due the surety by the bank when the bank is not suing and the maker and primary obligor is solvent. Knaffle *v.* Knoxville Banking & Trust Co., 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167.

4. **Del.**—Small *v.* Collins, 6 Houst. 273. **Ga.**—Burns *v.* Hill, 19 Ga. 22; Jordan *v.* Jordan, 12 Ga. 77; Ruckersville Bank *v.* Hemphill, 7 Ga. 396; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ill.**—Quick *v.* Lemon, 105 Ill. 578; Morris *v.* Calumet & C. C. & D. Co., 91 Ill. App. 437; Smith *v.* Billings, 62 Ill. App. 77. **Ia.**—Davis *v.* Milburn, 3 Iowa 163. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Wathen's Exr. *v.* Chamberlin, 8 Dana 164; Tribble *v.* Taul, 7 T. B. Mon. 455; Lansdale *v.* Mitchell, 14 B. Mon. 348. **Md.**—Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Smith *v.* Donnell, 9 Gill 84. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 102 N. E. 653. **Mich.**—Mechanic's Bank *v.* Stone, 115 Mich. 648, 74 N. W. 204; Hale *v.* Holmes, 8 Mich. 37; Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69. **Miss.**—Condon *v.* Shehan, 46 Miss. 710; Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70; Barnes' Admr. *v.* Lloyd, 1 How. 584. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260. **N. J.**—Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83. **N. Y.**—Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; Worcester-Brooklyn Realty Co. *v.* Bailey, 161 App. Div. 935, 146 N. Y. Supp. 59; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Wolcott *v.* Sullivan, 1 Edw. 399. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; Cincinnati Second Nat. Bank *v.* Hemingway, 34 Ohio St. 381; Allen *v.* Medill, 14 Ohio 445. **Ore.**—McDonald *r.* Mackenzie, 24 Ore. 573, 14 Pac. 866. **Pa.**—Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003; Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004; Tustin *v.* Cameron, 5 Whart. 379. **R. I.**—Baker *v.* Hawkins, 14 R. I. 359; Bell *v.* Ward, 10 R. I. 503. **S. C.** Nettles *v.* Elkins, 2 McCord Eq. 182. **Tenn.**—Caldwell *v.* Powell, 6 Baxt. 82; Smith *v.* Ross, 3 Humph. 220. **Vt.** Downer *v.* Dana, 17 Vt. 518. **Wis.** Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766.

[a] **The conditions must give rise to a presumption** that the one credit is understood by the parties to go in liquidation or set off of the other. Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753; Smith *v.* Billings, 170 Ill. 543, 49 N. E. 212; Howe Machine Co. *v.* Hickox, 106 Ill. 461.

[b] **That an administrator** brings the suit does not change the rule. Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753.

5. **Cal.**—Machado *v.* Borges, 170 Cal. 501, 150 Pac. 351; Hobbs *v.* Duff, 23 Cal. 596; Russell *v.* Conway, 11 Cal.

b. *Particular Grounds.* — (I.) **Insolvency.** — The insolvency of the party against whom the relief is sought generally affords sufficient grounds for invoking this equitable remedy,[6] although according to

93. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451. **Mass.**—Cromwell *v.* Parsons, 219 Mass. 299, 106 N. E. 1020.

6. **U. S.**—North Chicago Rolling Mill Co. *v.* St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565; Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059; Central Appalachian Co. *v.* Buchanan, 90 Fed. 454, 33 C. C. A. 598. **Ala.** Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552; Campbell *v.* Conner, 73 Ala. 211; Goldthwaite *v.* National Bank, 67 Ala. 397; Goldsmith *v.* Stetson & Co., 39 Ala. 183. **Cal.**—Machado *v.* Borges, 170 Cal. 501, 150 Pac. 351; Lyon *v.* Petty, 65 Cal. 322, 4 Pac. 103; Russell *v.* Conway, 11 Cal. 93. **Colo.** Plattner Implement Co. *v.* Bradley, Alderson & Co., 40 Colo. 95, 90 Pac. 86. **Conn.**—Goodwin *v.* Keney, 49 Conn. 563; Pond *v.* Smith, 4 Conn. 297; Gaylord *v.* Couch, 5 Day 223. **Del.** Burton *v.* Willen, 6 Del. Ch. 403, 33 Atl. 675. **D. C.**—Fitzgerald *v.* Wiley, 22 App. Cas. 329. **Ga.**—Sanderlin *v.* Willis, 94 Ga. 171, 21 S. E. 291; Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878; Maddox *v.* Oxford, 70 Ga. 179; Melson *v.* Dickson, 63 Ga. 682, 36 Am. Rep. 128. **Ill.**—Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Walker *v.* Doane, 108 Ill. 236; Quick *v.* Lemon, 105 Ill. 578; Chicago, D. & V. R. Co. *v.* Field, 86 Ill. 270; Hinrichsen *v.* Reinback, 27 Ill. 295; Smith *v.* Billings, 62 Ill. App. 77. **Ind.**—Hannon *v.* Hilliard, 83 Ind. 362; Keightley *v.* Walls, 24 Ind. 205. **Ia.**—Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379; Wikel *v.* Garrison, 82 Iowa 453, 48 N. W. 803; Davis *v.* Milburn, 3 Iowa 163. **Ky.** Kentucky Flour Co.'s Assn. *v.* Merchants Nat. Bank, 90 Ky. 255, 13 S. W. 910, 9 L. R. A. 108; Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24; Merrill *v.* Souther, 6 Dana 305; Robbins *v.* Holley, 1 T. B. Mon. 191. **Md.** Willson *v.* Williams, 108 Md. 522, 70 Atl. 409; Twigg *v.* Hopkins, 85 Md. 301, 37 Atl. 24; Marshall *v.* Cooper, 43 Md. 46; Levy *v.* Steinbach, 43 Md. 212. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 102 N. E. 653; Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391. **Minn.** St. Paul & M. Trust Co. *v.* Leck, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 576; Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579; Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543. **Miss.**—Lockwood *v.* Rainey, 19 So. 294; Posey *v.* Maddox, 65 Miss. 193, 3 So. 460. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260; Reppy *v.* Reppy, 46 Mo. 571; Field *v.* Oliver, 43 Mo. 200. **Neb.**—Richardson *v.* Doty, 44 Neb. 73, 62 N. W. 254; Thrall *v.* Omaha Hotel Co., 5 Neb. 295, 25 Am. Rep. 488. **Nev.**—Foulks *v.* Rhodes, 12 Nev. 225. **N. J.**—Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689; Jackson *v.* Bell, 31 N. J. Eq. 554. **N. Y.**—O'Connor *v.* Brandt, 12 App. Div. 596, 42 N. Y. Supp. 1079; Clute *v.* Warner, 8 App. Div. 40, 40 N. Y. Supp. 392; Holden *v.* Gilbert, 7 Paige 208; Manevitz *v.* Northern Bank, 133 N. Y. Supp. 745. **N. C.**—Raisin & Co. *v.* Thomas, 88 N. C. 148; Smith *v.* Smith, 79 N. C. 455. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ohio.**—King *v.* Armstrong, 50 Ohio St. 222, 34 N. E. 163; Barbour *v.* National Exch. Bank, 50 Ohio St. 90, 33 N. E. 542, 20 L. R. A. 192; Baker *v.* Kinsey, 41 Ohio St. 403. **Ore.** Mitchell *v.* Holman, 30 Ore. 280, 47 Pac. 616. **Pa.**—Craighead *v.* Swartz, 219 Pa. 149, 67 Atl. 1003; *In re* Lowman's Appeal, 3 Watts & S. 349; Stewart *v.* Coulter, 12 Serg. & R. 252. **S. C.** Enter *v.* Quesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891. **Tenn.** Memphis & C. R. Co. *v.* Greer, 87 Tenn. 698, 11 S. W. 931, 4 L. R. A. 858; Clift *v.* Martin, 4 Baxt. 387; Fields *v.* Carney, 4 Baxt. 137; Howe Sewing Machine Co. *v.* Zachary, 2 Tenn. Ch. 478. **Tex.**—Duncan *v.* Magette, 25 Tex. 245; Castro *v.* Gentiley, 11 Tex. 28; Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504. **Vt.**—Smith *v.* McDonald, 56 Vt. 305; Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Va.**—Childress *v.* Jordan, 107 Va. 275, 58 S. E. 563; Gordon *v.* Rixey's Admr., 86 Va. 853, 11 S. E. 562; Feazle *v.* Dillard, 5 Leigh (32 Va.) 30; Hupp *v.* Hupp, 6 Gratt. (47 Va.) 310; McClellan *v.* Kinnaird, 6 Gratt. (47 Va.) 352. **W. Va.**—Farland *v.* Wood, 35 W. Va. 458, 14 S. E. 140; Mattingly *v.* Sutton, 19 W. Va. 19. **Wis.**—Piotrowski

some cases, it is not of itself sufficient, in the absence of other reasons for equitable interference.[7]

(II.) Nonresidence. — Plaintiff's nonresidence is a material fact which equity will consider in connection with the allowance of a set-off.[8] There are many authorities which regard nonresidence[9] as of itself

v. Czerwinski, 138 Wis. 396, 120 N. W. 268; Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766; Pendleton *v.* Beyer, 94 Wis. 31, 68 N. W. 415; Jones *v.* Piening, 85 Wis. 264, 55 N. W. 413. **Eng.** *Ex parte* Stephens, 11 Ves. Jr. 24, 32 Eng. Reprint 996.

[a] **"Courts of equity always recognize the influence of insolvency** on the rights of parties touching the matter of set-offs, and in adjusting transactions between them will regard the equities of the solvent party and so accommodate their affairs as to minimize, as far as consistent with the rights of third persons, loss from that cause." Childress *v.* Jordan, 107 Va. 275, 58 S. E. 563.

[b] **The reason for the rule** was stated in Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, where it was said: "It is certainly unconscientious for an insolvent party to coerce the payment of his claim, when he is owing the other party an equal or larger sum, and thus leave the latter remediless; nor should a nonresident be allowed, under like circumstances, to enforce, through the agency of the courts, the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then, perhaps, find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such results should be prevented. Indeed, the doctrine of equitable set-off, to the extent it was formerly applied, was based upon moral justice, and to meet such cases as the above, thus preventing wrong."

[c] **Insolvency of Indorser's Principal.**—Where defendant was sued as an indorser of a note executed by the plaintiff's assignor, as maker, and was forced to pay the same, an assignment prior to such payment of a debt due by account from the defendant to the assignor did not preclude defendant from establishing an equitable set-off; it appearing that the assignor was insolvent at the time he executed the note and when he assigned the amount. Nolan Bros. Lumber Co. *v.* Dudley Lumb. Co., 128 Tenn. 11, 156 S. W. 465, Ann. Cas. 1914D, 744, 46 L. R. A. (N. S.) 62.

[d] **That the superintendent of banks has taken possession** of a bank does not create an inference that the bank is insolvent within the rule permitting an equitable set-off where the party is insolvent. Manevitz *v.* Northern Bank, 133 N. Y. Supp. 745.

[e] **In case of an assigned claim,** the insolvency of the assignor is an important and sometimes controlling consideration in determining whether a suit in equity to set-off may be maintained. Worcester-Brooklyn Realty Co. *v.* Bailey, 161 App. Div. 935, 146 N. Y. Supp. 59; Smith *v.* Felton, 43 N. Y. 419.

7. **U. S.**—Gordon *v.* Lewis, 2 Sumn. 143, 10 Fed. Cas. No. 5,614; Howe *v.* Sheppard, 2 Sumn. 409, 12 Fed. Cas. No. 6,773. **Mich.**—Hale *v.* Holmes, 8 Mich. 37; Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69. **N. Y.** Keep *v.* Lord, 2 Duer 78. **N. C.**—Riddick *v.* Moore, 65 N. C. 382.

8. **Colo.**—Plattner Implement Co. *v.* Bradley, Alderson & Co., 40 Colo. 95, 90 Pac. 86. **D. C.**—Fitzgerald *v.* Wiley, 22 App. Cas. 329. **Ga.**—Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878; Ingram *v.* Jordan, 55 Ga. 356. **Ill.**—Quick *v.* Lemon, 105 Ill. 578. **Ia.**—Davis *v.* Milburn, 3 Iowa 163. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Kentucky Flour Co.'s Assn. *v.* Merchants' Nat. Bank, 90 Ky. 255, 13 S. W. 910, 9 L. R. A. 108; Merrill *v.* Souther, 6 Dana 305. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 102 N. E. 653. **Mo.**—Gemmell *v.* Hueben, 71 Mo. App. 291. **N. J.** Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83. **Tenn.**—Edminson *v.* Baxter, 41 Hayw. 112, 9 Am. Dec. 75. **Tex.**—Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504. **Wis.**—Phoenix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

9. **U. S.**—North Chicago Rolling Mill Co. *v.* St. Louis Ore & S. Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565; Brown *v.* Pegram, 149 Fed. 515. **Ala.**—Mackintosh *v.* Stewart, 181 Ala. 328, 61 So. 956. **Ark.**—Ewing-Merkel

sufficient, and a few which require something in addition thereto.[10]

c. *Particular Applications.* — The jurisdiction of equity to allow set-offs and other cross-demands where the same would not be available in a court of law has been exercised in regard to unliquidated claims,[11] claims not matured,[12] claims arising in tort,[13] and in cases wherein the element of mutuality was wanting.[14]

H. Remedies Compared and Distinguished. — **1. Necessity for.** Courts very often confuse the terms set-off, counterclaim and recoupment. Care is required not to be misled by apparent analogies for the principles applicable to each remedy are in many respects different from those applicable to the others.

2. Set-off and Recoupment. — The remedies of recoupment and set-off, though designed in general to serve a similar purpose,[15] and closely related in certain respects,[16] nevertheless differ in many essential particulars.[17]

Recoupment is a rule of the common law, and not like set-off a creature of statute.[18] Recoupment springs from a violation by the plaintiff of a legal right of the defendant created by the contract or transaction upon which the suit is brought, while set-off is a demand

Electric Co. *v.* Lewisville Light & Water Co., 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21. **Colo.**—Plattner Implement Co. *v.* Bradley, Alderson & Co., 40 Colo. 95, 90 Pac. 86. **D. C.**—Fitzgerald *v.* Wiley, 22 App. Cas. 329. **Ga.**—Bibb Land Lumber Co. *v.* Lima Machine Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401; Livingston *v.* Marshall, 82 Ga. 281, 11 S. E. 542. **Ill.**—Quick *v.* Lemon, 105 Ill. 578. **Ind.** Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222; Hannon *v.* Hilliard, 83 Ind. 362. **Ia.** Davis *v.* Milburn, 3 Iowa 163. **Ky.** Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24; Aldridge *v.* Birney, 7 T. B. Mon. 344, 18 Am. Dec. 183; Taylor *v.* Stowell, 4 Metc. 175; Smith's Exrs. *v.* Field, 6 Dana 361; Moss *v.* Rowland, 1 Duv. 321; Abernathy *v.* Meyer-Bridges Coffee & Spice Co., 30 Ky. L. Rep. 1236, 100 S. W. 862. **N. Y.**—Fera *v.* Wickham, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456. **Tenn.**—Edminson *v.* Baxter, 4 Hayw. 112, 9 Am. Dec. 75. **Tex.**—Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504. **Wis.**—Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

[a] **Rule Adopted by Statute.**—Rigney *v.* Monette, 45 La. Ann. 940, 13 So. 201; State Nat. Bank *v.* Evans, 32 La. Ann. 464; Mayo *v.* Savory, 4 Rob. (La.) 1; Senecal *v.* Smith, 9 Rob. (La.) 418.

10. **Md.**—Smith *v.* Washington Gas Light Co., 31 Md. 12, 100 Am. Dec. 49; Beall *v.* Brown, 7 Md. 393. **Minn.** Birdsall *v.* Fischer, 17 Minn. 100. **N. Y.** Murray *v.* Toland, 3 Johns. Ch. 569; Tone *v.* Brace, 8 Paige 597. **N. D.** Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133.

11. See *infra*, VII, C, 7, b, (VI).
12. See *infra*, VII, C, 7, c, (VI).
13. See *infra*, VII, C, 3, (II).
14. See *infra*, VII, D, 1, a, (III).
15. See *supra*, I, A, 2.
16. See *infra*, this note.

[a] **They Are Each in a Sense Set-offs.**—Lehman *v.* Austin, 195 Ala. 244, 70 So. 653; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59.

17. **Ala.**—Lehman *v.* Austin, 195 Ala. 244, 70 So. 653; Carolina Portland C. Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Dalton *v.* Bunn, 152 Ala. 577, 44 So. 625; Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514; T. L. Farrow Mercantile Co. *v.* Riggins, 14 Ala. App. 529, 71 So. 963. **Fla.**—Jarrett Lumber Co. *v.* Reese, 66 Fla. 317, 63 So. 581. **Mass.**—American Bridge Co. *v.* Boston, 202 Mass. 374, 88 N. E. 1089. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **N. Y.** Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447.

18. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Grocery Co., 77 So. 748; Merchants' Bank *v.* Acme Lumber & Mfg. Co., 160 Ala. 435, 49 So. 782. **Mass.**—American Bridge Co. *v.* Boston, 202 Mass. 374, 88 N. E. 1089. **N. Y.**

independent of such contract or transaction.[19] Recoupment, unlike set-off, permits a claim for damages based upon tort to be set up against one founded entirely upon contract.[20] Recoupment may be had under the general issue, while set-off must be pleaded or interposed under notice.[21] Recoupment does not confess the action sued on by plaintiff, as does set-off.[22] Recoupment has no regard to whether the claim be liquidated or unliquidated, which is not true of set-off,[23] nor does recoupment, except as modified by statute,[24] permit an affirmative judgment in favor of defendant for the excess of defendant's damages over plaintiff's claim,[25] or a subsequent action against the plaintiff for such balance,[26] particulars which may or may not, according as the statutes declare, be true of set-off.

3. Counterclaim and Set-off. — A counterclaim in some states embraces set-off,[27] but is more comprehensive than set-off[28] in that it covers recoupment as well.[29] Moreover, unliquidated demands may be interposed by way of counterclaim but are generally not available as

Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447.

19. **Ala.**—Merchants' Bank *v.* Acme Lumber & Mfg. Co., 160 Ala. 435, 49 So. 782; Dalton *v.* Bunn, 152 Ala. 577, 44 So. 625; T. L. Farrow Mercantile Co. *v.* Riggins, 14 Ala. App. 529, 71 So. 963. **Fla.**—Jarrett Lumber Co. *v.* Reese, 66 Fla. 317, 63 So. 581. **Ind.** Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254. **Mich.**—Ward *v.* Fellers, 3 Mich. 281. **Miss.**—Hayes *v.* Slidell Liquor Co., 99 Miss. 583, 55 So. 356; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Myers *v.* Estell, 47 Miss. 4. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Batterman *v.* Pierce, 3 Hill 171. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

20. Sydney *v.* Mugford Printing & Engraving Co., 214 Fed. 841; Geo. E. Lloyd & Co. *v.* Manufacturers' & Merchants' Warehouse Co., 102 Ill. App. 551. See *infra,* XII, A, 1.

21. Geo. E. Lloyd & Co. *v.* Manufacturers' & Merchants' Warehouse Co., 102 Ill. App. 551. See *infra,* VIII, B, 3.

22. Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Smith *v.* Bellrose, 200 Ill. App. 368.

23. **U. S.**—The Zouave, 29 Fed. 296. **Ill.**—Clause *v.* Bullock Printing Press Co., 118 Ill. 612, 9 N. E. 201. **Ind.** West *v.* Hayes, 104 Ind. 251, 3 N. E. 932. **Miss.**—Hayes *v.* Slidell Liquor Co., 99 Miss. 583, 55 So. 356; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **N. J.**—Parker *v.* Hartt, 32 N. J. Eq. 225. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Mayor *v.* Mabie, 13 N. Y. 151; Davis *v.* American L. Ins. & T. Co., 4 Edw. Ch. 308; Batterman *v.* Pierce, 3 Hill 171. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115. **W. Va.**—Clark's Cove Guano Co. *v.* Appling, 33 W. Va. 470, 10 S. E. 809; Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

See *infra,* VII, C, 7, b, (II).

24. See *infra,* this note.

[a] **The statute has assimilated recoupment to set-off** in so far as to allow a judgment for the defendant if his claim or demand exceeds that of the plaintiff but that does not obliterate the distinction between the two. Merchants' Bank *v.* Acme Lumber & Mfg. Co., 160 Ala. 435, 49 So. 782.

25. **Ill.**—Bostrom *v.* Becker, 172 Ill. App. 410. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447. **W. Va.** Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

26. Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447.

27. See *supra,* I, D, 2.

28. Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832.

[a] **"Under the statutes, a set-off cannot be a counterclaim,** nor vice versa. The courts of this state have recognized the distinction between set-off and counterclaim." Scarritt Est. Co. *v.* Schmelzer & Sons Arms Co., 110 Mo. App. 406, 86 S. W. 489.

29. See *supra,* I, D, 2.

a set-off,[30] and counterclaim, unlike set-off, is available in tort actions as well as in those ex contractu.[31]

4. Recoupment and Counterclaim. — Recoupment, which, as has been seen, is in some states incorporated into the statutory counterclaim,[32] is quite similar to that class of counterclaims which arise out of the contract or transaction sued on,[33] but the two remedies differ in their origin and scope. Recoupment is a common law remedy, counterclaim a creature of the codes.[34] Recoupment is not so broad and comprehensive as counterclaim, which though it embraces recoupment[35] authorizes resort by defendant to causes of action by way of defense other than set-off and recoupment.[36] And recoupment is limited to the amount of the plaintiff's demand and to the reduction or extinction thereof, while counterclaim also contemplates affirmative recovery against the plaintiff.[37]

II. CHARACTER AND CONSTRUCTION OF STATUTES.[38] Since set-off, counterclaim and recoupment tend to advance justice by preventing a multiplicity of suits,[39] and the statutes in reference to them are usually deemed remedial in character,[40] such statutes are gener-

30. See *infra*, VII, C, 7.
31. See *infra*, V, B, 3.
32. See *supra*, I, D, 2.
33. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. See *infra*, VII, C, 3, b, (III).
34. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376; Desha's Exrs. *v.* Robinson, 17 Ark. 228.
35. See *supra*, I, D, 2.
36. Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381; Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661.
37. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376; Peuser *v.* Marsh, 167 App. Div. 604, 153 N. Y. Supp. 381. And see *infra*, XII, A.
38. See generally the title "**Statutes.**"
39. See *supra*, I, A, 2.
40. **Ala.**—Bowen *v.* Snell, 9 Ala. 481. **Ark.**—Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; Leach *v.* Lambeth, 14 Ark. 668. **Ga.**—Mell *v.* Moony, 30 Ga. 413. **Ill.**—Edwards *v.* Todd, 2 Ill. 462; Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484. **Ia.**—Campbell *v.* Fox, 11 Iowa 318. **Kan.**—Stevens *v.* Able, 15 Kan. 584. **Md.**—Clarke *v.* Magruder, 2 Har. & J. 77. **Mass.**—Richards *v.* Blood, 17 Mass. 66; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409. **Minn.**—Midland Co. *v.* Broat, 50 Minn. 502, 52 N. W. 972, 17 L. R. A. 312; Temple *v.* Scott, 3 Minn. 419. **Mo.** Barnes *v.* McMullins, 78 Mo. 260; Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106; Kamerick *v.* Castleman, 23 Mo. App. 481. **Nev.** Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; More *v.* Rand, 60 N. Y. 208; Ashley *v.* Marshall, 29 N. Y. 494; Chambovet *v.* Cagney, 10 Abb. Pr. (N. S.) 31, 41 How. Pr. 125, 2 Sweeney 378; Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Supp. 1119, 53 N. Y. St. 438; Wickham *v.* Weil, 17 N. Y. Supp. 518. **N. C.**—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Pearsall *v.* Mayers, 64 N. C. 549. **Ohio.**—Peter *v.* Farrel Foundry & M. Co., 53 Ohio St. 534, 42 N. E. 690. **Pa.**—Montz *v.* Morris, 89 Pa. 392; Ahl *v.* Rhoads, 84 Pa. 319; Carman *v.* Garrison, 13 Pa. 158; Good *v.* Good, 5 Watts 116. **S. D.**—McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. **Tex.** Reeves *v.* White (Tex. Civ. App.), 161 S. W. 43. **Vt.**—Thompson *v.* Congdon, 43 Vt. 396; Mott *v.* Mott, 5 Vt. 111. **Va.**—Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Allen *v.* Hart, 18 Gratt. (59 Va.) 722; Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460. **Wash.**—Gray *v.* Granger,

ally,[41] though not always,[42] given a liberal construction. But the statute cannot by construction be extended to include cross-demands of a character not reasonably within its language and terms.[43]

III. WHAT LAW GOVERNS. — Set-off, recoupment and counterclaim pertain to the remedy, and so are governed by the laws of the place where the action is brought.[44]

48 Wash. 442, 93 Pac. 912. **W. Va.** Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Wis.** Sprout *v.* Crowley, 30 Wis. 187.

41. **Ala.**—Bowen *v.* Snell, 9 Ala. 481; Hall *v.* Cook's Admr., 1 Ala. 629. **Ark.**—Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; Leach *v.* Lambeth, 14 Ark. 668. **Fla.**—Bates *v.* Lanier, 77 So. 628. **Ga.**—Mell *v.* Moony, 30 Ga. 413. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Ill.**—Edwards *v.* Todd, 2 Ill. 462; Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484. **Ia.**—Campbell *v.* Fox, 11 Iowa 318. **Kan.**—Stevens *v.* Able, 15 Kan. 584. **Md.**—Clarke *v.* Magruder, 2 Har. & J. 77. **Mass.**—Stowers *v.* Barnard, 15 Pick. 221; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409. **Minn.**—Blue Earth Valley Tel. Co. *v.* Com. Utilities Co., 140 Minn. 198, 167 N. W. 554; W. W. Kimball Co. *v.* Massey, 126 Minn. 461, 148 N. W. 307; Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312. **Miss.**—Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Nev.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. J.**—MacPherson *v.* Mackey, 103 Atl. 36. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Glen & Hall Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58; O'Brien *v.* Dwyer, 76 App. Div. 516, 78 N. Y. Supp. 600; Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566. **N. C.**—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Pearsall *v.* Mayers, 64 N. C. 549. **Ohio.** Peter *v.* Farrel Foundry & M. Co., 53 Ohio St. 534, 42 N. E. 690. **Ore.** Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661. **Pa.**—Montz *v.* Morris, 89 Pa. 392; Ahl *v.* Rhoads, 84 Pa. 319; Tustin *v.* Cameron, 5 Whart. 379. **R. I.**—McPhillips *v.* Durkin, 103 Atl. 929; Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022; Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250. **S. D.**—McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. **Tex.**—Reeves *v.* White (Tex. Civ. App.), 161 S. W. 43. **Vt.**—Stewart *v.* Knight, 83 Vt. 201, 75 Atl. 12; Thompson *v.* Congdon, 43 Vt. 396; Mott *v.* Mott, 5 Vt. 111. **Va.**—New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351; Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Wartman *v.* Yost, 22 Gratt. (63 Va.) 595. **Wash.**—Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Sprout *v.* Crowley, 30 Wis. 187.

[a] **Statute provides for liberal** construction of the laws relating to set-off and counterclaim. MacPherson *v.* Mackay (N. J.), 103 Atl. 36.

42. Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396.

43. Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

[a] **Statutes providing for suit against a state** are strictly construed, and unless such a statute expressly permits a certain condition of fact to be the subject of an original action against the state, such matter cannot be the subject of a set-off in an action by the state upon a contract, although another statute permits such matter to be pleaded as a set-off in actions on contracts generally. Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

44. **U. S.**—Snyder *v.* Pharo, 25 Fed. 398. **Ia.**—Savery *v.* Savery, 8 Iowa 217. **Ky.**—Davis *v.* Morton, 5 Bush 160, 96 Am. Dec. 345; Galliopolis Bank *v.* Trimble, 6 B. Mon. 599. **Mass.** Stone *v.* Old Colony St. R. Co., 212 Mass. 459, 99 N. E. 218. **N. H.**—Gibbs *v.* Howard, 2 N. H. 296. **N. Y.**—Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482. **Ohio.**—Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168. **Vt.**—Carver *v.* Adams, 38 Vt. 500.

IV. JURISDICTION.[45] — A. EFFECT OF CROSS-DEMAND ON COURT'S JURISDICTION OF THE ACTION. — Whether a particular suit or action is within the court's jurisdiction is usually ascertained from the averments of plaintiff's petition or complaint[46] without reference to anything set up by way of cross-demand and so the court will retain jurisdiction over the cause of action notwithstanding matters are pleaded as set-off or counterclaim beyond its jurisdiction.[47]

B. JURISDICTION TO ENTERTAIN CROSS-DEMAND. — **1. In General.** It is essential that the court have acquired jurisdiction of all parties interested in the matters involved in the counterclaim or set-off,[48] and of the subject matter thereof.[49] It may be said in general that any court which would have jurisdiction over an independent action upon the demand or cause of action asserted by way of cross-demand, has jurisdiction of the cross-demand itself,[50] and within the limitation thus

Eng.—Meyer *v.* Dresser, 16 C. B. N. S. 646, 143 Eng. Reprint 1280.

45. See generally the title "**Remedy.**"

46. See the title "**Jurisdiction.**"

47. **Cal.**—Hillger *v.* Yenrick, 25 Cal. App. 604, 144 Pac. 980. **Colo.** Ramer *v.* Smith, 4 Colo. App. 434, 36 Pac. 302. **Ind.**—Alexander *v.* Peck, 5 Blackf. 308. **Minn.**—Duresen *v.* Blackmarr, 117 Minn. 206, 135 N. W. 530, Ann. Cas. 1913D, 158; Barber *v.* Kennedy, 18 Minn. 216. **N. J.**—Clancy *v.* Neumeyer, 51 N. J. L. 299, 17 Atl. 154; Montgomery *v.* Snowhill, 2 N. J. L. 361. **Pa.**—Jones *v.* Stauffer, 1 Leg. Gaz. 91; **James *v.* Frick,** 3 W. N. C. 291. **S. C.**—Corley *v.* Evans, 69 S. C. 520, 48 S. E. 459. **Tenn.**—Ross *v.* Jackson, Cooke 406; Jordan *v.* Barry, 4 Hayw. 102. **Va.**—Ferguson *v.* Highley, 2 Va. Cas. (4 Va.) 255. **Wis.** Martin *v.* Eastman, 109 Wis. 286, 85 N. W. 359.

See 17 STANDARD PROC. 836, 851.

48. Cummings *v.* Morris, 25 N. Y. 625, *affirming* 3 Bosw. 560; Devries & Co. *v.* Warren, 82 N. C. 356.

[a] **If defendant's counterclaim involves the foreclosure of a mortgage** and the sale of land and the court has no jurisdiction over the subject matter, by reason of a statute limiting its jurisdiction to lands situated in its own county, a demurrer on the ground of lack of jurisdiction should be sustained. Lyman *v.* Stanton, 40 Kan. 727, 20 Pac. 510.

49. Lindsay's Exrs. *v.* Lindsay, 1 McCord (S. C.) 490.

[a] **A United States district court in bankruptcy** has no jurisdiction to determine, on the trustee's petition for an order requiring a bank to pay money deposited by the bankrupt, the bank's right to set off an unmatured note against the bankrupt, unless the bank has, by proving a claim based upon such note, subjected itself to the court's summary jurisdiction. If the bank contests such petition on jurisdictional grounds, the parties must be left to the remedy by action. Louisville Trust Co. *v.* Comingor, 184 U. S. 18, 22 Sup. Ct. 277, 46 L. ed. 413; First Nat. Bank *v.* Hopkins, 199 Fed. 873, 118 C. C. A. 321; *In re* Horgan, 158 Fed. 774, 86 C. C. A. 130; *In re* Radley Steel Const. Co., 212 Fed. 462.

[b] **Patent Infringement.** — Patent suits may be brought in any United States district court where the alleged infringer has "committed the act of infringement and has a regular and established place of business." Accordingly a counterclaim based on infringement of a patent can be set up only in a district court of a district where the act of infringement was done and where the complainant has a regular and established place of business. McGill *v.* Sorensen, 209 Fed. 876.

50. **U. S.**—McGill *v.* Sorensen, 209 Fed. 876. **Ark.**—Kilgore Lumb. Co. *v.* Thomas, 95 Ark. 43, 128 S. W. 62. **Cal.** Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820. **Colo.**—Ramer *v.* Smith, 4 Colo. App. 434, 36 Pac. 302. **Ga.** Picquet *v.* Cormick's Admr., Dudley 20; Cash *v.* Cash, Ga. Dec. 97. **Kan.** Thompson *v.* Stone, 63 Kan. 881, 64 Pac. 969; Lyman *v.* Stanton, 40 Kan. 727, 20 Pac. 510. **Ky.**—Bennett *v.* McCrocklin, 3 Metc. 322. **Mo.**—Reed *v.* Snodgrass, 55 Mo. 180; Almeida *v.*

expressed, set-offs and counterclaims may be asserted in courts of every kind.[51]

A cross-demand involving equitable grounds and necessitating the granting of equitable relief can properly be pleaded only in a court having equitable jurisdiction,[52] and cannot therefore be entertained by a court exercising strictly common law powers.[53] And on the other hand a defendant cannot set up as a counterclaim in equity a cause

Sigerson, 20 Mo. 497; Robinett *v.* Nunn, 9 Mo. 246; Vance *v.* McHugh, 187 Mo. App. 708, 173 S. W. 80. **N. J.** Clancy *v.* Neumeyer, 51 N. J. L. 299, 17 Atl. 154. **N. Y.**—Cragin *v.* Lovell, 88 N. Y. 258, 2 Civ. Proc. 128. **N. C.** Ijames *v.* McClamroch, 92 N. C. 362. **S. C.**—Lindsay's Exrs. *v.* Lindsay, 1 McCord 490; Simpson *v.* McMillion, 1 Nott & M. 192. **Tenn.**—Reynolds *v.* Wells, 1 Treadw. 478, 3 Brev. 407. **Tex.**—Hardeman *v.* Morgan, 48 Tex. 103. **Can.**—Canadian Bank *v.* Northwood, 5 Manitoba 342.

51. See *infra*, this note.

[a] **Municipal Court.** — Norton *v.* Graham, 130 Ga. 391, 60 S. E. 1049; Park *v.* Carmichael, 20 Ga. App. 36, 92 S. E. 397; Security Mortgage Co. *v.* Kallis, 169 N. Y. Supp. 566.

[b] **Justice's Courts.**—**Ill.**—Howell *v.* Goodrich, 69 Ill. 556. **Mo.**—Green *v.* Beebe, 39 Mo. App. 465. **N. Y.** McCumber *v.* Goodrich, 1 Johns. 56; Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Supp. 497, 20 N. Y. St. 639. **Pa.**—Rafferty *v.* Clark, 2 Pa. Co. Ct. 301. **Wis.** Hartel *v.* Kite, 70 Wis. 396, 36 N. W. 7.

[c] **County Court.** — Hancock *v.* Whitehall Tobacco Warehouse Co., 100 Va. 443, 41 S. E. 860.

[d] **Probate court** or court of general jurisdiction exercising probate powers has jurisdiction to determine the validity of an offset claimed by an executor in response to the petition of an estate creditor for an order directing the payment of his claim. Estate of Bell, 168 Cal. 253, 141 Pac. 1179.

[e] **"Courts of admiralty** are not invested by statute with any authority to hold plea of set-offs generally. Whenever they do entertain such claims, it is upon general principles of equity, where the claims attach to the particular maritime demand submitted to their cognizance by the libel, and not upon any notion of a right to enforce such set-offs as are now recognized and enforced in courts of common law under statutable provisions." Bains *v.* Schooner James, 1 Bald. 544, 2 Fed. Cas. No. 756. See 1 STANDARD PROC. 482.

[f] **Appellate Jurisdiction, U. S. Supreme Court.**—The assertion of a right of set-off in a bankruptcy proceeding presents a claim of federal right which will sustain an appeal to the supreme court of the United States. Western Tie & T. Co. *v.* Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. ed. 571.

52. See the title **"Equity Jurisdiction and Procedure."**

53. Ala.—Southern Grocery Co. *v.* Harrison, 184 Ala. 266, 63 So. 535. **Ga.**—Hecht *v.* P. H. Snook & A. F. Co., 114 Ga. 921, 41 S. E. 74; Janes *v.* City of Cedartown, 14 Ga. App. 72, 80 S. E. 339; Cole *v.* Illinois Sewing Mach. Co., 7 Ga. App. 338, 66 S. E. 979. **N. C.** Love *v.* Rhyme, 86 N. C. 576.

[a] **The city court** has no jurisdiction to entertain a cross-demand of an equitable nature. Janes *v.* City of Cedartown, 14 Ga. App. 72, 80 S. E. 339; Cole *v.* Illinois Sewing Machine Co., 7 Ga. App. 338, 66 S. E. 979.

[b] **In cases of strict trusts** the jurisdiction of equity is exclusive and in an action at law defendant cannot set off a debt due him from plaintiff under a trust agreement. Southern Grocery Co. *v.* Harrison, 184 Ala. 266, 63 So. 535.

[c] **Set-off of Executor's Bank Deposit Against Note of Decedent.**—In Estate of Bell, 168 Cal. 253, 141 Pac. 1179, it was held that upon petition of the representative of a bank praying the court to order an executor to pay an allowed claim based upon decedent's note to the bank, the court, as a probate court, had the same jurisdiction as a court of equity, and had power to permit the executor to set off a demand based upon the bank's obligation to repay estate funds therein deposited.

of action which he would have to assert at law if he sued upon it.[54]

2. Jurisdictional Amount. — The question of jurisdiction as affected by the amount of the cross-demand is treated elsewhere in this work.[55]

V. PROCEEDINGS IN WHICH AVAILABLE. — A. In General. The nature of the proceeding in which set-off or counterclaim are available is largely controlled by statute,[56] and the same is true in some states as to recoupment,[57] although, as has been seen,[58] this latter remedy exists independently of statute and its scope must generally depend solely on judicial decisions.

B. Actions. — **1. In General.** — Counterclaims and set-offs are sometimes restricted to actions,[59] and furthermore can only be asserted in those actions where a several judgment might be had between the parties.[60]

54. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190. See also *supra*, I, G.

[a] **A counterclaim in equity must be** one upon which a suit might be maintained by the defendant against the plaintiff in the suit. Title Ins. & Trust Co. *v.* Northwestern Long-Distance T. Co., 88 Ore. 666, 173 Pac. 251; Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190.

[b] **Misrepresentation as to Profits.** In a suit to foreclose a chattel mortgage on property given to secure purchase money notes, defendant cannot set up as a counterclaim damages for misrepresentations made by plaintiff in the sale to him of a bakery. His remedy for such misrepresentations is at law. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190.

[c] **The wrongful conversion of property** is a tort for which an action at law and not a suit can be maintained and so is not a proper matter for a counterclaim in equity. Title Ins. & Trust Co. *v.* Northwestern Long-Distance T. Co., 88 Ore. 666, 173 Pac. 251.

55. See 17 Standard Proc. 836, 851.

56. Ala.—Central of Georgia R. Co. *v.* Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 So. 202. **Ark.** Southern Tel. Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158. **Cal.**—*In re* Bell's Estate, 168 Cal. 253, 141 Pac. 1179; Bell *v.* Thompson, 8 Cal. App. 483, 97 Pac. 158. **Ga.**—Culver *v.* J. S. Wood & Bros., 138 Ga. 60, 74 S. E. 790. **Ill.** Replogle *v.* Toledo St. L. & W. Ry. Co., 184 Ill. App. 338. **Ind.**—Lesh *v.* Davidson, 181 Ind. 429, 104 N. E. 642. **Ia.**—J. J. Smith Lumb. Co. *v.* Scott County Garbage R. & F. Co., 149 Iowa 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184. **Mass.**—Montague *v.* Boston & F. Iron Works, 97 Mass. 502. **Mich.** Smith *v.* Warner, 16 Mich. 390. **Mo.** State *v.* Modrell, 15 Mo. 421. **N. Y.** Carroll *v.* Sharp, 122 N. Y. Supp. 694; Wilmot *v.* Hurd, 11 Wend. 584; Hills *v.* Tallman, 21 Wend. 674; McIntyre *v.* Smathers, 118 App. Div. 716, 103 N. Y. Supp. 873. **N. C.**—Dowd *v.* Faucett, 15 N. C. 92. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Pa.**—Wagner *v.* Prettyman, 53 Pa. Super. 316. **S. C.**—Pee Dee Lumber Co. *v.* Fountain, 90 S. C. 122, 72 S. E. 885; Ludden & Bates So. M. House *v.* Hornsby, 45 S. C. 111, 22 S. E. 781. **Tex.**—Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816; Hallinan *v.* Levytansky, 46 Tex. Civ. App. 228, 102 S. W. 463. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

57. Culver *v.* J. S. Wood & Bros., 138 Ga. 60, 74 S. E. 790; Arnold *v.* Carter, 125 Ga. 319, 54 S. E. 177; Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811; Finney *v.* Cadwallader, 55 Ga. 75; Latimer *v.* Lane, 45 Ga. 474; Williams *v.* Waters, 36 Ga. 454.

58. See *supra*, I, C, 2.

59. *In re* Bell's Estate, 168 Cal. 253, 141 Pac. 1179.

[a] **Enforcement of Claim Against Estate.**—A proceeding to compel the representative of a decedent's estate to pay an allowed claim against the estate is an "action" within the code provision as to counterclaim. *In re* Bell's Est., 168 Cal. 253, 141 Pac. 1179.

60. *In re* Bell's Estate, 168 Cal.

2. Ex Contractu. — a. *Set-off.* — Set-off is, in general, available in actions brought upon any contract or agreement express or implied,[61] whether the action, if formal, be debt,[62] assumpsit,[63] or covenant.[64]

b. *Counterclaim and Recoupment.* — Recoupment[65] and counterclaim[66] are of course both available in contract actions.

253, 141 Pac. 1179; Spurgin *v.* Kruse, 125 Ill. App. 507.

[a] **A suit to recover a penalty** is not within the statute. Spurgin *v.* Kruse, 125 Ill. App. 507.

61. **Ark.** — Southern Tel. Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158. **Ill.**—Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Rae *v.* Hulbert, 17 Ill. 572; Replogle *v.* Toledo St. L. & W. Ry. Co., 184 Ill. App. 338; The American Laundry Mach. Co. *v.* Barr, 176 Ill. App. 519. **Ky.**—Roebuck *v.* Tennis, 5 T. B. Mon. 82. **Mich.**—Smith *v.* Warner, 16 Mich. 390. **N. Y.**—Downer *v.* Eggleston, 15 Wend. 51. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Vt.**—Blair *v.* Ellsworth, 55 Vt. 415. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Eng.**—Thorpe *v.* Thorpe, 3 Barn. & Ad. 580, 23 E. C. L. 257, 110 Eng. Reprint 211.

Necessity of demand being liquidated, see *infra,* VII, C, 7, b, (II).

[a] **The words contract and agreement are used** in their ordinary sense and do not embrace every imaginable litigation upon every cause of action. Spurgin *v.* Kruse, 125 Ill. App. 507.

[b] **In a suit for freight,** brought by a common carrier, the set-offs allowed by statute may be interposed. Central of Georgia R. Co. *v.* Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 So. 202.

62. Vuyton *v.* Brenell, 1 Wash. C. C. 467, 28 Fed. Cas. No. 17,026, 4 Dall. 205, 1 L. ed. 802.

63. Replogle *v.* Toledo St. L. & W. R. Co., 184 Ill. App. 338; The American Laundry Mach. Co. *v.* Barr, 176 Ill. App. 519; Morris *v.* Jamieson, 99 Ill. App. 32; Thorpe *v.* Thorpe, 3 Barn. & Ad. 580, 23 E. C. L. 257, 110 Eng. Reprint 211.

64. Roebuck *v.* Tennis, 5 T. B. Mon. (Ky.) 82; Smith *v.* Warner, 16 Mich. 390.

65. **Ark.**—Wheat *v.* Dotson, 12 Ark. 699. **Kan.**—St. Louis Ft. S. & W. R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Fanson *v.* Linsley, 20 Kan. 235. **Md.**—Lee *v.* Rutledge, 51 Md. 311. **N. Y.**—Van Epps *v.* Harrison, 5 Hill 63, 40 Am. Dec. 314.

[a] **Allowed in Actions on Sealed Contracts.—Ark.**—Wheat *v.* Dotson, 12 Ark. 699. **N. J.**—Price's Exrs. *v.* Reynolds, 39 N. J. L. 171. **N. Y.**—Van Epps *v.* Harrison, 5 Hill 63, 40 Am. Dec. 314, unless prohibited by statute.

66. **Ark.**—Epstein *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587. **Cal.**—Jeffreys *v.* Hancock, 57 Cal. 646. **Colo.**—Ebensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008. **Ind.**—Turner *v.* Simpson, 12 Ind. 413. **Ky.**—Cranor Smith Lumb. Co. *v.* Frith, 118 S. W. 307. **Minn.**—McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Schmidt *v.* Bickenbach, 29 Minn. 122, 12 N. W. 349. **Mo.**—Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27. **Mont.**—Collier *v.* Ervin, 3 Mont. 142. **N. Y.**—Kurtz *v.* McGuire, 5 Duer 660; Wadley *v.* Davis, 63 Barb. 500; Carroll *v.* Sharp, 122 N. Y. Supp. 694. **N. C.**—Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277; Trotter *v.* Swain, 90 N. C. 455. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **S. D.**—Hoeven *v.* Morley, 36 S. D. 421, 155 N. W. 191; Tuthill *v.* Sherman, 32 S. D. 103, 142 N. W. 257. **Tex.**—Hallinan *v.* Levytansky, 46 Tex. Civ. App. 228, 102 S. W. 463. **Wis.** Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585; Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263; Vilas *v.* Mason, 25 Wis. 310; Connors *v.* Taylor, 13 Wis. 230.

[a] **The fact that the open account is verified** does not affect the right to plead a counterclaim. Hallinan *v.* Levytansky, 46 Tex. Civ. App. 228, 102 S. W. 463; Cross *v.* Gall, 65 W. Va. 276, 64 S. E. 533.

[b] **Actions on Negotiable Instruments.—Ark.**—Daniel *v.* Gordy, 84 Ark. 218, 105 S. W. 256. **Cal.**—Waugenheim *v.* Graham, 39 Cal. 169. **Ia.** First Nat. Bank *v.* O'Connell, 84 Iowa

3. Ex Delicto. — a. *Set-off.* — Cross-demands by way of set-off can be interposed in contract actions only and are not available in actions in form ex delicto,[67] such as case,[68] trespass,[69] ejectment,[70] replevin,[71] detinue,[72] and trover and conversion.[73]

377, 51 N. W. 162, 35 Am. St. Rep. 313. **Ky.**—Nolle *v.* Thompson, 3 Metc. 121. **Neb.**—Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. Y.**—Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189. **N. C.**—Merritt Mill Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4. **N. D.** Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354. **S. D.**—Tuthill *v.* Sherman, 32 S. D. 103, 142 N. W. 257. **Wis.** Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

[c] **Actions for Purchase Price. Colo.**—Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008. **N. M.**—Leyser *v.* Rindskopf, 3 N. M. 382, 5 Pac. 540. **N. Y.**—Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. Supp. 456; Cupi *v.* Craftman's Club, 33 Misc. 757, 67 N. Y. Supp. 956. **N. C.**—Branch *v.* Chappell, 119 N. C. 81, 25 S. E. 783.

[d] **Actions for Services Rendered. N. Y.**—Weiss *v.* Rosenbaum, 115 N. Y. Supp. 121. **N. C.**—Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277. **Ore.**—Chamberlain *v.* Townsend, 72 Ore. 207, 142 Pac. 782, 143 Pac. 924.

[e] **Actions for Rent.** — Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Supp. 948, 24 Civ. Proc. 121, 62 N. Y. St. 517; Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585.

[f] **Actions on Bonds.—Ky.**—Tinsley *v.* Tinsley, 15 B. Mon. 454. **N. Y.** De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Supp. 358, 29 Civ. Proc. 250. **N. C.**—Devries & Co. *v.* Warren, 82 N. C. 356.

67. **Ala.**—Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725. **Ark.**—Southern Tel. Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158; Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131. **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Conn.**—Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511. **Ill.**—Spurgin *v.* Kruse, 125 Ill. App. 507; Gunnerson *v.* Erickson, 69 Ill. App. 159. **Ind.**—Lesh *v.* Davidson, 181 Ind. 429, 104 N. E. 642; Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655; Allen *v.* Randolph, 48 Ind. 496; Collins *v.* Groseclose, 40 Ind. 414; Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Md.**—Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **Mass.**—Cains *v.* Tirrell, 112 Mass. 22; Talbot *v.* Whipple, 7 Gray 122. **Neb.**—White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012. **N. Y.**—McIntyre *v.* Smathers, 118 App. Div. 776, 103 N. Y. Supp. 873. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. **Pa.**—Wagner *v.* Prettyman, 53 Pa. Super. 316; Hall's Safe Co. *v.* Walenk, 42 Pa. Super. 576; National Cash Register Co. *v.* Cochran, 22 Pa. Super. 582; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700; Dahl *v.* Louderback, 40 W. N. C. 386; Corpman *v.* Backistow, 2 Pearson 199. **Tex.** Brown *v.* Durham (Tex. Civ. App.), 42 S. W. 331.

[a] **Action for Libel.** — Brown *v.* Durham (Tex. Civ. App.), 42 S. W. 331.

[b] **Action for Nuisance.** — Talbot *v.* Whipple, 7 Gray (Mass.) 122; Pattison *v.* Richards, 22 Barb. (N. Y.) 143.

68. Replogle *v.* Toledo St. L. & W. Ry. Co., 184 Ill. App. 338; Gould *v.* Kelley, 16 N. H. 551.

[a] **In an action for negligently killing stock,** the railroad company cannot set off damages to its locomotive caused by plaintiff's stock running against the side thereof. Replogle *v.* Toledo St. L. & W. Ry. Co., 184 Ill. App. 338.

69. **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. App. 99, 93 Pac. 1108. **Fla.** Robinson *v.* L'Engle, 13 Fla. 482. **Ind.** Humphrey *v.* Merritt, 51 Ind. 197. **N. Y.** Allen *v.* Horton, 7 Johns. 23. **Pa.** Wilson *v.* McElroy, 32 Pa. 82. **W. Va.** Knight *v.* Brown, 25 W. Va. 808.

70. White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012.

71. See *infra*, V, D, 1, a.

72. See *infra*, V, D, 1, a.

73. **U. S.**—Van Zandt *v.* Hanover

Waiver of Tort. — Where the plaintiff waives the tort and sues in contract the defendants may plead a proper set-off.[74]

b. *Recoupment.* — Cross-demands by way of recoupment are not confined to actions on contract but may be interposed in proceedings ex delicto in character,[75] at least where the tort sued on springs out of a contract pleaded as inducement.[76]

c. *Counterclaim.* — As has been seen, a number of codes provide for two classes of counterclaims. Counterclaims of the one class arise out of the contract, transaction or subject of the action pleaded, those

Nat. Bank, 149 Fed. 127, 79 C. C. A. 23. **Ala.**—Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; Russell *v.* Russell, 62 Ala. 48. **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Ga.** Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878. **Ill.**—Stow *v.* Yarwood, 14 Ill. 424; Keaggy *v.* Hite, 12 Ill. 99; Sinamaker *v.* Rose, 62 Ill. App. 118. **Ind.** Lesh *v.* Davidson, 181 Ind. 429, 104 N. E. 642; Boil *v.* Simms, 60 Ind. 162; Block *v.* Swango, 10 Ind. App. 600, 38 N. E. 55. **Md.**—Fishwick *v.* Sewell, 4 Har. & J. 393. **Mich.**—Dole *v.* McGraw, 71 Mich. 106, 38 N. W. 686; Fuller *v.* Parrish, 3 Mich. 211. **Mo.** Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494. **N. Y.**—Donohue *v.* Henry, 4 E. D. Smith 162; Moore *v.* Davis, 11 Johns. 144; McIntyre *v.* Smathers, 118 App. Div. 776, 103 N. Y. Supp. 873. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Pa.**—Arthur *v.* Sylvester, 105 Pa. 233. **Tex.**—Hillman *v.* Edwards (Tex. Civ. App.), 74 S. W. 787; Stagg's Heirs *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Ellis *v.* Stine (Tex. Civ. App.), 55 S. W. 758.

[a] **But where the conversion is a technical one** arising from failure to account for cross-demands of each against the other, growing out of contractual relations and debts, a set-off is allowable. Lesh *v.* Davidson, 181 Ind. 429, 104 N. E. 642.

[b] **A note cannot be set off** in conversion. First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668.

74. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873.

75. **Ill.**—Waterman *v.* Clark, 76 Ill. 428; Turner *v.* Retter, 58 Ill. 264; Streeter *v.* Streeter, 43 Ill. 155; Stow *v.* Yarwood, 14 Ill. 424; Spurgin *v.* Kruse, 125 Ill. App. 507. **Md.**—Fidelity & Dep. Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652; Lee *v.* Rutledge, 51 Md. 311. **Mass.**—Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494. **Mich.**—Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297. **N. H.**—Cole *v.* Colburn, 61 N. H. 499. **Eng.**—Whitehall *v.* Squire, Carth. 103, 90 Eng. Reprint 664.

[a] **Action on the Case.**—Cole *v.* Colburn, 61 N. H. 499.

[b] **Trover.**—**Ill.**—Turner *v.* Retter, 58 Ill. 264; Stow *v.* Yarwood, 14 Ill. 424. **Mass.**—Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494. **Mich.** Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674. **Pa.**—Work *v.* Bennett, 70 Pa. 484.

76. **Ill.**—Spurgin *v.* Kruse, 125 Ill. App. 507. **N. H.**—Cole *v.* Colburn, 61 N. H. 499. **R. I.**—Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

[a] **In an action on the case for** deceit in an exchange of chattels, there may be a recoupment of the defendant's damages caused by the plaintiff's breach of warranty. Cole *v.* Colburn, 61 N. H. 499.

[b] **The reason** for allowing recoupment in such cases **was stated by the** Massachusetts court in Carey *v.* Guillow, 105 Mass. 18: "Here are mutual and adverse claims for damages growing out of one transaction. Each party sold to the other a chattel and took another chattel in payment. For misrepresentations of the character alleged each party may generally sue in contract or tort. If the plaintiff had declared in contract, alleging that the defendant agreed that his horse was sound as far as he knew, knowing him to be unsound, it cannot be doubted, in view of the authorities cited above, that the defendant might recoup his damages. The fact that the plaintiff sues in tort does not complicate the matter. It is not more difficult, or less desirable, in such an action, to have the whole litigation adjusted in a single suit."

of the other are equivalent to the former set-off, and are based on independent claims or demands. The former are available in tort actions,[77] and have been asserted in actions for damages for negligence,[78] fraud and deceit,[79] trespass,[80] replevin,[81] detinue,[82] trover[83] and

77. U. S.—Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281. **Ark.**—Ramsey *v.* Capshaw, 71 Ark. 408, 75 S. W. 479; Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181. **Cal.**—Demartin *v.* Albert, 68 Cal. 277, 9 Pac. 157. **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Ind.**—Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852; Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208. **Ia.**—Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374. **Kan.**—Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Ky.**—Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407; Hutchings *v.* Dean, 11 Ky. L. Rep. 310. **Minn.** Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304; Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260; Ritchie *v.* Hayward, 71 Mo. 560; Howard *v.* Haas, 131 Mo. App. 499, 109 S. W. 1076; Kamerick *v.* Castleman, 23 Mo. App. 481. **Mont.**—Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345. **Neb.**—Ross P. Curtice Co. *v.* Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723. **Neb.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. Y.**—Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552; Thompson *v.* Kessell, 30 N. Y. 383; Vandevort *v.* Mink, 113 App. Div. 601, 98 N. Y. Supp. 772; Numan *v.* Wolf, 73 App. Div. 38, 76 N. Y. Supp. 371; Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Supp. 497, 20 N. Y. St. 639; Waters *v.* Lang, 79 Misc. 240, 139 N. Y. Supp. 844. **N. C.**—Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888; Bitting *v.* Thaxton, 72 N. C. 541; Walsh *v.* Hall, 66 N. C. 233. **Ohio.** Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **S. C.**—Sharp *v.* Kinsman, 18 S. C. 108. **Tex.**—Gooch *v.* Isbell (Tex. Civ. App.), 77 S. W. 973. **Utah.**—Marks *v.* Tomkins, 7 Utah 421, 27 Pac. 6. **Wash.** Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801. **Wis.**—Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887; Collins *v.* Morrison, 91 Wis. 324, 64 N. W. 1000; Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439; Phoenix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151; Vilas *v.* Mason, 25 Wis. 310.

78. Cal.—McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. **Neb.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123. **N. Y.**—Barhyte *v.* Hughes, 33 Barb. 320; Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360; Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Supp. 497, 20 N. Y. St. 639. **Ohio.**—Mogle *v.* Black, 5 Ohio C. C. 51, 3 Ohio Cir. Dec. 27. **S. C.**—Simkins *v.* Columbia & G. R. Co., 20 S. C. 258. **Wis.**—Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Rylander *v.* Laursen, 113 Wis. 461, 89 N. W. 488; Pelton *v.* Powell, 96 Wis. 473, 71 S. W. 887; McArthur *v.* Green Bay & M. Canal Co., 34 Wis. 139.

79. Colo.—Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767. **Minn.**—King *v.* Coe Commission Co., 93 Minn. 52, 100 N. W. 667. **N. Y.**—People *v.* Dennison, 84 N. Y. 272; Heidelbach *v.* Kilpatrick, 3 Civ. Proc. 209; Green *v.* Parsons, 47 Hun 631, 14 N. Y. St. 97. **Ore.**—Dove *v.* Hayden, 5 Ore. 500.

80. Ky.—Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407; Stillwell *v.* Duncan, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; Whitlock *v.* Ledford, 82 Ky. 390. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128. **Mo.**—Kamerick *v.* Castleman, 23 Mo. App. 481. **N. Y.**—Hall *v.* Werney, 18 App. Div. 565, 46 N. Y. Supp. 33. **N. C.**—Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888. **S. C.**—Sharp *v.* Kinsman, 18 S. C. 108. **Utah.**—Marks *v.* Tomkins, 7 Utah 421, 27 Pac. 6. **Wash.**—Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801. **Wis.**—Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114; Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478.

81. See *infra*, V, D, 1, a.

82. See *infra*, V, D, 1, a.

83. Cal.—Story & I. Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671. **Colo.** Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Ky.**—Hutchings *v.* Dean,

conversion, libel and slander,[84] assault and battery,[85] false imprisonment,[86] and malicious prosecution.[87] The other class of counterclaims are by the express provisions of the statute defining them,[88] restricted to actions in contract, and cannot be interposed in proceedings ex delicto.[89]

C. MOTIONS. — Where the right to interpose a set-off or counterclaim is restricted to actions, they are not available in proceedings by motion.[90]

11 Ky. L. Rep. 310. **Minn.**—Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132; Mayerus *v.* Hoscheid, 11 Minn. 243. **Mo.**—Ritchie *v.* Hayward, 71 Mo. 560; Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314; Reamer *v.* Morrison Exp. Co., 93 Mo. App. 501, 67 S. W. 718. **Mont.**—Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419. **Nev.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552; O'Brien *v.* Dwyer, 76 App. Div. 516, 78 N. Y. Supp. 600; Numan *v.* Wolf, 73 App. Div. 38, 76 N. Y. Supp. 371; Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238; Ter Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5; New York L. E. & W. R. Co. *v.* Davies, 38 Hun 477; Waters *v.* Lang, 79 Misc. 240, 139 N. Y. Supp. 844; Harrington *v.* Jaeckel, 133 N. Y. Supp. 933. **N. C.** Bitting *v.* Thaxton, 72 N. C. 541. **N. D.** Roney *v.* H. S. Halverson Co., 29 N. D. 13, 149 N. W. 688; Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825. **Ohio.** Cow Run Iron Tank Co. *v.* Lehmer, 41 Ohio St. 384. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Tex.**—Gooch *v.* Isbell (Tex. Civ. App.), 77 S. W. 973. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Vilas *v.* Mason, 25 Wis. 310.

84. **Minn.** — Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304. **N. Y.** Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Supp. 1119, 53 N. Y. St. 438; Fellerman *v.* Dolan, 7 Abb. Pr. 395; Richardson *v.* Northrup, 56 Barb. 105. **N. D.** Wrege *v.* Jones, 13 N. D. 267, 110 N. W. 705, 112 Am. St. Rep. 679. **Ohio.** Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433. **Wis.**—Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113.

85. Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887.

86. Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41; Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439.

87. Pettis *v.* Schwartz, 137 App. Div. 242, 122 N. Y. Supp. 50; Noonan *v.* Orton, 30 Wis. 356.

88. See *infra*, VII, C, 2, b, (VII).

89. **Ark.**—Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181; Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624. **Cal.** Demartin *v.* Albert, 68 Cal. 277, 9 Pac. 157; Waugenheim *v.* Graham, 39 Cal. 169. **Ind.**—Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88. **Minn.**—Hanson *v.* Byrnes, 96 Minn. 50, 104 N. W. 762. **N. Y.**—Miller *v.* Barber, 66 N. Y. 558; Van Dyck *v.* McQuade, 57 How. Pr. 62, 13 Jones & S. 620; Lehmair *v.* Griswold, 8 Jones & S. 100; Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238; Ferris *v.* Armstrong Mfg. Co., 57 Hun 592, 10 N. Y. Supp. 750, 32 N. Y. St. 908; Eckert *v.* Gallien, 24 Misc. 485, 53 N. Y. Supp. 879; Barker *v.* Platt, 1 N. Y. Supp. 416, 15 Civ. Proc. 52, 17 N. Y. St. 180. **N. C.**—Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450; Smith *v.* Young, 109 N. C. 224, 13 S. E. 735. **S. C.**—Simkins *v.* Columbia & G. R. Co., 20 S. C. 258; Sharp *v.* Kinsman, 18 S. C. 108. **Utah.**—Marks *v.* Tomkins, 7 Utah 421, 27 Pac. 6. **Wis.**—Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745; Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439; Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478; Ring *v.* Ogden, 45 Wis. 303.

90. Bell *v.* Thompson, 8 Cal. App. 483, 97 Pac. 158.

[a] **Motion to Tax Costs.**—On the

D. Particular Proceedings.[91] — **1. Proceedings To Recover Property.** — a. *Recovery of Personal Property.* — Set-off is ordinarily not available in actions to recover specific personal property,[92] and counterclaim has also been denied in such cases,[93] but usually a recoupment[94] or counterclaim arising out of the contract, transaction or subject matter is available and has been allowed in replevin[95] and

hearing of a motion by the unsuccessful party for an order of court taxing the costs, the parties' right to a set-off of an alleged unliquidated claim against the amount of the judgment cannot be determined. Bell *v.* Thompson, 8 Cal. App. 483, 97 Pac. 158.

91. See generally the particular titles. See also *supra,* V, B.

92. Wagner *v.* Prettyman, 53 Pa. Super. 316; Hall's Safe Co. *v.* Walenk, 42 Pa. Super. 576.

[a] **Replevin.**—Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Macky *v.* Dillinger, 73 Pa. 85; Peterson *v.* Haight, 3 Whart. (Pa.) 150; Wagner *v.* Prettyman, 53 Pa. Super. 316; Hall's Safe Co. *v.* Walenk, 42 Pa. Super. 576; Eureka Knitting Co. *v.* Snyder, 36 Pa. Super. 336; National Cash Register Co. *v.* Cochran, 22 Pa. Super. 582; Heffner *v.* Sharp, 3 Pa. Super. 249.

[b] **Detinue.**—Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725.

[c] **In an action to foreclose a chattel mortgage** set-off not available. Culver *v.* J. S. Wood & Bro., 138 Ga. 60, 74 S. E. 790; Arnold *v.* Carter, 125 Ga. 319, 54 S. E. 177.

[d] **Demands for improvements** alleged to have been made on rented lands by express direction of plaintiffs, cannot be set off in a suit by plaintiff to foreclose chattel mortgage. Culver *v.* J. S. Wood & Bros., 138 Ga. 60, 74 S. E. 790.

93. Pee Dee River Lumb. Co. *v.* Fountain, 90 S. C. 122, 72 S. E. 885.

[a] **The reason** for this is that it would allow a creditor to forcibly seize the property of his debtor without process and then plead the indebtedness as an offset to an action to recover it back. J. J. Smith Lumb. Co. *v.* Scott County Garbage R. & F. Co., 149 Iowa 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184; Palmer *v.* Palmer, 90 Iowa 17, 57 N. W. 645.

[b] **Unless equitable circumstances** exist justifying the relief. Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444; Ludden & Bates So. M. House *v.* Hornsby, 45 S. C. 111, 22 S. E. 781; Williams *v.* Irby, 15 S. C. 458.

[c] **Replevin.**—J. J. Smith Lumb. Co. *v.* Scott County Garbage R. & F. Co., 149 Iowa 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184; Pee Dee River Lumber Co. *v.* Fountain, 90 S. C. 122, 72 S. E. 885.

[d] **Detinue.**—See J. J. Smith Lumb. Co. *v.* Scott County Garbage R. & F. Co., 149 Iowa 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184.

94. Culver *v.* J. S. Wood & Bros., 138 Ga. 60, 74 S. E. 790; Arnold *v.* Carter, 125 Ga. 319, 54 S. E. 177.

95. **U. S.**—Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281. **Cal.**—Glide *v.* Kayser, 142 Cal. 419, 76 Pac. 50. **Ind.** Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852; Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35; Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208. **Kan.**—Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Ky.**—Rennebaum *v.* Atkinson, 103 Ky. 555, 45 S. W. 874. **Minn.**—W. W. Kimball Co. *v.* Massey, 126 Minn. 461, 148 N. W. 307. **Mo.**—Howard *v.* Haas, 131 Mo. App. 499, 109 S. W. 1076. **Mont.** Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345. **Neb.**—Ross P. Curtice Co. *v.* Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723. **Nev.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. J.**—Gottler *v.* Babcock, 7 Abb. Pr. 392; Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Marshall *v.* Friend, 35 Misc. 101, 71 N. Y. Supp. 221. **N. D.**—McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 48 L. R. A. (N. S.) 65. **S. D.**—Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266. **Wis.** Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Collins *v.* Morrison, 91 Wis. 324, 64 N. W. 1000.

[a] **A counterclaim is proper in replevin when** "the facts set up therein are so connected with the subject of the action that equity requires that the matter alleged in the complaint and the counterclaim should all be settled in the same litigation." Shore *v.*

detinue.[96]

b. *Recovery of Real Property.* — In actions to recover the possession of real property a cross-demand by way of set-off is generally not proper,[97] and recoupment has also been refused in such proceedings.[98] But a counterclaim or recoupment arising out of the transaction set forth in the complaint, or connected with the subject of the action is permissible in suits such as ejectment,[99] to quiet title,[1] and partition.[2]

2. Actions for Penalties. — In actions for statutory penalties, defendant has been denied the right to avail himself of a set-off[3] or

Ogden, 55 Ind. App. 394, 103 N. E. 852. And see Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35; Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208.

96. Wilson *v.* Hughes, 94 N. C. 182; Walsh *v.* Hall, 66 N. C. 233.

97. White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012.

[a] **Ejectment. — Ala.**—McKinnon *v.* Lessley, 89 Ala. 625, 8 So. 9. **Md.** Nutwell *v.* Tongue's Lessee, 22 Md. 419. **Neb.**—White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012.

98. Geiger *v.* Brown, 167 Ill. App. 534.

[a] **Damages resulting from dilapidated condition of premises** cannot be recouped in an action to recover possession of the premises. Geiger *v.* Brown, 167 Ill. App. 534.

99. **Cal.**—Wigmore *v.* Buell, 116 Cal. 94, 47 Pac. 927; Yorba *v.* Ward, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793; Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314. **Kan.**—Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260. **Minn.**—Curtiss *v.* Livingston, 36 Minn. 312, 30 N. W. 814; Reed *v.* Newton, 22 Minn. 541. **Neb.**—White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012. **N. Y.** Dinan *v.* Coneys, 143 N. Y. 544, 38 N. E. 715; Cavalli *v.* Allen, 57 N. Y. 508. **N. C.**—Griffin *v.* Thomas, 128 N. C. 310, 38 S. E. 903. **Ore.**—Chance *v.* Carter, 81 Ore. 229, 158 Pac. 947. **S. D.** Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

As to subject of claims assertable in ejectment, see *infra,* VII, C, 2, b, (IV) and (V).

[a] **Arising Out of the Cause of Action.**—In Indiana a counterclaim arising out of the cause of action pleaded is available in ejectment. Gilpin *v.* Wilson, 53 Ind. 443. See also Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Barnes *v.* Union School, 91 Ind. 301; Arnold *v.* Smith, 80 Ind. 417.

[b] **An equitable counterclaim** may be interposed. Pendleton *v.* Hubbard, 231 Mo. 314, 132 S. W. 696; Hubbard *v.* Slavens, 218 Mo. 598, 117 S. W. 1104; Bodenhamer *v.* Welch, 89 N. C. 78.

[c] **Must Amount to Equitable Defense.**—Where the statute provides that defendant in ejectment may set up as a counterclaim any matter which theretofore would have formed an equitable defense, an answer setting up limitations, a partition and allotment of the land, and claiming that plaintiff is estopped to assert any claim against defendant, is not available as a counterclaim. Appleton Mfg. Co. *v.* Fox River Paper Co., 111 Wis. 465, 87 N. W. 453. See also Guaranteed Inv. Co. *v.* St. Croix Consol. Copper Co., 156 Wis. 173, 145 N. W. 662; Harley *v.* Harley, 140 Wis. 282, 122 N. W. 761; Cornelius *v.* Kessel, 58 Wis. 237, 16 N. W. 550.

[d] **Reconvention** proper. Lothrop *v.* Goudeau, 142 La. 342, 76 So. 794.

1. See 21 STANDARD PROC. 1018.

2. Louisville Title Co. *v.* Darnell, 149 Ky. 312, 148 S. W. 369; Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Williams *v.* Clarke, 82 App. Div. 199, 81 N. Y. Supp. 381. See also Ferris *v.* Reed, 87 Ind. 123; Crane *v.* Kimmer, 77 Ind. 215.

3. **Ill.**—Spurgin *v.* Kruse, 125 Ill. App. 507. **Ind.**—Irvin *v.* Rushville Cooperative Tel. Co., 161 Ind. 524, 69 N. E. 258. **Mo.**—Woodward *v.* Conder, 33 Mo. App. 147. **N. Y.**—Morehouse *v.* Second Nat. Bank, 30 Hun 628. **Pa.** Lebanon Nat. Bank *v.* Karmany, 98 Pa. 65; Chambersburg Bank *v.* Com., 2 Grant 384.

[a] **It is not upon a contract or agreement within** the meaning of the

counterclaim,[4] but if the suit to recover the penalty may be deemed one upon contract express or implied there seems no reason why a proper set-off should not be allowed.[5]

3. Taxes. — The assertion of cross-demands in actions by the state, county or municipality to recover taxes is generally considered contrary to public policy and in the absence of statutory authorization therefor[6] is not permitted.[7]

E. UNLIQUIDATED DEMANDS.[8] — If the plaintiff's cause of action be a claim for unliquidated or uncertain damages founded on a tort or breach of covenant, the defendant is not entitled to interpose a set-off thereto.[9]

statute permitting set-offs. Spurgin *v.* Kruse, 125 Ill. App. 507.

[b] **Illegal Interest.**—In an action to recover the statutory penalty for charging or reserving illegal interest defendant cannot set off a contract claim against plaintiff. Lebanon Nat. Bank *v.* Karmany, 98 Pa. 65, 76.

[c] **Penalty Imposed on Bank for Not Keeping Notes at Par.**—In action by the state to recover such penalty, defendant cannot set off the bonus paid for its charter. Bank of Chambersburg *v.* Com., 2 Grant Cas. (Pa.) 384.

4. Woodward *v.* Conder, 33 Mo. App. 147; Moore *v.* Trimmer, 52 Hun 612, 6 N. Y. Supp. 430, 17 Civ. Proc. 99, 1 Silvern. 171, 23 N. Y. St. 2.

[a] **In an action to recover treble damages for trespass** on plaintiff's land defendant can not counterclaim damages caused by plaintiff's conversion of defendant's personalty. Woodward *v.* Conder, 33 Mo. App. 147.

5. **Ala.**—Kelly *v.* Johnson, 129 Ala. 627, 29 So. 672; Hamilton *v.* Griffin, 123 Ala. 600, 26 So. 243. **Kan.**—Sponenbarger *v.* Lemert, 23 Kan. 55. **Mo.** Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839. **N. H.**—Concord *v.* Pillsbury, 33 N. H. 310. **N. Y.**—Delaney *v.* Miller, 78 Hun 18, 28 N. Y. Supp. 1059, 60 N. Y. St. 481; Wickham *v.* Weil, 17 N. Y. Supp. 518. **Va.**—Hancock *v.* Whitehall Tobacco W. Co., 100 Va. 443, 41 S. E. 860. **Can.**—McKelvey *v.* McLean, 34 U. C. Q. B. 635.

[a] **In an action by a mortgagor** to recover from the mortgagee a penalty for not entering of record the amounts and dates of partial payments, a set-off of money due on a bond allowed. Burns *v.* Reeves, 127 Ala. 127, 28 So. 554.

[b] **Failure To Procure Business License.**—In an action to recover a penalty imposed upon a person transacting a certain kind of business without taking out a license therefor defendant could set off an order for money in favor of defendant and drawn upon the city treasurer. Springfield *v.* Hickox, 7 Ill. 241.

[c] **In action to recover a statutory penalty for cutting trees** on plaintiff's land defendant may set off a judgment against plaintiff. Hamilton *v.* Griffin, 123 Ala. 600, 26 So. 243.

[d] **Action on bond** for taxes. Concord *v.* Pillsbury, 33 N. H. 310.

6. Amy *v.* Shelby County, 114 U. S. 387, 5 Sup. Ct. 895, 29 L. ed. 172.

7. **Colo.**—Morgan *v.* Pueblo & A. V. R. Co., 6 Colo. 478. **Fla.**—Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292. **Ga.**—Hawkins *v.* Sumter, 57 Ga. 166.

8. **Unliquidated demands as cross-demands,** see *infra,* VII, C, 7, b.

9. **Ala.**—Brown *v.* Chambers, 12 Ala. 697; George *v.* Cahawba & M. R. Co., 8 Ala. 234. **Ind.**—Jones *v.* McGrew, 1 Blackf. 192. **Mass.**—Tracey *v.* Grant, 137 Mass. 181; Barry *v.* Cavanagh, 130 Mass. 436. **Mich.**—Smith *v.* Warner, 14 Mich. 152. **Miss.**—Burrus *v.* Gordon, 57 Miss. 93; Whitaker *v.* Robinson, 8 Smed. & M. 349. **Mo.**—Johnson. *v.* Jones, 16 Mo. 494; State *v.* Modrell, 15 Mo. 421. **N. H.**—Concord *v.* Pillsbury, 33 N. H. 310; Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380. **N. C.**—Dowd *v.* Faucett, 15 N. C. 92. **Tex.**—Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816; Hallinan *v.* Levytansky, 46 Tex. Civ. App. 228, 102 S. W. 463. **Eng.** Luckie *v.* Bushby, 13 C. B. 864, 138 Eng. Reprint 1443; Boddington *v.* Castelli, 1 C. L. R. 281, 1 El. & Bl. 879, 118 Eng. Reprint 665; Pellas *v.* Neptune Mar. Ins. Co., 5 C. P. D. 34, 49 L. J. C. P. 153, 42 L. T. 35, 28 W. R. 405.

VI. AGREEMENTS AS TO CROSS-DEMANDS. — A. In General. — Agreements of the parties in respect to set-offs, recoupments and counterclaims will generally be recognized and enforced by the courts,[10] provided they are supported by sufficient consideration.[11] The agreement need not be express; like other contracts generally, it may arise by implication from the facts and circumstances.[12]

B. Agreement To Allow. — It is competent for the parties to agree to allow a set-off or other cross-demand which in the absence of such agreement would not be available.[13]

But see St. Louis Ft. S. & W. R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584; Raymond *v.* Green, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763.

[a] **An action on notes is a certain** demand within the statute. Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[b] **Verification of an open account** sued on does not affect the nature of the demand as being certain or uncertain with the provisions of the statute. Hallinan *v.* Levytansky, 46 Tex. Civ. App. 228, 102 S. W. 463.

[c] **Actions on Bonds.—Ala.** Brown *v.* Chambers, 12 Ala. 697. **Mo. State** *v.* Modrell, 15 Mo. 421; May *v.* Kellar, 1 Mo. App. 381. **N. Y.**—Hart *v.* Willard, 1 Sandf. 254. **Eng.**—Gillingham *v.* Waskett, McClell. 198, 148 Eng. Reprint 84, 13 Price 434, 147 Eng. Reprint 1040.

10. **Ala.**—Kennedy *v.* Manship, 1 Ala. 43. **Ga.**—Threlkeld *v.* Dobbins, 45 Ga. 144. **Ill.**—International Bank *v.* Ferris, 118 Ill. 465, 8 N. E. 825. **Me.**—Otis *v.* Adams, 41 Me. 258. **Mass.** McGuinness *v.* Kyle, 208 Mass. 443, 94 N. E. 700; Livermore *v.* Newburyport Marine Ins. Co., 2 Mass. 232. **N. J.** King *v.* King, 9 N. J. Eq. 44; King *v.* Robinson, 2 N. J. L. 262. **N. Y.** Gutchess *v.* Daniels, 49 N. Y. 605; Ogilvie *v.* Lightstone, 1 Daly 129. **N. C.**—Martin *v.* Richardson, 68 N. C. 255. **Ore.**—Casner *v.* Hoskins, 64 Ore. 254, 128 Pac. 841, 130 Pac. 55. **Pa.** Kennedy *v.* Kennedy, 41 Pa. 185. **Tenn.** College Mill Co. *v.* Fidler, 58 S. W. 382. **Tex.**—Gulf, T. & W. Ry. Co. *v.* Stark, 151 S. W. 641. **Wis.**—Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379. **Can.**—Lundy *v.* McCulla, 11 Grant Ch. (U. C.) 368.

[a] **Equity will enforce such agreements.** Jones *v.* Waggoner's Admr., 7 J. J. Marsh. (Ky.) 144; Caldwell *v.* Hawkins Admr., 1 Litt. (Ky.) 212.

11. Kennedy *v.* Manship, 1 Ala. 43; Louden *v.* Tiffany, 5 Watts & S. (Pa.) 367.

12. **U. S.**—United States Bung Mfg. Co. *v.* Armstrong, 34 Fed. 94. **Ill.** Gross *v.* Weary, 90 Ill. 256; Hodgen *v.* Kief, 63 Ill. 146. **Miss.**—Price *v.* Mitchell, 10 Smed. & M. 179. **N. J.** King *v.* King, 9 N. J. Eq. 44. **N. Y.** Gutchess *v.* Daniels, 49 N. Y. 605; Green *v.* Storm, 3 Sandf. Ch. 305. **Pa.** Leonard *v.* Smith, 162 Pa. 284, 29 Atl. 915; Ardesco Oil Co. *v.* North American Oil Min. Co., 66 Pa. 375; Reed *v.* Penrose's Exx., 36 Pa. 214, 2 Grant Cas. 472.

But see Louden *v.* Tiffany, 5 Watts & S. (Pa.) 367; Freeman *v.* Lomas, 9 Hare 109, 15 Jur. 648, 20 L. J. Ch. 564, 68 Eng. Reprint 435.

[a] **A special deposit in a bank** is deemed and held to be an agreement on the part of the bank to waive or relinquish its right of set-off and to be founded upon a sufficient consideration. **Ind.**—Carter *v.* Martin, 22 Ind. App. 445, 53 N. E. 1066. **Ia.**—Smith *v.* Sanborn State Bank, 147 Iowa 640, 126 N. W. 779, 30 L. R. A. (N. S.) 517. **Me.**—Lynam *v.* Nat. Bank, 98 Me. 448, 57 Atl. 799. **Minn.**—Fitzgerald *v.* State Bank, 64 Minn. 469, 67 N. W. 361. **W. Va.**—Lutz *v.* Williams, 79 W. Va. 609, 91 S. E. 460, L. R. A. 1918A, 76.

13. **Conn.**—Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641; McLean *v.* McLean, 1 Conn. 397. **Ga.**—Threlkeld *v.* Dobbins, 45 Ga. 144. **Ill.**—International Bank *v.* Ferris, 118 Ill. 465, 8 N. E. 825. **Ind.**—Fugit *v.* Ewing, 9 Ind. 345. **Ky.**—Louisville & N. R. Co. *v.* Thompson, 18 B. Mon. 735; Jones *v.* Waggoner's Admr., 7 J. J. Marsh. 144. **Me.**—Otis *v.* Adams, 41 Me. 258. **Mass.**—McGuinness *v.* Kyle, 208 Mass. 443, 94 N. E. 700; Columbian Ins. Co. *v.* Bean, 113 Mass. 541; Liver-

C. AGREEMENT TO WAIVE. — The early English cases which refused to recognize agreements to waive the benefit of set-off statutes[14] have to some extent been followed in America,[15] but it is now generally accepted that such agreements are valid and binding whether they relate to set-off or any other cross-demand.[16]

VII. CONDITIONS ESSENTIAL TO REMEDY. — A. PENDING PROCEEDING. — Aside from the remedy by original bill in equity to procure a set-off,[17] recoupment, set-off and counterclaim can be asserted only in pending proceedings of the kind in which the particular cross-demand sought to be invoked is available.[18]

B. CAUSE OF ACTION IN PLAINTIFF. — **1. In General.** — Since the claim or demand which a defendant interposes by way of set-off, counterclaim or recoupment is an independent cause of action against the plaintiff[19] upon which an affirmative judgment in favor of defendant is generally authorized,[20] it would seem that he ought to prevail in the assertion of such demand irrespective of the sufficiency of plain-

more *v.* Newburyport Marine Ins. Co., 2 Mass. 232. **Miss.**—Price *v.* Mitchell, 10 Smed. & M. 179. **N. H.**—Hall *v.* Paris, 59 N. H. 71. **N. J.**—King *v.* King, 9 N. J. Eq. 44. **N. Y.**—Green *v.* Storm, 3 Sandf. Ch. 305. **N. C.**—Martin *v.* Richardson, 68 N. C. 255. **Ore.** Williams *v.* Culver, 30 Ore. 375, 48 Pac. 365. **Pa.**—Leonard *v.* Smith, 162 Pa. 284, 29 Atl. 915; Mays *v.* Mays, 7 Watts 561. **Tenn.**—College Mill Co. *v.* Fidler, 58 S. W. 382. **Tex.**—Ruzeoski *v.* Wilrodt (Tex. Civ. App.), 94 S. W. 142; Wentworth *v.* King (Tex. Civ. App.), 49 S. W. 696; A. B. Frank Co. *v.* A. H. Motley Co. (Tex. Civ. App.), 37 S. W. 868. **Wis.**—Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

[a] **A set-off of a claim in a different right** from that set up by plaintiff, permitted by agreement. King *v.* Robinson, 2 N. J. L. 262.

[b] **There is nothing to prevent parties** from making an agreement that on the maturity of a claim due from the defendant to the plaintiff a claim then due from the plaintiff to the defendant arising out of a separate transaction should be settled and one set off against the other. Such an agreement is an independent collateral agreement and does not contradict the contracts between the parties which gave rise to the separate claims. McGuinness *v.* Kyle, 208 Mass. 443, 94 N. E. 700.

14. Lechmere *v.* Hawkins, 2 Esp. Ni. Pri. (Eng.) 626; Cornforth *v.* Rivett, 2 Maul. & Sel. 510, 105 Eng. Reprint 471; Eland *v.* Karr, 1 East 375, 102 Eng. Reprint 145.

15. Downer *v.* Eggleston, 15 Wend. (N. Y.) 51; Gutchess *v.* Daniels, 58 Barb. (N. Y.) 401.

16. **U. S.**—United States Bung Mfg. Co. *v.* Armstrong, 34 Fed. 94. **Ala.** Saltmarsh *v.* Bower, 34 Ala. 613; Davis *v.* Carlisle, 6 Ala. 707. **Ill.**—Hill *v.* Parsons, 110 Ill. 107; Gross *v.* Weary, 90 Ill. 256. **Ind.**—Lovett *v.* King, 16 Ind. 464. **Kan.**—Stacy *v.* Cook, 62 Kan. 50, 61 Pac. 399. **Ky.**—Mulliken *v.* Winter, 2 Duv. 256, 87 Am. Dec. 495. **Minn.**—Fitzgerald *v.* State Bank, 64 Minn. 469, 67 N. W. 361. **N. Y.** Gutchess *v.* Daniels, 49 N. Y. 605; Troup *v.* Haight, Hopk. 239; Nottebohm *v.* Maas, 3 Rob. 249. **Pa.**—Blood *v.* Crew Levick Co., 177 Pa. 606, 35 Atl. 871, 55 Am. St. Rep. 742; Tagg *v.* Bowman, 108 Pa. 273, 56 Am. Rep. 204; Ardesco Oil Co. *v.* North American Oil & Min. Co., 66 Pa. 375; Reed *v.* Penrose's Exx., 36 Pa. 214, 2 Grant Cas. 472; United States Bank *v.* Macalester, 9 Pa. 475; Louden *v.* Tiffany, 5 Watts & S. 367. **W. Va.**—Lutz *v.* Williams, 79 W. Va. 609, 91 S. E. 460, L. R. A. 1918A, 76. **Wis.**—Batavian Bank *v.* Minneapolis, etc. R. Co., 123 Wis. 389, 101 N. W. 687.

Implied agreement to waive, see *supra,* VI, A.

17. See *supra,* I, G, and 16 STANDARD PROC. 570.

18. **As to the character of the proceeding** in which particular cross-demands are available, see *supra,* V.

19. See *supra,* I, A, 1.

20. See *infra,* XII, A.

tiff's cause of action,[21] particularly since a failure to permit a set-off or counterclaim in such case would defeat the very purpose of allowing cross-demands which is to prevent multiplicity of suits between the same parties.[22] Some authorities, accordingly, recognize the right of defendant to interpose and successfully maintain his set-off[23] or counterclaim,[24] notwithstanding the failure of plaintiff's demand or cause of action. Elsewhere relief on the cross-demand by way of set-off[25] or counterclaim[26] has, for various reasons,[27] been denied in such cases. Of course if the cross-demand arises out of the contract pleaded in the complaint, it will fail where the contract fails.[28] A defendant, moreover, cannot deny in toto the plaintiff's right of action and at the same time set off in his answer a substantive and independent cause of action inconsistent with the plaintiff's claim.[29]

2. Effect of Dismissal or Nonsuit. — In jurisdictions recognizing the right of defendant to prosecute his cross-demands, even though plaintiff's cause of action fail,[30] dismissal or other discontinuance of plaintiff's action does not operate to dismiss or discontinue a set-off or counterclaim,[31] but after the action has already been dismissed

21. Snyder *v.* Rainey, 198 Pa. 356, 47 Atl. 998.

22. Snyder *v.* Rainey, 198 Pa. 356, 47 Atl. 998. And see *supra*, I, A, 2.

23. **Ill.**—Moore *v.* Wright, 4 Ill. App. 443. **N. Y.**—Greenleaf *v.* Low, 4 Denio 168. **Pa.**—Snyder *v.* Rainey, 198 Pa. 356, 47 Atl. 998; Lewis *v.* Culbertson, 11 Serg. & R. 59.

24. Joffe-Mayer Co. *v.* Raden, 134 N. Y. Supp. 1037.

[a] **Where a plaintiff has assigned the claim** upon which it sues thus defeating its right to maintain the action, defendant is nevertheless entitled to judgment on his counterclaim. Joffe-Mayer Co. *v.* Raden, 134 N. Y. Supp. 1037.

25. **Ala.**—St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518. **Me.**—Sewall *v.* Tarbox, 30 Me. 27. **Mich.**—Smith *v.* Warner, 16 Mich. 390.

See also Claridge *v.* Klett, 15 Pa. 255.

[a] **Joinder of Baseless Claims.**—If a well founded claim is asserted by the plaintiff, it will not defeat defendant's right to set-off that other and baseless demands are also pleaded by the plaintiff. The legal inference in such case is that the plaintiff's action is rested not upon the baseless demand that was asserted, but rather upon the others that were not only pleaded but also established by the evidence. Smith *v.* Warner, 16 Mich. 390.

26. Nordmanser *v.* Hitchcock, 40 Mo. 178.

27. See *infra*, this note.

[a] **Mutuality.**—The reason for refusing to allow the cross-demand where the plaintiff's cause of action fails, is that the defendant's set-off can only be asserted where the plaintiff's action is founded upon demands which could themselves be the subject of set-off according to law. Smith *v.* Warner, 16 Mich. 390.

[b] **If the cross-demand does not authorize affirmative relief,** the rule that the failure of plaintiff's cause of action will defeat it is undoubtedly correct. But in most jurisdictions defendant is now entitled to affirmative relief on his set-off or counterclaim. Snyder *v.* Rainey, 198 Pa. 356, 47 Atl. 998.

28. Tribune Assn. *v.* Eisner & Mendelson Co., 34 Misc. 658, 70 N. Y. Supp. 706; Kohl *v.* Fleming, 21 Misc. 690, 47 N. Y. Supp. 1092.

[a] **In an action on a building contract,** a counterclaim for defects in the work must fail where the contractor does not establish a cause of action under the contract. Kohl *v.* Fleming, 21 Misc. 690, 47 N. Y. Supp. 1092.

29. Hoover Commercial Co. *v.* Humphrey, 107 Miss. 810, 66 So. 214; Shewalter *v.* Ford, 34 Miss. 417.

30. See *supra*, VII, B, 1.

31. Smith *v.* Hurt (Mo. App.), 203 S. W. 625. See 7 STANDARD PROC. 658.

[a] But see Nordmanser *v.* Hitch-

defendant cannot plead a cross-demand.[32]

C. CAUSE OF ACTION IN DEFENDANT. — **1. Necessity for.** — The principle underlying the practice of set-off, counterclaim and recoupment is that the adversary parties have claims and demands against each other which justice and convenience require to be disposed of in the same suit.[33] Matter which is purely defensive, and which would merely show that plaintiff has no cause of action against defendant, does not, therefore, constitute a cross-demand;[34] for the claim which defendant seeks to assert should itself amount to a cause of action,[35] one upon which he could maintain an independent suit against the plaintiff.[36]

2. Subject Matter of, in General. — a. *General Statement.* — Except where specifically authorized by statute,[37] the defendant cannot

cock, 40 Mo. 178, holding that a counterclaim, though a separate cross-demand on which defendant may be entitled to judgment, is nevertheless dependent on the original suit or petition and that where plaintiff does not come into court and prosecute his suit, no judgment can be taken against him on his counterclaim; that the rights of the defendant in such case are not prejudiced, and he can pursue his remedy on the matter set up in his counterclaim as an original action.

Right to dismiss after filing of counterclaim, see 7 STANDARD PROC. 657.

32. Griffith *v.* Dowd, 133 Minn. 305, 158 N. W. 420.

See 7 STANDARD PROC. 658.

33. See *supra,* I, A, 2.

34. See *supra,* I, A, 4.

35. **U. S.**—Allegheny Valley Brick Co. *v.* C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189. **Ill.**—Crate *v.* Kohlsaat, 44 Ill. App. 460. **Ky.**—Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641. **Me.**—Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128. **Mo.**—Second Baptist Church *v.* Beecham (Mo. App.), 180 S. W. 1065. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267. **S. D.** Fanton *v.* Byrum, 26 S. D. 366, 128 N. W. 325, 34 L. R. A. (N. S.) 501.

36. **U. S.**—North America Commercial Co. *v.* United States, 171 U. S. 110, 18 Sup. Ct. 817, 43 L. ed. 98; United States *v.* Blackfeather, 155 U. S. 180, 15 Sup. Ct. 64, 39 L. ed. 114, 30 Ct. Cl. 481. **Ala.**—Drennen *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902. **Cal.**—Ainsworth *v.* California Bank, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686. **Ind.**—Newkirk *v.* Neild, 19 Ind. 194, 81 Am. Dec. 383. **Kan.**—Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260. **Mass.**—Graham *v.* Middleby, 213 Mass. 437, 100 N. E. 750, Ann. Cas. 1914A, 384, 43 L. R. A. (N. S.) 977; Eddy *v.* Coffin, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441. **Minn.**—Chase & Co. *v.* Kelly, 125 Minn. 317, 146 N. W. 1113, L. R. A. 1916A, 912. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Shabata *v.* Johnston, 53 Neb. 12, 73 N. W. 278; Tessier *v.* Englehart, 18 Neb. 167, 24 N. W. 734; Simpson *v.* Jennings, 15 Neb. 671, 19 N. W. 473. **N. H.**—Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442. **N. Y.**—Vassear *v.* Livingston, 13 N. Y. 248. **N. C.**—Gaskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439. **N. D.**—Lynn *v.* Seby, 29 N. D. 420, 151 N. W. 31. **Ohio.**—Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502. **Okla.**—Hurford *v.* Norvall, 39 Okla. 496, 135 Pac. 1060. **Va.**—Leterman *v.* Charlottesville Lumb. Co., 110 Va. 769, 67 S. E. 281.

[a] **But recoupment** according to some cases need not consist in a demand which defendant could enforce in an independent suit. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376; Caples *v.* Morgan, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760.

37. See *infra,* VII, C, 2, b, (II).

use as an offset any and every cause of action which he may have against the plaintiff;[38] it must be of the character recognized by the law as a proper subject of cross-demand, and be still an existing and valid claim when sought to be availed of, and not outlawed,[39] settled or adjusted,[40] waived,[41] or otherwise incapable of being enforced.

b. *Counterclaim.* — (I.) **In General.** — (A.) MUST BE OF KIND DESIGNATED IN STATUTES. — Counterclaim being a code remedy,[42] reference must be had to the language of the code in each jurisdiction to ascertain its scope and the demands which may be the basis thereof; for in no case can an indebtedness be asserted as a counterclaim unless it is of the character specified by the code or statutes defining the remedy.[43] But the diversity of the statutory provisions gives rise to

38. Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130; Byerly *v.* Humphrey, 95 N. C. 151.

[a] **"It was not the intention of the reformed procedure** to allow persons having independent claims against each other, the relief authorized in one having no relation to that which could be given in the other, nor in any manner affecting it, to settle them all in one action upon the sole ground that, as they have been brought into court to contend against each other with respect to one case or dispute, they should at that time and place settle all other matters of controversy existing between them." Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40.

39. See *infra,* VII, C, 6, d, (II).

40. See *infra,* VII, C, 6, d, (III).

41. See *supra,* VI, C.

42. See *supra,* I, D, 2.

43. Ariz.—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Ky.**—White *v.* Townsend, 143 Ky. 750, 137 S. W. 220. **Minn.**—Blakely *v.* J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179. **Mont.**—Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083; Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.** Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Wright *v.* Delafield, 25 N. Y. 266; George F. Root Co. *v.* New York Cent. & H. R. Co., 166 App. Div. 137, 151 N. Y. Supp. 702; Scognamillo *v.* Passarelli, 157 App. Div 428, 142 N. Y. Supp. 382; Baum *v.* Sporborg, 146 App. Div. 537, 131 N. Y. Supp. 267; Garvey *v.* Jarvis, 54 Barb. 179. **N. D.**—Roney *v.* H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688; Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354; Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825. **Okla.**—Harris *v.* Warren-Smith Hardware Co., 44 Okla. 477, 144 Pac. 1050. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **Tex.**—Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56; Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501. **Wis.**—Smith *v.* Diamond, 86 Wis. 359, 56 N. W. 922.

[a] **In an action for rent,** injuries arising from trespasses committed by the lessor upon the demised premises cannot be interposed as a counterclaim. Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359.

[b] **In an action for conversion** of a span of mules the defendant cannot set up a note of plaintiff's as a counterclaim when the note does not arise out of the contract or transaction set forth in the complaint and is not connected with the subject of the action. First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668.

[c] **In action to foreclose a mechanic's lien** for services rendered and materials furnished, damages resulting from plaintiff's negligence in performing another job, are not available as a counterclaim. George F. Root Co. *v.* New York Cent. & H. R. Co., 166 App. Div. 137, 151 N. Y. Supp. 702.

[d] **Where a mechanic's lien is enforced by an equitable suit** an answer in an action for such purpose stating that the premises described in the complaint formed the defendant's "homestead" and were in consequence free from all liens does not set up a counterclaim. Englebrecht *v.* Rickert, 14 Minn. 140.

[e] **In an action to recover upon a promissory note** cross-demands in ejectment, trespass, forcible entry and detainer, or conversion, not available. Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354.

some confusion in the decisions as to what claims may be interposed by way of counterclaim. Even under the provisions of the same statute the courts appear to have considerable difficulty in determining when a counterclaim is authorized.[44]

(B.) CLAIMS FORMERLY ASSERTABLE AS SET-OFF OR RECOUPMENT. Counterclaim clearly embraces causes of action which under the former procedure were available by way of recoupment,[45] and the language of some codes defining the remedy is also broad enough to cover causes of action included in the former set-off.[46]

(C.) MUST TEND TO DIMINISH PLAINTIFF'S CAUSE OF ACTION.— The counterclaim authorized by most codes must tend in some way to diminish or defeat the plaintiff's recovery,[47] a requirement which is applicable not only to counterclaims connected with the contract, transaction, or subject of action, but also to those arising on independent con-

44. See Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

Classes of counterclaims, see *infra,* VII, C, 2, b, (II) to (VII).

45. Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310. See *supra,* I, D, 2.

46. See *supra,* I, D, 2, and *infra,* VII, C, 2, b, (VII).

47. **Colo.**—Bannerot *v.* McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126. **Ind.**—Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Caspary *v.* Hatch, 157 App. Div. 679, 142 N. Y. Supp. 785; Johnson *v.* Johnson, 157 App. Div. 289, 142 N. Y. Supp. 416; Fliess *v.* Hoy, 150 App. Div. 555, 135 N. Y. Supp. 44; Stolitzky *v.* Linscheid, 150 App. Div. 253, 134 N. Y. Supp. 805; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266.

[a] **By amendment made in 1877** to §501 Code Civ. Proc. of New York—the only amendment since the original enactment—the words "must tend, in some way to diminish or defeat the plaintiff's recovery" were added. Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382.

[b] **Pomeroy in his code remedies,** §745, says: "These cases must be considered as establishing the doctrine that the defendant's cause of action, in order to constitute a valid counterclaim, must to some extent defeat, modify, qualify or interfere with the relief which would otherwise be obtained by the plaintiff." This is quoted approvingly in Smith *v.* Price, 102 Ark. 367, 144 S. W. 206.

[c] **Defendants' claim for unpaid dividends** upon certain stock tends to defeat a suit to cancel the stock. It is entirely inconsistent with plaintiff's cause of action for if defendants are entitled to dividends, plaintiff is not entitled to a cancellation of the stock. East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266.

[d] **A counterclaim for nominal damages** is not authorized. Devendorf *v.* Wert, 42 Barb. (N. Y.) 227.

[e] **A counterclaim, interposed in ejectment** to recover premises and damages for wrongful detention, tends to diminish or defeat plaintiff's recovery, where it shows that defendant while lawfully in possession as mortgagee, in good faith and with the knowledge and acquiescence of plaintiffs, expended money for the preservation and maintenance of the property, which gives him an offset against plaintiff's claim for damages. Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391.

[f] **In an action to reform a deed** a counterclaim which shows that there was no mutual mistake is not demurrable on the ground that it does not tend to diminish or defeat plaintiff's recovery. Stolitzky *v.* Linscheid, 150 App. Div. 253, 134 N. Y. Supp. 805.

tracts.[48] The relief sought must necessarily interfere with, defeat, lessen or modify the relief granted to plaintiff in virtue of the cause of action alleged in his complaint or petition,[49] and must be so involved in the case that a determination thereof is necessary to a complete settlement of the questions raised by plaintiff.[50]

(D.) Sufficient To Sustain Independent Suit. — Not only must the counterclaim operate to defeat in whole or in part the plaintiff's right to recover in the action,[51] but it should in accordance with the requirement as to cross-demands generally[52] contain the substance of what is necessary to sustain an action in favor of the defendant against the plaintiff if the plaintiff had not sued the defendant.[53]

(E.) Equitable Demands.[54] — There is nothing in the language of the codes defining counterclaim which confines the remedy to actions

[g] **In a suit for specific performance** of a contract to convey land, defendant cannot, by way of counterclaim, ask foreclosure of a mortgage on the land given by plaintiff to defendant. Hays *v.* McLain, 66 Ark. 400, 50 S. W. 1006.

48. Minn.—Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345. **N. Y.** Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858; Pendegast *v.* Greenfield, 40 Hun 494, 10 Civ. Proc. 231, 1 N. Y. St. 422.

[a] **An independent cause of action against a co-defendant** is not available as a set-off or counterclaim since it does not tend to defeat plaintiff's action. Hull *v.* First Guaranty State Bank (Tex. Civ. App.), 199 S. W. 1148.

49. Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013; National Fire Ins. Co. *v.* McKay, 21 N. Y. 191; Vassear *v.* Livingston, 13 N. Y. 248; Leavenworth *v.* Packer, 52 Barb. (N. Y.) 132; Pattison *v.* Richards, 22 Barb. (N. Y.) 143; Mattoon *v.* Baker, 24 How. Pr. (N. Y.) 329.

50. Harris *v.* Warren-Smith Hdw. Co., 44 Okla. 477, 144 Pac. 1050.

51. See *supra*, VII, C, 2, b, (I), (C).

52. See *supra*, VII, C, 1.

53. Cal.—McKean *v.* German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656; Murdock *v.* Brooks, 38 Cal. 596. **Colo.**—Miller *v.* Yockey, 49 Colo. 303, 112 Pac. 772; Canfield *v.* Arnett, 17 Colo. App. 426, 68 Pac. 784. **Ind.**—Indiana Mut. Bldg. & L. Assn. *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Woodruff *v.* Garner, 27 Ind. 4. **Ia.**—Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797. **Kan.**—Corlett *v.* Mut. Ben. L. Ins. Co., 60 Kan. 134, 55 Pac. 844. **Ky.** Rice *v.* Pulliam, **141 Ky. 10, 131 S. W.** 1053; Bennett *v.* McCrocklin, 3 Metc. 322; Bowen *v.* Sebree, 2 Bush 112. **Minn.**—Brackett *v.* Osborne, 31 Minn. 454, 18 N. W. 153; Lash *v.* McCormick, 17 Minn. 403; Swift *v.* Fletcher, 6 Minn. 550. **Mo.**—Missouri Pac. Ry. Co. *v.* Kansas City etc. Air Line Co., 189 Mo. 538, 88 S. W. 3; Holzbauer *v.* Heine, 37 Mo. 443; McPherson *v.* Meek, 30 Mo. 345. **Neb.**—Wehn *v.* Fall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397. **N. Y.**—Fulton County Gas & Electric Co. *v.* Hudson River Tel. Co,, 200 N. Y. 287, 93 N. E. 1052; Vassear *v.* Livingston, 13 N. Y. 248; Mattoon *v.* Baker, 24 How. Pr. 329; Nichols *v.* Riley, 118 App. Div. 404, 103 N. Y. Supp. 554; Turner *v.* Fulcher, 165 N. Y. Supp. 282. **N. C.**—Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632; Askew *v.* Koonce, 118 N. C. 526, 24 S. E. 218. **Ohio.**—Hill *v.* Butler, 6 Ohio St. 207. **Okla.**—Johnson *v.* Acme Harvesting Mach. Co., 24 Okla. 468, 103 Pac. 638. **Ore.**—Watson *v.* McLench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416. **S. D.**—Fanton *v.* Byrum, 26 S. D. 366, 128 N. W. 325, 34 L. R. A. (N. S.) 501; McKinney *v.* Sundback, 3 S. D. 106, 52 N. W. 322. **Tex.**—Kolp *v.* Specht, 11 Tex. Civ. App. 685, 33 S. W. 714. **Wis.**—McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173; Resch *v.* Senn, 31 Wis. 138; Jarvis *v.* Peck, 19 Wis. 74.

54. Set-off in equity, see *supra*, I, G.

at law,[55] nor which limits defendant's cross-demand to causes of action of a legal nature.[56] Equitable claims and demands, providing they possess the other requisites of a proper counterclaim, are assertable as such[57] both in equity suits[58] and by express terms of the code itself[59] in actions at law.[60]

55. **Proceedings in which counterclaim available,** see *supra,* V.

56. See *infra,* this note.

[a] **Equitable Relief Usually Counterclaim.**—"Undoubtedly, in the great majority of instances, any equitable affirmative relief properly conferred upon a defendant would fall within some description of a counterclaim; in order that it should not be a counterclaim, it must be a cause of action entirely independent of that set forth by the plaintiff, and not arising from a contract." Pom. Code Rem. §765. And see Lombard *v.* Cowham, 34 Wis. 486.

57. **Cal.**—Moyle *v.* Porter, 51 Cal. 639. **Ind.**—Vail *v.* Jones, 31 Ind. 467; Sample *v.* Rowe, 24 Ind. 208; Charlton *v.* Tadry, 28 Ind. 452. **Kan.** Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128. **N. Y.** Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Glen & Hall Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Cavalli *v.* Allen, 57 N. Y. 508; Andrews *v.* Gillespie, 47 N. Y. 487; Hicksville & C. S. B. R. Co. *v.* Long Island R. Co., 48 Barb. 355; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58. **N. C.**—Whedbee *v.* Reddick, 79 N. C. 521. **S. D.**—Redwater Land & Canal Co. *v.* Jones, 27 S. D. 194, 130 N. W. 85. **Wis.**—Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547; Lawe *v.* Hyde, 39 Wis. 345; Stowell *v.* Eldred, 39 Wis. 614; Du Pont *v.* Davis, 35 Wis. 631; Lombard *v.* Cowham, 34 Wis. 486; Fisher *v.* Moolick, 13 Wis. 321.

58. More *v.* Rand, 60 N. Y. 208; Perry *v.* Foster, 62 How. Pr. (N. Y.) 228; Reynolds *v.* Dickson, 48 Wash. 407, 93 Pac. 910.

[a] **Must Be Connected With Subject of Action.**—In some states a counterclaim set up in equity must be connected with the subject of the action. Title Ins. & Trust Co. *v.* Northwestern Long Distance T. Co., 88 Ore. 666, 173 Pac. 251.

[b] **An injunction against plaintiff** sought by way of counterclaim in his suit for injunction, see Glen & Hall Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp 58; Redwater Land & Canal Co. *v.* Jones, 27 S. D. 194, 130 N. W. 85.

59. See the codes and *infra,* this note.

[a] **The code in express terms permits** equitable defences and counterclaims in actions at law (see the title "**Suits and Actions**") and authorizes the joining of as many defences and counterclaims, whether legal or equitable or *both* as the defendant may have. Hicksville & C. S. B. R. Co. *v.* Long Island R. Co., 48 Barb. (N. Y.) 355.

60. **Colo.**—Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013. **Ind.**—Vail *v.* Jones, 31 Ind. 467; Charlton *v.* Tardy, 28 Ind. 452; Sample *v.* Rowe, 24 Ind. 208. **Kan.**—Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105; Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **Minn.** Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Eastman *v.* Linn, 20 Minn. 433. **N. Y.**—Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Cavalli *v.* Allen, 57 N. Y. 508; Hicksville & C. S. B. R. Co. *v.* Long Island R. Co., 48 Barb. 355. **N. C.**—Fields *v.* Brown, 160 N. C. 295, 76 S. E. 8; Whedbee *v.* Reddick, 79 N. C. 521. **Wis.**—Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547; Stowell *v.* Eldred, 39 Wis. 614; Lawe *v.* Hyde, 39 Wis. 345; Lombard *v.* Cowham, 34 Wis. 486; Jarvis *v.* Peck, 19 Wis. 74; Fisher *v.* Moolick, 13 Wis. 321.

But see Jones *v.* Moore, 42 Mo. 413.

[a] **Counterclaim for Rescission.** (1) In a suit by the vendor against the purchaser to recover the land, the purchaser may set up an equitable counterclaim seeking rescission of the contract for fraud and recovery of payments made thereunder. Connecticut Mut. Life Ins. Co. *v.* Carson, 186 Mo. App. 221, 172 S. W. 69. (2) And in detinue for a horse, a counterclaim for rescission of the contract of exchange through which the plaintiff had received the horse, may be set up. Walsh *v.* Hall, 66 N. C. 233.

[b] **A counterclaim for cancella-**

(II.) Classes of Demands in General. — The counterclaim authorized in one state at least is very broad and inclusive, embracing any cause of action owned by the defendant against the plaintiff,[61] and in one or two other states the demand asserted as a counterclaim may be one connected with the "cause of action" set forth in the complaint.[62] The balance of the codes may be arranged into two classes: namely, those in which the counterclaim embraces causes of action arising out of the matter pleaded, as well as causes of action based on independent contracts, and those in which the counterclaim includes only the former demands and which have separate provisions as to set-off.[63] In so far as the codes authorize the assertion as counterclaims of causes of action springing from the matter which forms the foundation of plaintiff's suit, they limit the demands thus available to certain specified classes which are embraced within the following enumeration: 1. A cause of action arising out of the contract set forth in the complaint as the foundation of the action.[64] 2. A cause of action

tion of lease because of fraud, set up in an action for rent under the lease. Powell *v.* F. C. Lynde Co., 49 App. Div. 286, 64 N. Y. Supp. 153.

[c] **A demand for an accounting** (1) set up in an action on a note (Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013), and (2) in an action to recover rent for the use of land. Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105.

[d] **Where plaintiff's right is based on a judgment,** defendant may plead as a counterclaim matters which would in equity defeat the judgment. Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547.

[e] **In an action of trespass** defendant may plead by way of counterclaim matters which would constitute a ground for equitable relief against the judgment upon which plaintiff bases his rights. Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547.

Fraud and deceit as basis of counterclaim, see *infra,* VII, C, 2, b, (III), (C); VII, C, 2, b, (IV) (D); VII, C, 2, b, (V) (C).

Demand for specific enforcement of the contract sued on, see *infra,* VII, C, 2, b, (III), (C).

Equitable defenses in actions at law, see the title "**Suits and Actions.**"

[f] **In Federal Courts.**—Under New Eq. Rule 30 (201 Fed. v., 118 C. C. A. v.), only counterclaims which might be the subject of an independent suit in equity may be set up in answer to a bill in equity, consequently a legal demand cannot be interposed as a set-off or counterclaim in an equity suit. Motion Picture Patents Co. *v.* Eclair Film Co., 208 Fed. 416.

61. Coats *v.* Milner (Ark.), 203 S. W. 701.

[a] **The code of Arkansas** provides: "The counterclaim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them," thus omitting the provision: "arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action" which the prior statute contained. Coats *v.* Milner (Ark.), 203 S. W. 701.

[b] **The manifest purpose** of the legislature was to permit all persons who have gone to law to settle in a single suit all matters in dispute between them whether the respective causes of action grow out of the same or different contracts or whether they arise upon contract or out of some tort. Coats *v.* Milner (Ark.), 203 S. W. 701.

[c] **In an action on a note,** defendant may assert as counterclaim a cause of action for damages against the plaintiff and another as partners for breach of an independent contract to sell and deliver a sawmill. Coats *v.* Milner (Ark.), 203 S. W. 701.

62. See *infra,* VII, C, 2, b, (VI).

63. See *supra,* I, D, 2 and *infra,* VII, C, 2, b, (VII).

64. See *infra,* VII, C, 2, b, (III).

arising out of the transaction pleaded by the plaintiff as the foundation of his action.[65] 3. A cause of action connected with the subject of the action.[66] These several classes of demands are different and distinct,[67] as will more fully appear from the subsequent treatment of them.

(III.) Arising Out of the Contract. — (A.) IN GENERAL. — One class of counterclaims, evidently designed as a substitute for recoupment,[68] embraces causes of action arising out of the contract set forth in the complaint as the foundation of plaintiff's action.[69]

65. See *infra*, VII, C, 2, b, (IV).

66. See *infra*, VII, C, 2, b, (V).

67. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. See *infra*, VII, C, 2, (IV), (V) and (VI).

68. Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115. See *supra*, I, D, 2.

69. **U. S.**—Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281. **Ariz.**—Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753; Greene *v.* Hereford, 12 Ariz. 85, 95 Pac. 105. **Cal.**—Placerville Gold Min. Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748; Stoddard *v.* Treadwell, 26 Cal. 294. **Colo.**—Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013; Bannerot *v.* McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126. **Ind.** Penn-American Plate Glass Co. *v.* Harshaw F. & G. Co., 46 Ind. App. 645, 90 N. E. 1047. **Ind. Ter.**—Patterson *v.* Bradley, 4 Ind. Ter. 124, 69 S. W. 821; Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310; J. R. Watkins Medical Co. *v.* Moss, 160 Iowa 244, 141 N. W. 497; Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510. **Kan.**—Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105; Ontjes *v.* Rhodenbaugh, 89 Kan. 533, 132 Pac 211; Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257; Fraker *v.* Cullum, 24 Kan. 679. **Ky.** Combs *v.* Frick Co., 162 Ky. 42, 171 S. W. 999; Bowman *v.* Jones-Hughes Coal Co., 147 Ky. 672, 145 S. W. 373; Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407; Rennebaum *v.* Atkinson, 103 Ky. 555, 45 S. W. 874; Tebbs *v.* Lewis, 15 Ky. L. Rep. 537. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Blakely *v.* J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179; Hackett *v.* Kanne, 98 Minn. 240, 107 N. W. 1131; Lahiff *v.* Hennepin County Catholic Bldg. & L. Assn., 61 Minn. 226, 63 N. W. 493; Koempel *v.* Shaw, 13 Minn. 488; Majerus *v.* Hoscheid, 11 Minn. 243; Whalon *v.* Aldrich, 8 Minn. 346; Mason *v.* Heyward, 3 Minn. 182. **Mo.**—Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438; Ritchie *v.* Hayward, 71 Mo. 560; McAdow *v.* Ross, 53 Mo. 199; Hay *v.* Short, 49 Mo. 139; Graham Paper Co. *v.* National Newspapers Assn. (Mo. App.), 193 S. W. 1003; Johnston *v.* O'Shea, 118 Mo. App. 287, 94 S. W. 783. **Mont.**—Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419; Boucher *v.* Powers, 29 Mont. 342, 74 Pac. 942. **Neb.**—Ross P. Curtice Co. *v.* Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723. **N. Y.**—Harlock *v.* Le Baron, 1 Civ. Proc. 168; Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Cook *v.* Soule, 56 N. Y. 420; Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Smith *v.* Rowe, 49 App. Div. 582, 64 N. Y. Supp. 389; Waters *v.* Lang, 79 Misc. 240, 139 N. Y. Supp. 844; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; Bernheimer *v.* Willis, 11 Hun 16; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694; Turner *v.* Fulcher, 165 N. Y. Supp. 282; American Ink Co. *v.* Riegel Sack Co., 141 N. Y. Supp. 549. **N. C.**—Byerly *v.* Humphrey, 95 N. C. 151; Cobb *v.* Morgan, 83 N. C. 211; Burton *v.* Wilkes, 66 N. C. 604. **N. D.**—Roney *v.* H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688; Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354; Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825. **Ohio.**—Hade *v.* McVay, Allison & Co., 31 Ohio St. 231; Craig *v.* Heis, 30 Ohio St. 550; Loomis *v.* Eagle Bank, 10 Ohio St. 327. **Okla.**—Harris *v.* Warren-Smith Hdw. Co., 44 Okla. 477, 144 Pac. 1050; First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668; Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50; Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Merrill *v.* Hexter, 52 Ore. 138, 94 Pac. 972,

(B.) "Arising Out of." — The term "arising out of," is used in its common and colloquial sense.[70] A counterclaim may be said to arise out of the contract sued on when it is founded on the very consideration upon which plaintiff rests his claim.[71] By no construction of the term can it be extended to embrace claims for breach of contracts other than the one sued on.[72]

(C.) Applications of the Provision. — The foregoing provision of the code, authorizing the use as counterclaims of demands arising out of the contract sued on, has been construed to allow the setting up of claims for damages for breach of the contract pleaded[73] as for breach

96 Pac. 865; Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661; Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179. **S. C.**—Co-operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525; Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803; Latimer *v.* Mahaffey, 30 S. C. 612, 8 S. E. 642. **Wash.**—Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50; Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912; Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380. **Wis.**—Progress Blue Ribbon Farms *v.* George, 167 Wis. 228, 167 N. W. 253; Wheelan *v.* United States Fidelity & Guaranty Co., 165 Wis. 394, 162 N. W. 444; Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547; Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Collins *v.* Morrison, 91 Wis. 324, 64 N. W. 1000; Smith *v.* Diamond, 86 Wis. 359, 56 N. W. 922; McGregor *v.* Auld, 83 Wis. 539, 53 N. W. 845; Racine County Bank *v.* Keep, 13 Wis. 209.

70. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

[a] "**Arising** is springing from, coming into being, beginning, originating, and incident, is appertaining to or following another thing, and connected, is related matters, etc." Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

71. Progress Blue Ribbon Farms *v.* George, 167 Wis. 228, 167 N. W. 253.

[a] **Where defendant denies** the existence of the contract or transaction, he cannot claim that his own cause of action arose out of it. Safran *v.* Silverman, 129 N. Y. Supp. 116.

72. **Ariz.**—Greene *v.* Hereford, 12 Ariz. 85, 95 Pac. 105. **Ark.**—Barry-Wehmiller Machinery Co. *v.* Thompson, 83 Ark. 283, 104 S. W. 137; Mathews *v.* Weiler, 57 Ark. 606, 22 S. W. 569. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510. **Kan.**—Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Mo.** Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438. **N. Y.**—American Ink Co. *v.* Riegel Sack Co., 141 N. Y. Supp. 549. **Ohio.**—Loomis *v.* Eagle Bank, 10 Ohio St. 327. **Ore.**—Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661.

[a] **Damages for breach of a new contract** entered into after breach of the original contract, are not (1) available as a counterclaim under this section. Corrigan *v.* Ritter, 21 Civ. Proc. 82, 15 N. Y. Supp. 163, 39 N. Y. St. 311. (2) Nor where the suit is in respect to the new contract can damages for breach of the original contract be interposed. Sugden *v.* Magnolia Metal Co., 58 App. Div. 236, 68 N. Y. Supp. 809, 32 Civ. Proc. 18.

73. **Ariz.**—Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753. **Ia.**—J. R. Watkins Medical Co. *v.* Moss, 160 Iowa 244, 141 N. W. 497. **Ky.**—Bowman *v.* Jones-Hughes Coal Co., 147 Ky. 672, 145 S. W. 373. **Minn.** Blakely *v.* J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179. **Mo.**—Johnston *v.* O'Shea, 118 Mo. App. 287, 94 S. W. 783. **N. Y.**—Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; O'Sullivan *v.* Junior Dress Co., 130 N. Y. Supp. 209; Harris *v.* Curet, 9 Abb. Pr. N. S. 199.

[a] **Where plaintiff declares upon an express contract** and the evidence shows that it has not been strictly performed, he must recover, if at all, under the doctrine of substantial performance, and, in such case, the defendant may recover damages suffered by reason of plaintiff's failure of strict performance. Blakely *v.* J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

of a warranty,[74] or a covenant[75] in the contract or for negligence[76]

[b] **Breach of contract to drive logs** by water. Blakely *v.* J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

[c] **Lost Profits.**—Where there has been a sale of merchandise for coal to be later delivered, and there is a refusal to take the coal, the seller of the coal may counterclaim for the profit he would have made on the coal, in an action against him for the price of the merchandise. Bowman *v.* Jones-Hughes Coal Co., 147 Ky. 672, 145 S. W. 373.

[d] **A counterclaim for unpaid purchase price** of goods already delivered under a contract may be set up in an action by the buyer against the seller for non-delivery of the goods sold under the contract. Leavenworth *v.* Packer, 52 Barb. (N. Y.) 132.

[e] **Counterclaim for Salary.**—Defendant when sued for the price of books may by way of counterclaim show that he was merely the agent of the plaintiff and recover the salary due. Co-operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525.

[f] **Failure to make payments on contract** of purchase of farm, counterclaimed in an action for damages for breach of the contract. Tebbs *v.* Lewis, 15 Ky. L. Rep. 537.

[g] **Misconduct of employe,** constituting a breach of her contract of employment as a designer, is a proper subject matter of counterclaim in an action to recover a deposit made by her with the employer. O'Sullivan *v.* Junior Dress Co., 130 N. Y. Supp. 209.

[h] **Damages for Withholding Possession of Automobile by Seller.**—Where a conditional contract of sale of automobile was breached by the buyer and the seller took possession of the machine after default, and finally sued defendant on the notes representing the balance on the unpaid purchase price, defendant was allowed to counterclaim damages resulting from plaintiff's depriving her of the use of the machine subsequent to the institution of the suit but not before, since prior to the commencement of the suit plaintiff's possession was lawful. A. F. Chase & Co. *v.* Kelly, 125 Minn. 317, 146 N. W. 1113, L. R. A. 1916A, 912.

[i] **In an action for breach of a covenant** made by the seller of a business not to engage in the same business at the same place, the defendant may recover by way of counterclaim the unpaid portion of the purchase price. Baker *v.* Connell, 1 Daly (N. Y.) 469.

74. **Cal.**—Earle *v.* Bull, 15 Cal. 421. **Ia.**—Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310. **N. Y.** Dounce *v.* Dow, 57 N. Y. 16; Smith *v.* Rowe, 49 App. Div. 582, 64 N. Y. Supp. 389; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; American Ink Co. *v.* Riegel Sack Co., 141 N. Y. Supp. 549; Lemon *v.* Trull, 13 How. Pr. 248; Warren *v.* Van Pelt, 4 E. D. Smith 202.

See also the title "**Sales.**"

[a] **Warranty as to Other Goods.** A counterclaim under this section cannot be based on a breach of warranty as to other goods than those in respect to which the suit is brought. American Ink Co. *v.* Riegel Sack Co., 141 N. Y. Supp. 549.

[b] **Where breach of contract to purchase gasoline** is set up in the complaint, the defendant may counterclaim that the gasoline was not of the quality warranted. Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177.

[c] **Damages for breach of warranty of a horse** may be counterclaimed in action on a note given for balance due plaintiff on an exchange of horses. Maders *v.* Lawrence, 49 Hun 360, 2 N. Y. Supp. 159.

75. Cook *v.* Soule, 56 N. Y. 420; Myers *v.* Burns, 35 N. Y. 269; Benkard *v.* Babcock, 2 Robt. 175, 17 Abb. Pr. 421, 27 How. Pr. 391.

[a] **Actions for Rent.**—(1) Counterclaim for breach of covenant to repair (Cook *v.* Soule, 56 N. Y. 420; Myers *v.* Burns, 35 N. Y. 269), (2) breach of covenant for quiet enjoyment. Ludlow *v.* McCarthy, 5 App. Div. 517, 38 N. Y. Supp. 1075.

76. **Ariz.**—Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753. **Cal.**—Stoddard *v.* Treadwell, 26 Cal. 294. **Ohio.**—Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344.

[a] **Negligence of employe** is (1) a proper basis of counterclaim in an action for services rendered. Stoddard *v.* Treadwell, 26 Cal. 294; Patterson *v.* Bradley, 4 Ind. Ter. 124, 69 S. W. 821. (2) So is negligence of farm

or delay[77] in performance. Fraud and deceit practiced in connection with the contract, as for example, in inducing the agreement,[78] is a proper subject matter of counterclaim. A demand for specific enforcement of the contract sued on may likewise be asserted.[79]

laborer resulting in death of a horse. Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803.

[b] **Negligence of Attorney.**—**N. Y.** Harlock *v.* Le Baron, 1 Civ. Proc. 168. **S. C.**—Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803. **Wis.**—McGregor *v.* Auld, 83 Wis. 539, 53 N. W. 845.

[c] **Negligence of Architect.**—Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380.

[d] **Expenditures by defendant** made in remedying defective work done by plaintiff are a proper subject of counterclaim in plaintiff's action upon a contract to perform certain labor. Baldel *v.* Berko, 144 N. Y. Supp. 10.

[e] **Negligence of lessee in making an addition** to a hotel, resulting in its being destroyed by fire, set up as counterclaim in an action to recover for money expended in making the addition. Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179.

[f] **Negligence of Initial Carrier.** Where a shipment is over several lines of carriers, each independent carrier may require of the shipper prepayment of the freight charges, and where a terminal carrier sues for charges advanced by it to the initial carrier, the defendant shipper cannot counterclaim for damages sustained by the negligence of the initial carrier. Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753.

77. Allegheny Valley Brick Co. *v.* C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189.

78. **U. S.**—American Sign Co. *v.* Electro-Lens Sign Co., 211 Fed. 196; *In re* Harper, 175 Fed. 412. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **N. Y.**—Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Rawley *v.* Woodruff, 2 Lans. 419. **N. C.**—Fields *v.* Brown, 160 N. C. 295, 76 S. E. 8.

See also *infra*, VII, C, 3, a, (II); VII, C, 3, c, (II).

In proceedings to recover leased premises, see 18 STANDARD PROC. 592.

[a] **Inducing Contract of Employment.**—Where defendant was sued for wrongfully discharging plaintiff, he may set up as a counterclaim misrepresentations of plaintiff which induced him to hire plaintiff and to purchase the business which plaintiff was then engaged in managing. Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599.

[b] **Fraud in inducing marriage promise** is a proper basis of counterclaim in an action for breach of promise. Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315.

[e] **Fraudulent representations in respect to one of two articles sold** under one agreement may constitute the basis of a counterclaim in a suit for the price of both articles. Rawley *v.* Woodruff, 2 Lans. (N. Y.) 419.

[d] **Partnership Accounting.**—Fraud in inducing defendants to enter into a contract which provided contingently for a co-partnership subsequently created, is proper matter for counterclaim in an action for dissolution of such partnership and for accounting. More *v.* Rand, 60 N. Y. 208.

[e] **In an action for purchase price of print paper** defendant may counterclaim for the excess price paid as a result of the excess weight of the paper delivered under the contract. Graham Paper Co. *v.* National Newspaper Assn. (Mo. App.), 193 S. W. 1003. See also Garnett & A. Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736.

[f] **In an action on an agreement to share profits** with plaintiff arising out of work done by defendant for an audit company, defendant may plead by way of counterclaim that when the audit company went to see plaintiff, to find out where defendant was and employ him, the plaintiff fraudulently represented that defendant was in its employ, thus inducing the various arrangements under which defendant was to share his gains with plaintiff and preventing defendant from securing the work on his own account. Universal Audit Co. *v.* Cameron, 169 App. Div. 879, 155 N. Y. Supp. 1025.

79. Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442.

[a] **In a suit to recover money paid** upon land under a contract, defendant can set up by way of counterclaim a demand for specific enforcement of

(IV.) Arising Out of Same Transaction. — (A.) Rule Stated. - It is quite generally provided by the codes that defendant may counterclaim a cause of action arising out of the transaction relied upon by the plaintiff as the foundation of his action.[80]

the contract. Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442.

80. **U. S.**—Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281; Californian Canneries Co. *v.* Pacific Sheet Metal Works, 164 Fed. 978, 91 C. C. A. 106; American Sign Co. *v.* Electro-Lens Sign Co., 211 Fed. 196. **Ariz.**—Rouse *v.* Bolen, 17 Ariz. 14, 147 Pac. 736; Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Cal.**—Placerville Gold Min. Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748; Story & Isham Com. Co. *v.* Story, 100 Cal. 30, 34 Pac. 671; James *v.* Center, 53 Cal. 31; McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98; Stoddard *v.* Treadwell, 26 Cal. 294; Mixer *v.* Mixer, 2 Cal. App. 227, 83 Pac. 273. **Colo.** Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108; Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379; Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767; Hyman *v.* Jockey Club Wine, Liquor & Cigar Co., 9 Colo. App. 299, 48 Pac. 671. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832; Murphy *v.* Russell, 8 Idaho 151, 67 Pac. 427; Stevens *v.* Home Sav. & L. Assn., 5 Idaho 741, 51 Pac. 779, 986. **Ind.**—Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477; Judah *v.* Trustees of Vincennes University, 16 Ind. 56; Penn-American Plate Glass Co. *v.* Harshaw, F. & G. Co., 46 Ind. App. 645, 90 N. E. 1047; Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981; Lake Shore & M. S. Ry. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119. **Ind. Ter.** Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510. **Kan.**—Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105; Ontjes *v.* Rhodenbaugh, 89 Kan. 533, 132 Pac. 211; Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Ky.**—Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641; Combs *v.* Frick Co., 162 Ky. 42, 171 S. W. 999; Rennebaum *v.* Atkinson, 103 Ky. 555, 45 S. W. 874; Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628; Tinsley *v.* Tinsley, 15 B. Mon. 454. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304; King *v.* Coe Com. Co., 93 Minn. 52, 100 N. W. 667; Fergus Printing & Pub. Co. *v.* Otter Tail, 60 Minn. 212, 62 N. W. 272; Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132; Steele *v.* Etheridge, 15 Minn. 501; Barker *v.* Walbridge, 14 Minn. 469. **Mo.**—Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438; Ritchie *v.* Hayward, 71 Mo. 560; McAdow *v.* Ross, 53 Mo. 199; Becke *v.* Forsee (Mo. App.), 199 S. W. 734; Coatsworth Lumber Co. *v.* Owen, 186 Mo. App. 543, 172 S. W. 436; Garnett & A. Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736; Reamer *v.* Morrison Exp. Co., 93 Mo. App. 501, 67 S. W. 718. **Mont.**—Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083; Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345; Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419; Boucher *v.* Powers, 29 Mont. 342, 74 Pac. 942; Davis *v.* Frederick, 6 Mont. 300, 12 Pac. 664. **Neb.**—Ross P. Curtice Co. *v.* Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723; Sheibley *v.* Dixon, 61 Neb. 409, 85 N. W. 399; Barr *v.* Post, 56 Neb. 698, 77 N. W. 123. **N. Y.**—Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Bloom *v.* Sutton, 181 App. Div. 247, 168 N. Y. Supp. 403; Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Caspary *v.* Hatch, 157 App. Div. 679, 142 N. Y. Supp. 785; Universal Audit Co. *v.* Cameron, 169 App. Div. 879, 155 N. Y. Supp. 1025; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41; Waters *v.* Lang, 79 Misc. 240, 139 N. Y. Supp. 844; Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315; Pierce *v.* Massman, 168 N. Y. Supp. 1029; Turner *v.* Fulcher, 165 N. Y. Supp. 282; Barhyte *v.* Hughes, 33 Barb. 320; Bernheimer *v.* Willis, 11 Hun 16; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694. **N. C.**—John Slaughter Co. *v.* Standard Mach. Co., 148 N. C. 471, 62 S. E. 599; Davison *v.* West Oxford Land Co., 121 N. C. 146, 28 S. E. 266; Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450; Wilson *v.* Hughes, 94 N. C. 182; Whedbee *v.* Reddick, 79 N. C. 521; Bitting *v.* Thaxton, 72 N. C. 541. **N. D.**—Roney *v.* H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688; Farmer

(B.) MEANING OF TRANSACTION. — The term "transaction" is not legal and technical, but common and colloquial.[81] It is therefore to be construed according to the context and approved usage.[82] As so construed it is different from[83] and broader than[84] contract, and

v. Dakin, 28 N. D. 452, 149 N. W. 354; Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825; Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679. **Ohio.**—Loomis *v.* Eagle Bank, 10 Ohio St. 327; Marthens *v.* Dudley, 7 Ohio Dec. (Reprint) 215, 1 Wkly. L. Bul. 302; Marshall Bros. *v.* Masson, 13 Ohio Dec. 771, 2 Cin. 66. **Okla.**—Harris *v.* Warren-Smith Hardware Co., 44 Okla. 477, 144 Pac. 1050; First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668; Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50; Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009. **Ore.**—Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661; Sears *v.* Martin, 22 Ore. 311, 29 Pac. 890; Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179; Burrage *v.* Bonanza Gold & Quicksilver Min. Co., 12 Ore. 169, 6 Pac. 766. **S. C.** Co-operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525; Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803; Witte *v.* Weinberg, 37 S. C. 579, 17 S. E. 681; Latimer *v.* Sullivan, 30 S. C. 111, 8 S. E. 639; Simkins *v.* Columbia & G. R. Co., 20 S. C. 258; Sharp *v.* Kinsman, 18 S. C. 108. **S. D.**—Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51; Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266; McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766. **Utah.**—Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6. **Wash.**—Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50; Boston Tow Boat Co. *v.* John J. Sesnon Co., 64 Wash. 375, 116 Pac. 1083. **Wis.**—Progress Blue Ribbon Farms *v.* George, 167 Wis. 228, 167 N. W. 253; Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547; Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113; Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Rylander *v.* Laursen, 113 Wis. 461, 89 N. W. 488; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887; Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982; Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745; Weatherby *v.* Meiklejohn, 56 Wis. 73, 13 N. W. 697; Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439; Dietrich *v.* Koch, 35 Wis. 618; Rickard *v.* Kohl, 22 Wis. 506; Akerly *v.* Vilas, 21 Wis. 88; Hall *v.* Gale, 14 Wis. 54; Walker *v.* Wilson, 13 Wis. 522; Racine County Bank *v.* Keep, 13 Wis. 209.

81. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454.

Meaning of transaction in connection with the joinder of causes of action arising out of the same transaction, see the title "**Joinder of Actions.**".

82. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694.

83. **Kan.**—Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Mo.**—Ritchie *v.* Hayward, 71 Mo. 560. **N. Y.**—Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694. **Okla.** Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

But see Collier *v.* Ervin, 3 Mont. 142.

[a] "**The legislature, in using both words**, must be assumed to have designed that each should have a meaning; and, in our judgment, their construction should be according to the natural and ordinary signification of the terms. In this sense every contract may be said to be a transaction; but every transaction is not a contract." Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372, 389.

84. **Minn.**—King *v.* Coe Com. Co., 93 Minn. 52, 100 N. W. 667. **Mo.** Ritchie *v.* Hayward, 71 Mo. 560. **Mont.** Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694; Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Supp. 1119, 53 N. Y. St. 438. But see Barhyte *v.* Hughes, 33 Barb. 320. **R. I.**—McPhillips *v.* Durkin, 103 Atl. 929.

[a] "**Being placed in immediate connection with the word 'contract'**

broader than "cause of action,"[85] or "subject of action,"[86] or tort,[87] although it may include any of these.[88] Nor is the term transaction synonymous with "occurrence" or "accident."[89] It intends some commercial or business negotiation,[90] and applies to any dealings of the parties resulting in wrong without regard to whether the wrong be done by violence, neglect or breach of contract.[91] According to a well known law writer, it is "that combination of acts and events, circumstances and defaults which viewed in one aspect, results in the plaintiff's right of action and viewed in another aspect results in the defendant's right of action."[92]

Not Limited to Facts Pleaded. — Transaction is not limited to the facts set forth in the complaint but includes the entire series of acts and mutual conduct of the parties in the business or proceedings between them which forms the basis of the agreement,[93] and if the plaintiff

and separated therefrom by the disjunctive 'or,' one conclusion is *certain at all events;* namely, that the legislature intended by it something different from and additional to 'contract.' The most familiar rules of textual interpretation are violated by the assumption that no such signification was intended." Pom. Code Rem., §769.

85. See Pom. Code Rem., §774.

The Indiana and Texas statutes use the words *"cause of action"* instead of *"transaction"* or *"subject of the action,"* see *infra,* VII, C, 2, b, (VI).

86. See *infra,* VII, C, 2, b, (V), (B).

87. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454.

[a] **"Even in popular language** no one would speak of an assault or a slander, or false imprisonment or a cheat, as a transaction." Barhyte *v.* Hughes, 33 Barb. (N. Y.) 320.

88. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454.

89. Lake Shore & M. S. Ry. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119.

90. **Cal.**—Clark *v.* Kelley, 163 Cal. 207, 124 Pac. 846; Glide *v.* Kayser, 142 Cal. 419, 76 Pac. 50. **Ind.**—Lake Shore & M. S. Ry. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119. **N. Y.**—Barhyte *v.* Hughes, 33 Barb. 320. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Lowenberg *v.* Rosenthal, 18 Ore. 178, 22 Pac. 601.

[a] **The term includes** "all that is said and done in connection with a purchase and sale, or other trade; and all that is said and done in connection with the perpetration of a fraud or cheat." Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257.

91. Scott *v.* Waggoner, 48 Mont. 536, 139 **Pac. 454.**

That cause of actions in tort may arise out of the "transaction," see *infra,* VII, C, 3.

92. Pom. Code Rem., §774. See also **Minn.**—King *v.* Coe Com. Co., 93 Minn. 52, 100 N. W. 667. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41; Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315; Harrington *v.* Jaeckel, 133 N. Y. Supp. 933.

[a] **"It is believed the rule promulgated** in Conner *v.* Winton, 7 Ind. 523, to which Mr. Pomeroy refers as affording the correct test of when a counterclaim may be legally interposed, should be controlling, and that the clause in our statute, 'a cause of action arising out of the . . . transaction set forth in the complaint, as the foundation of the plaintiff's claim,' should be so construed as to permit a counterclaim to be set up, when from the nature of the case it can readily be seen that the parties at the time the 'transaction' culminated could have reasonably intended might in some event give rise to a cause of action by one against the other." Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, 395, Ann. Cas. 1914B, 115.

93. Story *v.* Story & Isham Commercial Co., 100 Cal. 41, 34 Pac. 675; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372, 2 Bos. 694; Gross *v.* Hoch-

fails to set forth in his complaint the entire transaction out of which the claim arose, defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court,[94] for the plaintiff is not at liberty to select an isolated act or fact which is only one of a series of acts or steps in the entire transaction, and insist on a judgment on that fact alone if the fact is so connected with others that it forms only a portion of the transaction.[95]

(C.) ARISING OUT OF. — The term arising out of has been explained in connection with the subdivision dealing with counterclaims arising out of the contract sued on.[96]

(D.) AS APPLIED TO PARTICULAR CASES. — (1.) *Actions Upon Contract for Debt Due or Damages.* — The foregoing provisions of the code authorizing counterclaims arising out of the transaction sued on has frequently been construed and applied in connection with ordinary contract actions,[97] such as those brought to recover the purchase price[98] of goods

stim, 72 Misc. 343, 130 N. Y. Supp. 315.

[a] **"Some facts enter into the plaintiff's case which . . . do not enter into the defendant's** case, and vice versa. But, from the nature of the subject, this must always be so. The legislature were not so absurd as to mean that the defendant might counterclaim, when the very facts alleged by him, with all their particulars, were identical with those alleged by the plaintiff." Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372, 392.

[b] **"The transaction is not necessarily confined** by the facts stated in the complaint, but the defendant may set up new facts, and show the entire transaction and counterclaim upon that state of facts as the transaction upon which plaintiff's claim is founded." King *v.* Coe Commission Co., 93 Minn. 52, 100 N. W. 667.

[c] **Defendant's Theory of the Contract Different.**—Where plaintiff treats the contract as one of sale and seeks to recover the purchase price, defendant may show it to be a contract of agency and counterclaim for breach thereof. Steele *v.* Etheridge, 15 Minn. 501.

94. Story *v.* Story & Isham Commercial Co., 100 Cal. 41, 34 Pac. 675.

95. **Cal.**—McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. **Neb.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123. **N. Y.**—Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360; Prosser *v.* Carroll, 33 Misc. 428, 68 N. Y. Supp. 542, 9 N. Y. Ann. Cas. 242; Schnaderbeck *v.* Worth, 8 Abb. Pr. 37. **Ohio.**—Mogle *v.* Black, 5 Ohio C. C. 51, 30 Ohio Cir. Dec. 27. **S. D.**—Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51. **Wis.** Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887.

96. See *supra*, VII, C, 2, b, (II), (B).

97. **Tort demands in contract actions,** see *infra*, VII, C, 3, c, (II).

98. **Ind.** — Penn-American Plate Glass Co. *v.* Harshaw, F. & G. Co., 46 Ind. App. 645, 90 N. E. 1047. **Ia.** Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510. **Minn.**—Steele *v.* Etheridge, 15 Minn. 501. **Mo.**—Garnett & A. Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736. **N. Y.** Siebrecht *v.* Siegel-Cooper Co., 38 App. Div. 549, 56 N. Y. Supp. 425; Starr Cash Car Co. *v.* Reinhardt, 2 Misc. 116, 20 N. Y. Supp. 872, 49 N. Y. St. 228. **N. C.**—Davison *v.* West Oxford Land Co., 121 N. C. 146, 28 S. E. 266. **Okla.**—Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009. **S. C.**—Co-operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525.

[a] **The sale and delivery of the goods** is the transaction in a suit for goods sold and delivered. Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008.

[b] **The sale and purchase** constitute the transaction. Siebrecht *v.* Siegel-Cooper Co., 38 App. Div. 549, 56 N. Y. Supp. 425; Starr Cash Car Co. *v.* Reinhardt, 2 Misc. 116, 20 N. Y. Supp. 872.

or other property sold, or to recover for services rendered,[99] or for rent of premises,[1] or upon an account stated;[2] for breach of promise,[3] or upon bonds,[4] or bills and notes.[5]

[c] **Recovery for Overcharges Fraudulently Made.**—Defendant may when sued for the purchase price of goods show that plaintiff had fraudulently invoiced the goods in excess of their real weight and recover excess payments made in consequence. Garnett & A. Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736.

[d] **Tort After Default in Contract.** In an action to recover the purchase price upon non-performance of a contract for the sale of real estate, the defendant cannot counterclaim for the wrongful filing of the contract after plaintiff's default, because such cause of action does not arise out of the contract or transaction set forth in the complaint, nor is it connected with the subject of the action. Bloom *v.* Sutton, 181 App. Div. 247, 168 N. Y. Supp. 403.

99. **Cal.**—Stoddard *v.* Treadwell, 26 Cal. 294. **Minn.**—Fergus Printing & Pub. Co. *v.* Otter Tail, 60 Minn. 212, 62 N. W. 272. **Mo.**—Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438. **Neb.** Sheibley *v.* Dixon, 61 Neb. 409, 85 N. W. 399. **S. C.**—Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803.

[a] **The work done** considered the transaction. Sheibley *v.* Dixon, 61 Neb. 409, 85 N. W. 399.

[b] **Negligence of attorney,** proper subject of counterclaim in an action by him to recover for the services in respect to which his negligence occurred. Whitelegge *v.* De Witt, 12 Daly (N. Y.) 319.

1. Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359; Ayres *v.* O'Farrell, 4 Robt. (N. Y.) 668; Drake *v.* Cockroft, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How. Pr. (N. Y.) 377.

2. Ingle *v.* Angell, 111 Minn. 63, 126 N. W. 400, 137 Am. St. Rep. 533.

[a] **A balance not included in the settlement** of the mutual accounts, may be counterclaimed. Ingle *v.* Angell, 111 Minn. 63, 126 N. W. 400, 137 Am. St. Rep. 533.

3. Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315.

[a] **Fraud in inducing the promise of marriage** is proper subject matter for counterclaim in such suits. Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315.

4. Tinsley *v.* Tinsley, 15 B. Mon. (Ky.) 454; Devries & Co. *v.* Warren, 82 N. C. 356.

[a] **The loan of the money** for which the bond was given, is the transaction in an action on bond. De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Supp. 358, 29 Civ. Proc. 250.

[b] **The sale of the land** is held to be the transaction in an action upon a bond given for the purchase price of land. Devries & Co. *v.* Warren, 82 N. C. 356.

[c] **Injunction Bond.**—Where a suit to restrain a proceeding to recover possession of a farm was dismissed and an action subsequently brought upon the bond given in such injunction suit, the defendant was allowed to plead as a counterclaim that notwithstanding the injunction, and before it was dissolved, the plaintiff (the defendant in the injunction suit) wrongfully took possession of the land and converted the crops thereon to his own use. Tinsley *v.* Tinsley, 15 B. Mon. (Ky.) 454.

5. **Ind. Ter.** — Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Neb.**—Fouts *v.* Mann, 15 Neb. 172, 18 N. W. 64. **N. Y.**—Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251; Clinton *v.* Eddy, 1 Lans. 61. **Ohio.**—Loomis *v.* Eagle Bank, 10 Ohio St. 327; Marthens *v.* Dudley & Co., 7 Ohio Dec. (Reprint) 215, 1 Wkly. L. Bul. 302. **Ore.**—Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661. **S. C.**—Witte *v.* Weinberg, 37 S. C. 579, 17 S. E. 681; Latimer *v.* Sullivan, 30 S. C. 111, 8 S. E. 639. **S. D.**—Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51. **Wis.**—Martin *v.* Pugh, 23 Wis. 184; Rickard *v.* Kohl, 22 Wis. 506; Racine County Bank *v.* Keep, 13 Wis. 209.

[a] **Actions on Notes.**—"We are of the opinion that any cause of action in favor of the defendant, and against the plaintiff, arising out of the contract or transaction between the parties, of which the promissory note set out in the complaint is but the

(2.) *Actions for Personal Torts.* — The transaction out of which defendant's counterclaim may arise is not confined to business and contractual dealings. Acts and relations of a tortious character are equally within the contemplation of the provision.[6] It may be invoked to justify the interposition of counterclaims in suits wherein the plaintiff seeks reparation for libel and slander,[7] assault[8] and bat-

evidence, can be said to arise out of the contract or transaction upon which plaintiff's action is based, and may be set up as a counterclaim to an action on the note.'' Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661.

[b] **Fraud.**—(1) Where an action is brought on notes given for patent rights, it is proper to set up a counterclaim for fraud inducing the making of the contract. American Sign Co. *v.* Electro-Lens Sign Co., 211 Fed. 196. (2) But a tort accomplished by fraud long after the execution of the note sued upon cannot be set up as a counterclaim. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

[c] **Counterclaim for Negligence.** Where defendant purchased a threshing machine from plaintiff and gave notes for the purchase price, he may, in a suit on such notes, show by way of counterclaim, that under the contract of sale plaintiff agreed, upon defendant's request, to remedy any defects in the machine and that in carrying out this provision of the contract, negligently injured the son of the defendant. Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51.

[d] **A demand to recover usurious interest** paid (1) for the loan which is the basis of the action is a valid counterclaim (Martin *v.* Pugh, 23 Wis. 184), but (2) not one to recover usurious interest paid to plaintiff on former loans. Clinton *v.* Eddy, 1 Lans. (N. Y.) 61.

[e] **In an action on notes executed to brokers** for amount due in purchase and sale of wheat, the dealing in wheat for defendant's account is the transaction. Kneeland *v.* Pennell, 49 Misc. 94, 96 N. Y. Supp. 403.

[f] **Breach of Contract To Sell Note at Discount.**—In an action on a note, the maker may by way of counterclaim allege that the plaintiff had contracted to sell the note to him before maturity at a discount and had broken such agreement. Bell *v.* Pitman, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820.

6. **See as to tort demands** as counterclaims, *infra*, VII, C, 3.

7. **Minn.**—Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304. **N. Y.** Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Supp. 1119, 53 N. Y. St. 438; Fellerman *v.* Dolan, 7 Abb. Pr. 395. **N. D.** Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679. **Wis.** Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113.

[a] **The entire word encounter** in slander is included in the transaction. Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113.

[b] **Slander perpetrated by plaintiff** on the same occasion is not a proper counterclaim as arising out of the transaction. Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Supp. 1119, 53 N. Y. St. 438; Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679. *Contra*, Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113.

[c] **A claim for goods sold and delivered** to plaintiff, cannot be asserted in an action for libel against defendant for having plaintiff's name published as a delinquent debtor. Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304.

8. **Neb.**—Barr *v.* Post. 56 Neb. 698, 77 N. W. 123. **N. Y.**—Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360; Prosser *v.* Carroll, 33 Misc. 428, 68 N. Y. Supp. 542, 9 N. Y. Ann. Cas. 242. **Wis.**—Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887.

[a] **The entire physical encounter** in assault and battery is embraced within the term transaction. Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744.

[b] **An assault by plaintiff on defendant** in the same affray may be set up as a counterclaim in action for

tery, false imprisonment,[9] or malicious prosecution.[10]

(3.) *Proceedings Involving Title and Possession of Real Property.* — In that class of cases wherein the plaintiff sues in respect to possession of a title to real property, there may lie at the foundation of plaintiff's cause of action, a transaction within the contemplation of the statute.[11] Thus the defendant's demand may arise out of the transaction when the plaintiff proceeds on ejectment[12] or for partition;[13] or to quiet title or remove a cloud,[14] or in waste[15] or trespass.[16]

assault and battery. Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887.

[c] **Damages for a libel** which brought on the assault are not a proper counterclaim. McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. But see Mogle *v.* Black, 5 Ohio C. C. 51, 30 Ohio Cir. Dec. 27.

9. Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41; Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439.

[a] **The arrest** considered the transaction. Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41.

[b] **The arrest and the accompanying facts** connected with the bringing the action with malice and without probable cause constitute the transaction in false imprisonment under process. Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858.

10. **Mo.** — Becke *v.* Forsee (Mo. App.), 199 S. W. 734. **N. Y.**—Pettis *v.* Schwartz, 137 App. Div. 242, 122 N. Y. Supp. 50. **Wis.**—Noonan *v.* Orton, 30 Wis. 356.

[a] **The malicious prosecution** is the transaction in such case. Becke *v.* Forsee (Mo. App.), 199 S. W. 734; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41.

[b] **In an action for malicious prosecution for an assault** defendant cannot counterclaim for damages which he suffered by the alleged assault. The cause of action thus set up did not arise out of any acts connected with the malicious prosecution, but out of a controversy occurring some time previous, and in no way dependent upon the malicious prosecution. Becke *v.* Forsee (Mo. App.), 199 S. W. 734.

11. **In summary dispossessory proceeding by landlord,** see 18 STANDARD PROC. 592; in forcible detainer case, see 8 STANDARD PROC. 1120.

12. **Cal.**—Wigmore *v.* Buell, 116 Cal. 94, 47 Pac. 927; Yorba *v.* Ward, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793; Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314. **Neb.**—White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012. **N. Y.**—Dinan *v.* Coneys, 143 N. Y. 544, 38 N. E. 715. **N. C.**—Griffin *v.* Thomas, 128 N. C. 310, 38 S. E. 903.

[a] **Maintenance of Plaintiff.**—In ejectment a demand for maintenance of plaintiff on the premises does not arise out of the transaction. White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012.

13. Williams *v.* Clarke, 82 App. Div. 199, 81 N. Y. Supp. 381.

14. Rogers Development Co. *v.* Southern California Real Estate Invest. Co., 159 Cal. 735, 115 Pac. 934, 35 L. R. A. (N. S.) 543; Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40; Stevens *v.* Home Sav. & L. Assn., 5 Idaho 741, 51 Pac. 779, 986.

[a] **The mortgage sought to be satisfied of record,** is the transaction. Stevens *v.* Home Sav. & L. Assn., 5 Idaho 741, 51 Pac. 779, 986.

[b] **That a claim for possession of the premises** is not admissible as a counterclaim in a suit to quiet title to such premises, see Moyle *v.* Porter, 51 Cal. 639.

15. Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982.

[a] **The waste** is the transaction in an action for waste. Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982.

16. **Ky.**—Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407. **N. Y.**—Van *v.* Madden, 132 App. Div. 535, 116 N. Y. Supp. 1115. **S. C.**—Sharp *v.* Kinsman, 18 S. C. 108. **Utah.**—Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6. **Wash.** Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801. **Wis.**—Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114; Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478.

[a] **The trespass,** held to be the

(4.) *Proceedings Involving Ownership and Possession of Personalty.*— As with suits and actions in respect to real property, so with those in which plaintiff seeks to vindicate his ownership or possession of personalty, there may be some transaction involved out of which a cause of action in favor of defendant arises. Counterclaims of the class under discussion have been urged by defendant when sued in detinue,[17] replevin,[18] claim and delivery,[19] trespass,[20] and conversion.[21]

transaction. Sharp *v.* Kinsman, 18 S. C. 108.

[b] **Where tenant attempts to retain possession of leased premises** and the landlord brings an action for damages and an injunction based on such alleged wrongful acts, the tenant may counterclaim a cause of action in tort based on the landlord's wrongful acts in breaking into the leased premises while the tenant was still in rightful occupancy thereof. The transaction pleaded in such case is the alleged wrongful acts of the tenant in attempting to retain possession of the leased premises. Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128.

17. Wilson *v.* Hughes, 94 N. C. 182. *Compare* 7 STANDARD PROC, 483.

18. **U. S.**—Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281. **Cal.**—Glide *v.* Kayser, 142 Cal. 419, 76 Pac. 50. **Mo.** Howard *v.* Haas, 131 Mo. App. 499, 109 S. W. 1076. **Mont.**—Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345. **Neb.**—Ross P. Curtice Co. *v.* Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723. **N. Y.**—Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Bernheimer *v.* Hartmayer, 50 App. Div. 316, 63 N. Y. Supp. 978; Marshall *v.* Friend, 35 Misc. 101, 71 N. Y. Supp. 221; Gottler *v.* Babcock, 7 Abb. Pr. 392. **S. D.**—Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266. **Wis.**—Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

[a] **In an action of replevin for a stock of goods** under a chattel mortgage made to secure the payment of a note given in part payment for the purchase of the goods, the defendant mortgagor may set out, as a counterclaim a cause of action which has accrued to him on account of fraud practiced on him by the mortgagee when the goods were purchased. Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537.

[b] **In replevin for goods against receiver** of a corporation, defendant cannot set up as a counterclaim a debt owing from plaintiff to the corporation. Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50.

19. Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345.

[a] **The wrongful taking** of the property is the transaction. Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345.

20. **N. Y.**—Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Supp. 497, 20 N. Y. St. 639. **S. C.**—Simkins *v.* Columbia & G. R. Co., 20 S. C. 258. **Wis.**—Rylander *v.* Laursen, 113 Wis. 461, 89 N. W. 488.

[a] **The injury done,** held to be the transaction. Simkins *v.* Columbia & G. R. Co., 20 S. C. 258.

[b] **The collision** of the wagons is the transaction in an action based on defendant's negligence in driving against plaintiff's wagon. Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Supp. 497, 20 N. Y. St. 639.

21. **Cal.**—Story & Isham Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671. **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Minn.**—Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132; Mayerus *v.* Hoscheid, 11 Minn. 243. **Mo.**—Ritchie *v.* Hayward, 71 Mo. 560; Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314; Reamer *v.* Morrison Exp. Co., 93 Mo. App. 501, 67 S. W. 718. **Mont.**—Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419. **N. Y.**—Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552; O'Brien *v.* Dwyer, 76 App. Div. 516, 78 N. Y. Supp. 600; Numan *v.* Wolf, 73 App. Div. 38, 76 N. Y. Supp. 371; Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238; Schaefer *v.* Empire Lithographing Co., 28 App. Div. 469, 51 N. Y. Supp. 104; Monroe Miller Co. *v.* Stokes, 7 Misc. 433, 27 N. Y. Supp. 940; Bissell *v.* Pearse, 21 How. Pr. 130; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694; Askins *v.* Hearns, 3 Abb. Pr. 184. **N. C.**—Bitting *v.* Thaxton, 72 N. C. 541. **N. D.** Roney *v.* H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688; Kain *v.* Garnaas,

(5.) *Foreclosure Proceedings.* — Counterclaims may properly arise out of the transaction in proceedings to foreclose mortgages on real or personal property,[22] or trust deeds,[23] or liens.[24]

27 N. D. 292, 145 N. W. 825. **Okla.** First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Ore.**—Loewenberg *v.* Rosenthal, 18 Ore. 178, 22 Pac. 601. **S. C.**—Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167.

[a] **That the conversion** is considered the transaction (1) in trover or conversion, see **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Minn.**—Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132. **N. Y.**—Askins *v.* Hearns, 3 Abb. Pr. 184. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. (2) But see Numan *v.* Wolf, 73 App. Div. 38, 76 N. Y. Supp. 371, where in an action for conversion of money entrusted to defendant for purposes of plaintiff's defense, the court seems to regard the transaction as the payment of the money to provide for the defense or discharge of plaintiff.

[b] **Where collateral security is converted,** the note which it was given to secure is considered part of the transaction. Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238.

[c] **A cause of action for the purchase price of an automobile** may be counterclaimed in an action by the buyer against the seller for damages for conversion of the automobile. "Since plaintiff's right of possession depended upon his purchase of it, and his right to the possession was a necessary part of his right of action, it would seem to follow that the purchase of the automobile was a part of the transaction set forth in plaintiff's complaint as modified by the admissions in his reply, and that the defendant's counterclaim for the balance of the purchase price arose out of the same transaction, or, at least, was connected with the subject of the action." Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083.

22. **Cal.**—Placerville Gold Min. Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748. **Idaho.**—Murphy *v.* Russell, 8 Idaho 151, 67 Pac. 427. **Mo.**—McAdow *v.* Ross, 53 Mo. 199. **N. Y.**—Agate *v.* King, 17 Abb. Pr. 159. **Ore.**—Sears *v.* Martin, 22 Ore. 311, 29 Pac. 890; Burrage *v.* Bonanza Gold & Quicksilver Min. Co., 12 Ore. 169, 6 Pac. 766. **Wis.**—Akerly *v.* Vilas, 21 Wis. 88; Hall *v.* Gale, 14 Wis. 54; Walker *v.* Wilson, 13 Wis. 522. See 19 STANDARD PROC. 966.

[a] **Purchase Money Mortgage.** Akerly *v.* Vilas, 21 Wis. 88; Hall *v.* Gale, 14 Wis. 54; Walker *v.* Wilson, 13 Wis. 522.

[b] **The loan of the money** together with the delivery of the note and mortgage and the default in payment of the debt are the transaction. Watts *v.* Gantt, 42 Neb. 869, 61 N. W. 104. See also Insurance Co. *v.* Parker, 64 Neb. 411, 89 N. W. 1040.

[c] **Cancellation of Deed.**—Where in addition to the mortgage sought to be foreclosed, defendant, to secure the same loan, gave plaintiff a deed to the other half of the same premises, which deed was intended as a mortgage merely; his claim to have such deed cancelled upon payment of the loan, is a proper counterclaim. Bernheimer *v.* Willis, 11 Hun (N. Y.) 16.

[d] **Counterclaim for Breach of Covenants.**—In an action to foreclose a purchase money mortgage a counterclaim for breach of covenant of seisin in the deed is permissible. Akerly *v.* Vilas, 21 Wis. 88.

[e] **A money demand upon the part of a subsequent grantee** of the mortgagor, who has not assumed payment of the mortgage debt and against whom no personal judgment is asked, is not a proper counterclaim. Placerville Gold Min. Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748.

23. Title Ins. & Trust Co. *v.* Northwestern Long Distance Tel. Co., 88 Ore. 666, 173 Pac. 251.

[a] **Execution of Trust Deed, the Transaction.**—In a suit to foreclose a trust deed executed to secure certain bonds, the transaction involved is the execution of the deed for the purpose mentioned and plaintiff's conversion of cash and bonds of defendant after the beginning of the suit cannot be interposed as a counterclaim arising out of the transaction. Title Ins. & Trust Co. *v.* Northwestern Long Distance T Co., 88 Ore. 666, 173 Pac. 251.

24. See 18 STANDARD PROC. 1007,

(6.) *Proceedings Seeking Special Remedies.* — It was not the intention of the codifiers to confine counterclaims to ordinary actions based on money demands for tort or breach of contract. There may exist claims connected with the subject of the action,[25] or arising out of the transaction even where plaintiff seeks some special remedy. Thus defendant's cause of action may constitute a proper counterclaim when it springs from the transaction set forth by plaintiff suing for an accounting[26] for injunction,[27] for reformation,[28] for rescission and cancellation,[29] or for specific performance.[30]

(7.) *Miscellaneous Proceedings.* — The scope and application of the phrase "arising out of the transaction" has been considered by the courts in connection with various proceedings other than those mentioned above. They include such proceedings as those for divorce,[31]

1008; 19 STANDARD PROC. 689.

[a] **Lien for Street Assessment.** Engebretsen *v.* Gay, 158 Cal. 27, 109 Pac. 879.

[b] **The assessment is the transaction** in an action to foreclose a street assessment. Engebretsen *v.* Gay, 158 Cal. 27, 109 Pac. 879; Himmelmann *v.* Spanagel, 39 Cal. 389.

25. See *infra,* VII, C, 2, b, (V), (C).

26. See *infra,* this note.

[a] **Money paid to plaintiff under mistake** counterclaimed in an action by cestui que trust for an accounting. Perry *v.* Foster, 62 How. Pr. (N. Y.) 228.

27. **Cal.**—Mixer *v.* Mixer, 2 Cal. App. 227, 83 Pac. 273. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Hackett *v.* Kanne, 98 Minn. 240, 107 N. W. 1131. **N. Y.** Burns *v.* Nevins, 27 Barb. 493. **S. D.** Redwater Land & Canal Co. *v.* Jones, 27 S. D. 194, 130 N. W. 85. **Utah.** Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6. **Wis.**—Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745.

[a] **The wrongful attempt to retain possession** of leased premises is the transaction in a suit by the owner to enjoin the defendant from entering the premises. Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128.

[b] **Counterclaims to have boundaries determined** asserted in action to enjoin trespasses on land. Hackett *v.* Kanne, 98 Minn. 240, 107 N. W. 1131.

28. Lahiff *v.* Hennepin County Catholic Bldg. & L. Assn., 61 Minn. 226, 63 N. W. 493.

29. **Colo.**—Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379. **Mo.**—Coatsworth Lumber Co. *v.* Owen, 186 Mo. App. 543, 172 S. W. 436. **N. Y.**—Barnes *v.* Gilmore, 6 Civ. Proc. 286; D'Auxy *v.* Dupre, 47 App. Div. 51, 62 N. Y. Supp. 244; Smith *v.* Hilton, 50 Hun 236, 2 N. Y. Supp. 820, 19 N. Y. St. 340; Venice *v.* Breed, 65 Barb. 597, 1 Thomp. & C. 130; New York *v.* Wood, 4 Abb. Pr. N. S. 332. **Wis.**—Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097.

[a] **Rents and profits** counterclaimed in action to cancel deed. Barnes *v.* Gilmore, 6 N. Y. Civ. Proc. 286.

[b] **Rent due under a lease** sought to be cancelled, may be counterclaimed. New York *v.* Wood, 4 Abb. Pr. N. S. (N. Y.) 332.

30. Bannerot *v.* McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126; Thompson *v.* McKee (Ky.), 119 S. W. 229. See the title "**Specific Performance.**"

31. R. F. H. *v.* S. H., 40 Barb. (N. Y.) 9 (defendant's alleged adultery is the "transaction" and he cannot counterclaim plaintiff's adultery); Henry *v.* Henry, 17 Abb. Pr. (N. Y.) 411, 27 How. Pr. 5, 3 Robt. 614; Diddell *v.* Diddell, 3 Abb. Pr. (N. Y.) 167.

[a] **In an action for a limited divorce** on the ground of cruelty, an answer charging adultery by plaintiff and demanding an absolute divorce is not a proper counterclaim. Henry *v.* Henry, 17 Abb. Pr. (N. Y.) 411, 27 How. Pr. 5, 3 Robt. 614.

[b] **In suit for absolute divorce** for adultery, an answer setting up cruelty and praying for a judicial separation, not a proper counterclaim. Terhune *v.* Terhune, 40 How. Pr. (N. Y.) 258; Griffin *v.* Griffin, 23 How. Pr. (N. Y.) 183; Diddell *v.* Diddell, 3 Abb.

for dower,[32] and those involving wills.[33]

(V.) Connected With Subject of Action. — (A.) RULE STATED.— In all but one or two[34] of the states where counterclaim prevails, the defendant may, whether the action be on contract or other transaction, set up a counterclaim "connected with the subject of the action," even though it does not arise out of the same contract or the same transaction.[35]

(B.) MEANING OF "CONNECTED WITH SUBJECT OF ACTION." — Courts have experienced some difficulty in construing the phrase "connected with

Pr. (N. Y.) 167. But see Armstrong *v.* Armstrong's Admr., 27 Ind. 186.

32. The marriage seisin and death of the husband, constitute the transaction in an action for dower. Bogardus *v.* Parker, 7 How. Pr. (N. Y.) 303. See also Burnett *v.* Burnett, 86 App. Div. 386, 83 N. Y. Supp. 760. *Compare* 7 STANDARD PROC. 877.

33. See *infra*, this note.

[a] **Recovery of Legacy.**—The will of the decedent, and its admission to probate, constitute the transaction in an action for a legacy. Lehleuter *v.* Shano, 49 Misc. 99, 96 N. Y. Supp. 716.

34. Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Merrill *v.* Hexter, 52 Ore. 138, 94 Pac. 972, 96 Pac. 865; Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552; Dove *v.* Hayden, 5 Ore. 500.

[a] **At law** a counterclaim is not sufficient if it be only connected with the subject of the action. Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Wait *v.* Wheeler & Wilson Mfg. Co., 23 Ore. 297, 31 Pac. 661.

35. **U. S.**—Williams Patent Crusher & P. Co. *v.* Kinsey Mfg. Co., 205 Fed. 375. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Cal.**—Placerville Gold Min. Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748; Waugenheim *v.* Graham, 39 Cal. 169. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Ia.** Dice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310. **Kan.**—Ontjes *v.* Rhodenbaugh, 89 Kan. 533, 132 Pac. 211. **Ky.**—Tinsley *v.* Tinsley, 15 B. Mon. 454; Nolle *v.* Thompson, 3 Metc. 121. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1; Eastman *v.* Linn, 20 Minn. 433. **Mo.**—Lane *v.* Dowd, 172 Mo. 167, 72 S. W. 632; McAdow *v.* Ross, 53 Mo. 199; Jones *v.* Moore, 42 Mo. 413; Connecticut Mut. Life Ins. Co. *v.* Carson, 186 Mo. App. 221, 172 S. W. 69; Coatsworth Lumber Co. *v.* Owen, 186 Mo. App. 543, 172 S. W. 436. **N. Y.** Bloom *v.* Sutton, 181 App. Div. 247, 168 N. Y. Supp. 403; Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Fliess *v.* Hoy, 150 App. Div. 555, 135 N. Y. Supp. 44; Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694. **N. C.** Bitting *v.* Thaxton, 72 N. C. 541; Walsh *v.* Hall, 66 N. C. 233. **N. D.** Roney *v.* H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688; Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354; Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825. **Okla.**—Harris *v.* Warren-Smith Hardware Co., 44 Okla. 477, 144 Pac. 1050; Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50; Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009. **Wash.**—Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50. **Wis.**—Washburn Land Co. *v.* White River Lumb. Co., 165 Wis. 112, 161 N. W. 547; Wille *v.* Maas, 156 Wis. 274, 145 N. W. 783; McArthur *v.* Moffet, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264; McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139; Vilas *v.* Mason, 25 Wis. 310; Scheunert *v.* Kaehler, 23 Wis. 523; Akerly *v.* Vilas, 21 Wis. 88.

[a] **The English and Canadian** statutes permit defendant to interpose demands "relating to or connected with the original subject of the cause or matter." Edge *v.* Weigel, 97 L. T. N. S. (Eng.) 447; Barber *v.* Blaiberg, 51 L. J. Ch. N. S. (Eng.) 509, 46 L. T. N. S. 52, 30 Wkly. Rep. 362; Grills *v.* Farah, 21 Ont. L. Rep. 457, 16 Ont. Wkly. Rep. 285; Dauphin *v.*

the subject of the action,"[36] due to the fact that it is somewhat indefinite and ambiguous.[37] They have not always agreed as to what constitutes the "subject of the action,"[38] and have had even more trouble in ascertaining when the cause of action sought to be enforced as a counterclaim is "connected with" that subject.[39]

The subject of the action is not the same thing as the object of the action,[40] nor is it identical with the plaintiff's cause of action,[41] though some cases confuse it with the latter.[42] Some authorities take the subject of the action to denote the specific thing in regard to which the legal controversy is carried on,[43] as for example the instrument or contract to be cancelled,[44] or the specific thing converted[45] or sought to be replevied,[46] and elsewhere it is taken as relating not to the thing itself about which the controversy has arisen, but as referring rather

Starke Cooperage Co., 7 Quebec Pr. Rep. 454.

36. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

37. See Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1.

[a] "**The words, connected with the subject of the action,** are exceedingly loose, and would embrace every conceivable claim which can arise directly or remotely from any act or omission which can be the subject of a civil suit. It was not the intention of the legislature, I apprehend, to allow all manner of rights of action to be litigated between parties under the name of counterclaims, merely because they may have had their origin in the transaction which is the subject matter of the suit." Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130.

38. See Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

[a] "**Exactly what is meant** by the words 'subject of the action' as used in the code does not seem to be very clearly defined in any judicial decision which has come under our notice." Humbert *v.* Brisbane, 25 S. C. 506.

39. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

40. **Ark.**—Dale *v.* Hall, 64 Ark. 221, 41 S. W. 761. **Ia.**—Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386. **N. Y.**—Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694.

[a] **Thus in an action for damages for conversion** of bills of exchange "the *object* of the action is damages, but the *subject* is the bills of exchange, **or the right to their possession.**" **Xenia** Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372, 396. To same effect, Van *v.* Madden, 132 App. Div. 535, 116 N. Y. Supp. 1115.

41. Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

42. **U. S.**—*In re* Harper, 175 Fed. 412. **N. Y.**—Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858; Chamboret *v.* Cagney, 10 Abb. Pr. N. S. 31, 41 How. Pr. 125, 2 Sweeney 328; Van *v.* Madden, 116 N. Y. Supp. 1115; Lehmair *v.* Griswold, 8 Jones & S. 100. **Wis.**—Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745.

[a] **Thus the claim of plaintiff** has been held to be the subject of the action in an action to recover the price of goods furnished. *In re* Harper, 175 Fed. 412.

43. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Ia.**—Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386. **N. Y.**—Carpenter *v.* Manhattan Life Ins. Co., 93 N. Y. 552; Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379; Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

44. Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386; Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266.

45. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873; Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379; Adams *v.* Loomis, 54 Hun 638, 8 N. Y. Supp. 17, 4 Silv. 558.

46. Small *v.* Speece, 131 Mo. App. 513, 110 S. W. 7.

to the origin and ground of the plaintiff's right to recover or obtain the relief sought.[47] Perhaps the correct view is that which regards it as the main primary right which has been broken and by means of whose breach a remedial right arises,[48] as for example, the right of property and possession in ejectment and replevin,[49] the right of possession in trover and trespass,[50] and the right to the money in all cases of debt and the like,[51] would be the "subject" of those actions respectively.

The term "connected with" must be considered as something different from "arising out of" for the defendant's cause of action may be "connected with the subject of the action" although it does not "arise out of the transaction."[52] The connection with the subject of the action must be immediate and direct.[53] It must be so connected with it that the claims of the respective parties ought to be in fairness adjusted in a single suit,[54] or such that a cross-bill would have been sustained,[55] or a recoupment allowed[56] under the former practice. A remote, uncertain partial connection is not enough to satisfy the requirements of the statute.[57] "The subject matter of the counterclaim

47. Pittsmont Copper Co. *v.* O'Rourke, 49 Mont. 281, 141 Pac. 849; Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419; Collier *v.* Ervin, 3 Mont. 142.

48. **N. Y.**—Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58; Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251; Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. Supp. 456; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694. **N. D.**—Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825. **S. C.**—Humbert *v.* Brisbane, 25 S. C. 506. **Wis.**—Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Grignon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938.

[a] "**It seems, therefore, more in accordance with the nature of actions** and more in harmony with the language of the statute to regard the 'subject of the action' as denoting the plaintiff's principal primary right to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on. In this manner alone can we arrive at a *general* rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions." Pom. Code Remedies, §725.

[b] **Where plaintiff claims a road over land** of defendant and seeks to enjoin defendant from interfering therewith, the subject of the action is plaintiff's asserted right to occupy defendant's land with its road. Wild Rice Lumb. Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1.

49. Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50.

50. Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825.

51. Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359; Devries & Co. *v.* Warren, 82 N. C. 356.

52. Pom. Code Rem. (2nd ed.), §793.

53. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251; Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130; Akerly *v.* Vilas, 21 Wis. 88.

54. Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130.

[a] "**The counterclaim must have such a relation** to, and connection with, the subject of the action, that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation." Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552.

55. Akerly *v.* Vilas, 21 Wis. 88.

56. Akerly *v.* Vilas, 21 Wis. 88.

57. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N.

is sufficiently connected with the subject of the action when the transactions all arise in the same general course of dealing."[58] It must, according to some cases, be such a connection that the parties could be supposed to have foreseen and contemplated it in their mutual acts, in other words that the parties must be assumed to have had the connection and its consequences in view when they dealt with each other.[59]

(C.) APPLICATIONS TO PARTICULAR CLASSES OF PROCEEDINGS. — (1.) *Ordinary Contract Actions.*[60] — The cases following indicate the construction given by the courts to the term "connected with the subject of the action" when applied to ordinary contract actions upon money demands for the purchase price of property,[61] for rent,[62] for services rendered,[63]

Y. Supp. 251; Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130.

58. General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288.

59. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251; Ter Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5, 63 N. Y. St. 355.

60. **Tort demands** as counterclaims generally, see *infra*, VII, C, 3.

Contract demands against tort, see *infra*, VII, C, 4.

61. **U. S.**—In re Harper, 175 Fed. 412. **Ark.**—Matthews *v.* Weiler, 57 Ark. 606, 22 S. W. 569. **Mo.**—Garnett & A. Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736. **N. M.** Leyser *v.* Rindskopf, 3 N. M. 382, 5 Pac. 540. **N. Y.**—Siebrecht *v.* Siegel-Cooper Co., 38 App. Div. 549, 56 N. Y. Supp. 425; Starr Cash Car Co. *v.* Reinhardt, 2 Misc. 116, 20 N. Y. Supp. 872, 49 N. Y. St. 228; Kurtz *v.* McGuire, 5 Duer 660. **N. C.**—General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288. **Okla.**—Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009. **S. C.**—Co-operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525.

[a] **The price of the goods** is the subject of the action in an action for goods sold and delivered. Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008.

[b] **The materials furnished** constitute the subject of the action, in a suit for the value of materials furnished to build a house. McAdow *v.* Ross, 53 Mo. 199.

[c] **The claim sued on,** considered the subject of the action. In re Harper, 175 Fed. 412.

62. **Colo.**—Hyman *v.* Jockey Club Wine, Liquor & Cigar Co., 9 Colo. App. 299, 48 Pac. 671. **Minn.**—Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847. **N. Y.**—Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Thorp *v.* Philbin, 15 Daly 155, 3 N. Y. Supp. 939, 22 N. Y. St. 27; Faber *v.* Phillips, 26 Misc. 723, 56 N. Y. Supp. 1028; Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Supp. 948, 24 Civ. Proc. 121; McKenzie *v.* Hatton, 70 Hun 142, 24 N. Y. Supp. 88, 53 N. Y. St. 776; Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585.

[a] **The rent money** is the subject of the action. Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359; Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34, 1 Abb. Pr. 203, 10 How. Pr. 377; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192; Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Supp. 948, 24 Civ. Proc. 121.

As to negligent or tortious acts of the landlord as basis of counterclaim in actions for rent, see *infra*, VII, C, 3, c, (II), (B), (2).

[b] **A claim for deposit** made to secure the payment of the rent is available as a counterclaim. Hyman *v.* Jockey Club Wine, Liquor & Cigar Co., 9 Colo. App. 299, 48 Pac. 671.

63. **Ariz.**—Greene *v.* Hereford, 12 Ariz. 85, 95 Pac. 105. **Mo.**—Fulton *v.* Fisher, 239 Mo. 116, 143 S. W. 438. **Neb.**—Sheibley *v.* Dixon, 61 Neb. 409, 85 N. W. 399. **N. Y.**—Meeks *v.* Berry, 51 Hun 640, 3 N. Y. Supp. 840, 21 N. Y. St. 248; Biershenk *v.* Stokes, 18 N. Y. Supp. 854, 46 N. Y. St. 179, 43 N. Y. St. 788; Wadley *v.* Davis, 63 Barb. 500. **N. C.**—Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277. **Ohio.**—Evens *v.* Hall, 1 Handy 434, 12 Ohio Dec. 222. **Ore.**—Chamberlain *v.* Townsend, 72 Ore. 207, 142 Pac. 782, 143 Pac. 924. **S. C.**—Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803.

[a] **The doing of the work (1) is**

or upon bills and notes or other negotiable instruments.[64]

(2.) *Actions for Personal Torts.*[65] — The courts have been called upon to interpret the code provision "connected with the subject of the action," in actions for such personal torts as assault and battery,[66] libel and slander,[67] and malicious prosecution.[68]

(3.) *Respecting Title and Possession of Personal Property.* — What constitutes the subject of the action in proceedings to protect the title to and possession of personal property, and just when defendant's claim may be viewed as one connected with such subject, will be seen from the application of the provision to actions in detinue,[69] trover and

the subject of action in an action to recover for services (Biershenk *v.* Stokes, 18 N. Y. Supp. 854, 43 N. Y. St. 788, 46 N. Y. St. 179; Branch *v.* Chappell, 119 N. C. 81, 25 S. E. 783), (2) the doing of the work and the failure to pay for it, is the subject of action. Lundine *v.* Callaghan, 82 App. Div. 621, 81 N. Y. Supp. 1052.

[b] **The recovery of the money due,** considered the subject of the action. Evens *v.* Hall, 1 Handy (Ohio) 434, 12 Ohio Dec. 222.

[c] **The right to the earnings of the boat** held to be the subject of action in an action brought to recover freight earned by a steamer. Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133.

64. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374. **Ky.**—Nolle *v.* Thompson, 3 Metc. 121. **N. C.**—Garrett *v.* Love, 89 N. C. 205. **N. D.**—Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354. **Ohio.** Loomis, Campbell & Co. *v.* Eagle Bank, 10 Ohio St. 327. **S. C.**—Witte *v.* Weinberg, 37 S. C. 579, 17 S. E. 681; Latimer *v.* Sullivan, 30 S. C. 111, 8 S. E. 639. **S. D.**—Tuthill *v.* Sherman, 32 S. D. 103, 142 N. W. 257. **Wis.**—Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263; Rickard *v.* Kohl, 22 Wis. 506; Racine County Bank *v.* Keep, 13 Wis. 209.

Assertion of tort claims in such actions, see *infra,* VII, C, 3, c, (II).

[a] **The bill or note sued on,** the subject of the action. Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374; Story *v.* Richardson, 91 App. Div. 381, 86 N. Y. Supp. 843.

[b] **The debt due upon the note** sued on, the subject of the action. Nolle *v.* Thompson, 3 Metc. (Ky.) 121.

[c] **A demand for cancellation of the note** interposed by defendant. Garrett *v.* Love, 89 N. C. 205.

[d] **Action on Draft.**—Merritt Mill Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4.

[e] **The money due on the contract of sale** is the subject of action in an action on a bond given for the purchase price of property. Devries & Co. *v.* Warren, 82 N. C. 356.

65. **Assertion of tort claims in such** actions, see *infra,* VII, C, 3, b.

Assertion of contract against tort, see *infra,* VII, C, 4, b.

66. **Ark.**—Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624. **Cal.**—McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. **Neb.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123. **N. Y.**—Barhyte *v.* Hughes, 38 Barb. 320; Prosser *v.* Carroll, 33 Misc. 428, 68 N. Y. Supp. 542, 9 N. Y. Ann. Cas. 242; Murphy *v.* McQuade, 20 Misc. 671, 46 N. Y. Supp. 382. **Ohio.**—Mogle *v.* Black, 5 Ohio C. C. 51, 3 Ohio Cir. Dec. 27.

[a] **The affray,** is the subject of the action. Murphy *v.* McQuade, 20 Misc. 671, 46 N. Y. Supp. 382.

Counterclaim for assault and battery see *infra,* VII, C, 3, b.

67. **Minn.**—Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304. **N. Y.**—Fellerman *v.* Dolan, 7 Abb. Pr. 395. **Ohio.**—Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433. **Eng.**—Edge *v.* Weigel, 97 L. T. N. S. 447.

[a] **That damages for malicious prosecution** that occasioned the libel, are connected with the subject of the libel suit, see Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433.

68. Dale *v.* Hall, 64 Ark. 221, 41 S. W. 761; More *v.* Rand, 60 N. Y. 208; Perry *v.* Foster, 62 How. Pr. (N. Y.) 228; Fliess *v.* Hog, 150 App. Div. 555, 135 N. Y. Supp. 44; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41.

69. Wilson *v.* Hughes, 94 N. C. 182; Walsh *v.* Hall, 66 N. C. 233.

[a] **A demand for rescission of con-**

conversion[70] and replevin.[71]

tract set-up in detinue, see Walsh *v.* Hall, 66 N. C. 233.

70. See the following cases: **Ariz.** Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Ky.**—Duff *v.* Bailey, 29 Ky. L. Rep. 919, 96 S. W. 577. **Minn.**—Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132; Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632; Majerus *v.* Hoscheid, 11 Minn. 243; Illingworth *v.* Greenleaf, 11 Minn. 235. **Mo.**—Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314; Reamer *v.* Morrison Exp. Co., 93 Mo. App. 501, 67 S. W. 718. **Mont.** Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419. **N. Y.**—Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552; Van *v.* Madden, 132 App. Div. 535, 116 N. Y. Supp. 1115; Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379; Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238; Waters *v.* Lang, 79 Misc. 240, 139 N. Y. Supp. 844; Harrington *v.* Jaeckel, 75 Misc. 653, 133 N. Y. Supp. 933; Benton *v.* Moore, 42 Misc. 660, 87 N. Y. Supp. 717; Ter Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5, 63 N. Y. St. 355; Adams *v.* Loomis, 54 Hun 638, 8 N. Y. Supp. 17, 28 N. Y. St. 444, 4 Silv. 558; Chamboret *v.* Cagney, 41 How. Pr. 125, 10 Abb. Pr. N. S. 31; Bissell *v.* Pearse, 21 How. Pr. 130; Xenia Branch Bank *v.* Lee, 2 Bosw. 694, 7 Abb. Pr. 372. **N. C.**—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Bitting *v.* Thaxton, 72 N. C. 541. **N. D.** Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825. **Ohio.**—Cow Run Iron Tank Co. *v.* Lehmer, 41 Ohio St. 384. **Okla.** First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Scheunert *v.* Kaehler, 23 Wis. 523.

[a] **The property converted** (1) is the subject of the action. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873; Benton *v.* Moore, 42 Misc. 660, 87 N. Y. Supp. 717; Adams *v.* Loomis, 54 Hun 638, 8 N. Y. Supp. 17, 28 N. Y. St. 444, 4 Silv. 558. (2) The wagon is the subject of the action in an action for conversion of the wagon. Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379.

[b] **The money converted** is the subject of the action in an action for conversion of money. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873; Benton *v.* Moore, 42 Misc. 660, 87 N. Y. Supp. 717.

[c] **The original right of possession and the original wrongful taking,** constitute the subject of the action, in conversion. Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825.

[d] **The trespass** committed by defendant considered the subject of action in conversion. Chamboret *v.* Cagney, 41 How. Pr. (N. Y.) 125, 10 Abb. Pr. N. S. 31.

[e] **A title or right of possession acquired subsequently** to the wrongful taking cannot be counterclaimed in conversion. Kain *v.* Garnaas, 27 N. D. 292, 145 N. W. 825.

[f] **A claim for conversion of other property** than that alleged to have been converted by defendant, not connected with the subject of the action. Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632.

[g] **A counterclaim for work and labor in repairing a wagon** proper in an action for conversion of the wagon. Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379.

[h] **A claim for work done in altering a coat,** in a suit by the owner for conversion of part of the material of the coat and for damages for altering it without authority. Harrington *v.* Jaeckel, 75 Misc. 653, 133 N. Y. Supp. 933.

[i] **A counterclaim for waste** and depreciation of his mortgage security through cutting of timber may be interposed by a first mortgagee in an action by the second mortgagee in possession for conversion of wood which plaintiff had cut from standing timber on the premises. Carpenter *v.* Manhattan Life Ins. Co., 93 N. Y. 552.

71. See the following cases: **Cal.** Lovensohn *v.* Ward, 45 Cal. 8. **Kan.** Deford *v.* Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. **Ky.**—Rennebaum *v.* Atkinson, 103 Ky. 555, 45 S. W. 874. **Minn.**—W. W. Kimball Co. *v.* Massey, 126 Minn. 461, 148 N. W. 307. **Mo.**—Small *v.* Speece, 131 Mo. App. 513, 110 S. W. 7; Howard *v.* Haas, 131 Mo. App. 499, 109 S. W. 1076; McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 79 S. W. 745. **Nev.** Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. Y.**—Gleason *v.* Bush, 166

(4.) *Actions To Protect Title and Possession of Real Property.*[72] — The provision of the code under discussion permits the assertion of certain demands as counterclaims where plaintiff proceeds in ejectment,[73] or

App. Div. 865, 152 N. Y. Supp. 54; Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379; Marshall *v.* Friend, 35 Misc. 101, 71 N. Y. Supp. 221. **N. D.** McCarty *v.* Kepreta, 24 N. D. 395, 139 N. W. 1012, 48 L. R. A. (N. S.) 65. **S. D.**—Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266. **Wis.**—Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

[a] **The thing sought to be replevied,** considered the subject of the action. **Cal.**—Lovensohn *v.* Ward, 45 Cal. 8. **Mo.**—Small *v.* Speece, 131 Mo. App. 513, 110 S. W. 7. **Nev.**—Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. Y.**—Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379; Marshall *v.* Friend, 35 Misc. 101, 71 N. Y. Supp. 221. **N. D.**—McCarty *v.* Kepreta, 24 N. D. 395, 139 N. W. 1012, 48 L. R. A. (N. S.) 65.

[b] **A counterclaim for replevin of other property** than that mentioned in the complaint, is not connected with the subject of the action. Lovensohn *v.* Ward, 45 Cal. 8.

[c] **A claim for repairs** (1) made on an automobile, held proper in a suit to replevy it. Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852. (2) Also repairs to a wagon are recoverable in an action to replevy it. Cooper *v.* Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379.

[d] **Claims to a Lien on the Property.**—"In an action for conversion or replevin, a mere claim to a lien upon the property, and demand for the foreclosure thereof, even though arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's action, or connected with the subject of the action, is not a cause of action in favor of a defendant against a plaintiff, within the contemplation of the statutory provisions relating to a counterclaim, unless the claim or cause of action for the security of which the lien was given arises out of the contract or transaction set forth in the complaint as the basis of the action, or is connected with the subject thereof, which is not in itself a cause of action and is deemed incidental to the cause of action which it secures; but of course a lien may be pleaded and proved as a defense . . . and therefore, in my opinion it is better that the practice be allowed to remain settled as established, and leave it to the Legislature, if it shall deem it advisable, to enact a change, rather than for the court, at this late day, to presume to overrule the existing precedents." Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382, 385. See also Bernheimer *v.* Hartmayer, 50 App. Div. 316, 63 N. Y. Supp. 978; Lyungstrandh *v.* William Haaker Co., 16 Misc. 387, 38 N. Y. Supp. 129, 73 N. Y. St. 808; Miller Co. *v.* Stokes, 7 Misc. 433, 27 N. Y. Supp. 940; Rochester Distilling Co. *v.* O'Brien, 72 Hun 462, 25 N. Y. Supp. 281; Rogers *v.* King, 66 Barb. (N. Y.) 495; Gottler *v.* Babcock, 7 Abb. Pr. (N. Y.) 392.

[e] **Installments paid on a piano** are recoverable as a counterclaim connected with the subject of the action to replevy it. W. W. Kimball Co. *v.* Massey, 126 Minn. 461, 148 N. W. 307.

72. **Tort demands** as counterclaims generally, see *infra,* VII, C, 3.

Contract demands against tort, see *infra,* VII, C, 4.

73. See the following cases: **Cal.** Wigmore *v.* Buell, 116 Cal. 94, 47 Pac. 927; Yorba *v.* Ward, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793; Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314. **Kan.** Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260. **Mo.**—Connecticut Mut. Life Ins. Co. *v.* Carson, 186 Mo. App. 221, 172 S. W. 69. **Neb.** White *v.* Whitney, 68 Neb. 739, 94 N. W. 1012. **N. Y.**—Dinan *v.* Coneys, 143 N. Y. 544, 38 N. E. 715. **N. C.**—Griffin *v.* Thomas, 128 N. C. 310, 38 S. E. 903. **Okla.**—Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50.

[a] **The land** sought to be recovered is the subject of the action. Lane *v.* Dowd, 172 Mo. 167, 72 S. W. 632; Connecticut Mut. Life Ins. Co. *v.* Carson, 186 Mo. App. 221, 172 S. W. 69.

[b] **The alleged right of plaintiff to the possession** of the premises, is the subject of the action. Dinan *v.* Coneys, 143 N. Y. 544, 38 N. E. 715; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50.

[c] **Rents and Profits.**—Defendant

for partition,[74] or to quiet title,[75] or for trespass.[76]

(5.) *Foreclosure Proceedings.*[77] — In proceedings to foreclose mort-

in ejectment may by way of counterclaim set up a lease upon the premises, and ask for possession and for rents and profits. Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50.

[d] **A cause of action for foreclosure** is properly pleaded as counterclaim in an action in ejectment. Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391.

[e] **In ejectment for devised land,** defendant cannot counterclaim for the amount of a legacy which under the will was made a charge upon the land. Dinan *v.* Coneys, 143 N. Y. 544, 38 N. E. 715.

[f] **Damages to land contiguous** to the land sought to be recovered in ejectment cannot be demanded by way of counterclaim. Wigmore *v.* Buell, 116 Cal. 94, 47 Pac. 927.

74. See the following cases: **U. S.** Williams Patent Crusher & P. Co. *v.* Kinsey Mfg. Co., 205 Fed. 375. **Ky.** Louisville Title Co. *v.* Darnell's Committee, 149 Ky. 312, 148 S. W. 369. **N. Y.**—Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Williams *v.* Clarke, 82 App. Div. 199, 81 N. Y. Supp. 381.

[a] **The property sought to be partitioned** the subject of the action. Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066.

[b] **In partition for a specific piece of property** an accounting for the rents and profits of other property cannot be interpolated by way of counterclaim. Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066.

[c] **A counterclaim for unfair competition** in trade, arising out of misrepresentations as to the scope of the claims, the ownership of the patent or the effect of the reissue, not proper in a suit for infringement. Williams Patent Crusher & P. Co. *v.* Kinsey Mfg. Co., 205 Fed. 375.

75. **Cal.**—Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40; Moyle *v.* Porter, 51 Cal. 639. **Minn.**—Eastman *v.* Linn, 20 Minn. 433. **N. C.**—Byerly *v.* Humphrey, 95 N. C. 151. **Wash.**—Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912. **Wis.**—Jarvis *v.* Peck, 19 Wis. 74.

[a] **The land** is the subject of the action. Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40; Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912.

[b] **The adverse claim, estate or interest,** held to be the subject of the action. Moyle *v.* Porter, 51 Cal. 639; Eastman *v.* Linn, 20 Minn. 433.

[c] **A claim to the title to the land** and a demand to have such title quieted, proper counterclaim in suit to quiet title. Eastman *v.* Linn, 20 Minn. 433; Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912. See also 21 STANDARD PROC. 1018.

[d] **Damages for Disturbing Possession.**—In an action to determine the title to real estate and for damages for an alleged trespass committed thereon, defendant may counterclaim for damages for invading his possessory right to the same real property. Wille *v.* Maas, 156 Wis. 274, 145 N. W. 783.

[e] **The specific property involved** together with the plaintiff's primary right considered the subject of the action in a suit to determine title to land and for trespass thereto. Wille *v.* Maas, 156 Wis. 274, 145 N. W. 783.

76. **Ky.**—Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407; Stillwell *v.* Duncan, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; Whitlock *v.* Ledford, 82 Ky. 390. **Mo.**—Kamerick *v.* Castleman, 23 Mo. App. 481. **N. Y.**—Van *v.* Madden, 132 App. Div. 535, 116 N. Y. Supp. 1115; Hall *v.* Werney, 18 App. Div. 565, 46 N. Y. Supp. 33. **N. C.**—Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888. **S. C.**—Sharp *v.* Kinsman, 18 S. C. 108. **Utah.**—Marks *v.* Tomkins, 7 Utah 421, 27 Pac. 6. **Wash.**—Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801. **Wis.**—Wille *v.* Maas, 156 Wis. 274, 145 N. W. 783; Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114.

[a] **The land trespassed upon,** held to be the subject of the action, in an action for trespass to land. Whitlock *v.* Redford, 82 Ky. 390.

[b] **The alleged trespass** regarded as the subject of the action in an action for trespass upon land. Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888.

[c] **The violation of plaintiff's right** to possession, considered the subject of the action. Sharp *v.* Kinsman, 18 S. C. 108.

77. **Tort demands, as counterclaims** generally, see *infra*, VII, C, 3.

gages,[78] or to redeem from foreclosure,[79] and in those to foreclose vendor's liens,[80] the defendant may interpose demands or claims constituting good counterclaims within the class here treated.

(6.) *Proceedings To Obtain Special Remedies.*[81] — Where plaintiff is suing for special relief or, in other words, seeking some extraordinary or equitable remedy, defendant may interpose a cause of action which is connected with the subject of the action, as in suits for injunction,[82]

Contract demands against tort, see *infra,* VII, C, 4.

78. See *infra,* this note and 19 STANDARD PROC. 966.

[a] **Plaintiff's right to the money** due him is the subject of action in mortgage foreclosure suits. Humbert *v.* Brisbane, 25 S. C. 506.

[b] **The promissory note and its incident, the mortgage,** the subject of action in foreclosure of mortgage. Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552.

[c] **The mortgage and the property** is the subject of the action in foreclosure proceedings. Metropolitan Trust Co. *v.* Tonawanda Valley & C. R. Co., 43 Hun 521, 18 Abb. N. C. 368, *affirmed,* 106 N. Y. 673, 13 N. E. 937.

79. See *infra,* this note.

[a] **In an action to redeem from a mortgage** the plaintiff's right to redeem is the subject of the action. Smith *v.* Price, 102 Ark. 367, 144 S. W. 206.

80. See *infra,* this note.

[a] **The right to have payment of the purchase money** is the main primary right and the subject of the action in such suits. Humbert *v.* Brisbane, 25 S. C. 506.

[b] **Counterclaim for Eviction.**—In an action to foreclose an equitable mortgage on two lots, a counterclaim for trespasses amounting to eviction is not admissible. "**The land upon which the trespass is alleged to have** been committed cannot in any view be regarded as the 'subject of the action,' for to it the plaintiff has no primary right and it is not the thing sought to be obtained by the action." Humbert *v.* Brisbane, 25 S. C. 506.

81. Tort demands as counterclaims generally, see *infra,* VII, C, 3.

Contract demands against tort, see *infra,* VII, C, 4.

82. Minn.—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1; Hackett *v.* Kanne, 98 **Minn. 240, 107 N. W. 1131. Mont.** Pittsmont Copper Co. *v.* O'Rourke, 49 Mont. 281, 141 Pac. 849. **N. Y.**—Glen & H. Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Thompson *v.* Kessel, 30 N. Y. 383; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58; Sugden *v.* Magnolia Metal Co., 58 App. Div. 236, 68 N. Y. Supp. 809, 32 Civ. Proc. 18; Grange *v.* Gilbert, 44 Hun 9, 6 N. Y. St. 423; Burns *v.* Nevins, 27 Barb. 493. **Ore.**—Miser *v.* O'Shea, 37 Ore. 231, 62 Pac. 491, 82 Am. St. Rep. 751. **S. D.**—Redwater Land & Canal Co. *v.* Jones, 27 S. D. 194, 130 N. W. 85. **Utah.**—Marks *v.* Tomkins, 7 Utah 421, 27 Pac. 6. **Wash.**—Morrison *v.* Bernot, 58 Wash. 302, 108 Pac. 772; Peters *v.* Lewis, 33 Wash. 617, 74 Pac. 815. **Wis.**—Telulah Paper Co. *v.* Patten Paper Co., 132 Wis. 425, 112 N. W. 522; Grignon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938; Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745.

[a] **The title and right of possession,** the subject of the action, in suits to enjoin trespasses upon or interference with ownership or possession. **Minn.**—Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1. **N. Y.** Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58. **Wis.**—Grignon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938.

[b] **The property** which is affected by the trespasses sought to be enjoined, considered the subject of the action. Miser *v.* O'Shea, 37 Ore. 231, 62 Pac. 491, 82 Am. St. Rep. 751.

[c] **The ownership of the wharf** is the subject of the action in an action to restrain defendant from interfering with plaintiff's use of the wharf. Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58.

[d] **The means by which plaintiff's rights are excluded** cannot be considered the subject of the action. Thus where plaintiff sues to restrain defendant from maintaining a fence across plaintiff's wharf, the right to the wharf, and not the fence, is the subject of the action. Kelly *v.* Web-

or where plaintiff seeks reformation,[83] rescission and cancellation,[84]

ster, 143 App. Div. 737, 128 N. Y. Supp. 58.

[e] **"Number 10" is the subject of the action** in a suit to restrain the use of "Number 10" alleged to be a trademark. Glen & Hall Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278.

[f] **Diversion and Appropriation of Water.**—In action to enjoin the taking of water from a ditch, a demand that plaintiff be restrained from appropriating water from the ditch is connected with the subject of the action—the claims of ownership in the water and the ditch—and is a proper counterclaim. Redwater Land & Canal Co. *v.* Jones, 27 S. D. 194, 130 N. W. 85.

[g] **Restraining Interference With Road.**—In an action to restrain defendants from interfering with plaintiff's right to possess and occupy a logging road over lands of defendant and for damages for obstructing the same, defendant may counterclaim damages for injury to the land by the construction of the road, but not for negligent operation by plaintiff of a locomotive on the road. Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1.

[h] **Restraining Use of Trade Mark.** In a suit to restrain the use of a trade mark, defendant may by way of counterclaim demand that plaintiff be enjoined from using it and damages for its unlawful use. Glen & Hall Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278.

83. Lahiff *v.* Hennepin County Catholic Bldg. & L. Assn., 61 Minn. 226, 63 N. W. 493.

[a] **The mistake sought to be corrected,** held to be the subject of the action. Lahiff *v.* Hennepin County Catholic Bldg. & L. Assn., 61 Minn. 226, 63 N. W. 493.

[b] **A counterclaim to foreclose the mortgage** sought to be reformed, proper. Lahiff *v.* Hennepin County Catholic Bldg. & L. Assn., 61 Minn. 226, 63 N. W. 493.

84. **Colo.**—Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379. **Ia.**—Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386. **Mont.**—Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715. **N. Y.**—Barnes *v.* Gilmore, 6 Civ. Proc. 286; Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; D'Auxy *v.* Dupre, 47 App. Div. 51, 62 N. Y. Supp. 244; Smith *v.* Hilton, 50 Hun 236, 2 N. Y. Supp. 820, 19 N. Y. St. 340; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266; Venice *v.* Breed, 65 Barb. 597, 1 Thomp. & C. 130. **Ore.** Merrill *v.* Hexter, 52 Ore. 138, 94 Pac. 972, 96 Pac. 865. **Wash.**—Reynolds *v.* Dickson, 48 Wash. 407, 93 Pac. 910; Duggar *v.* Dempsey, 13 Wash. 396, 43 Pac. 357. **Wis.**—Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097.

[a] **The writing or instrument to be cancelled** is the subject of the action. Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386; Stevenson *v.* Devines, 158 App. Div. 616, 143 N. Y. Supp. 916.

[b] **The property** to which the deed is given, is the subject of the action where a deed is sought to be cancelled. Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379; Barnes *v.* Gilmore, 6 N. Y. Civ. Proc. 286.

[c] **In a suit to cancel stock,** the stock is the subject of the action and a claim for dividends on the stock is connected with that stock and forms of proper matter for counterclaim. East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266.

[d] **A claim for installments under contract to purchase stock** is a proper counterclaim in a suit to cancel the contract for fraud. Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916.

[e] **In action to cancel an insurance policy,** the policy issued is the subject of the action. Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386.

[f] **A counterclaim for foreclosure** of the mortgage may be interposed in a suit to cancel the mortgage. Reynolds *v.* Dickson, 48 Wash. 407, 93 Pac. 910; Duggar *v.* Dempsey, 13 Wash. 396, 43 Pac. 357.

[g] **Counterclaim for Specific Performance.**—Where plaintiff sues to cancel a lease, defendant may counterclaim for specific performance of an agreement contained in the lease. Merrill *v.* Hexter, 52 Ore. 138, 94 Pac. 972, 96 Pac. 865.

[h] **Fraudulent Conveyance.**—A claim to have will set aside as void refused in a suit to cancel a conveyance made under the will. Smith *v.* Hilton, 50 Hun 236, 2 N. Y. Supp. 820, 19 N. Y. St. 340.

or where he sues for specific performance.[85]

(7.) *Miscellaneous Proceedings.* — Counterclaims connected with the subject of the action have been set up in various other proceedings such as those for divorce,[86] for dower,[87] for fraud and deceit,[88] those involving wills,[89] and other proceedings.

(VI.) Connected With or Arising Out of the Cause of Action. — (A.) IN GENERAL. — The codes of some states limit the counterclaim to demands arising out of or connected with the "cause of action" set forth by plaintiff.[90] The facts which under this section may be introduced by way of counterclaim are such only as are necessary for the court to have before it in deciding the question raised in the original action[91] to enable it to do full and complete justice to all of the parties before

85. Hoover *v.* Binkley, 66 Ark. 645, 51 S. W. 73; Hays *v.* McLain, 66 Ark. 400, 50 S. W. 1006; Bannerot *v.* McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126.

86. Henry *v.* Henry, 17 Abb. Pr. (N. Y.) 411, 27 How. Pr. 5, 3 Robt. 614; Diddell *v.* Diddell, 3 Abb. Pr. (N. Y.) 167; R. F. H. *v.* S. H., 40 Barb. (N. Y.) 9, where defendant's adultery is alleged, plaintiff's adultery is not a counterclaim connected with the subject of the action which is defendant's adultery.

87. Bogardus *v.* Parker, 7 How. Pr. (N. Y.) 303; Burnett *v.* Burnett, 86 App. Div. 386, 83 N. Y. Supp. 760.

88. People *v.* Dennison, 84 N. Y. 272; Green *v.* Parsons, 47 Hun 631, 14 N. Y. St. 97; Morris *v.* Emmons, 42 Hun 659, 4 N. Y. Supp. 882; Heidelbach *v.* Kilpatrick, 3 N. Y. Civ. Proc. 209; Dove *v.* Hayden, 5 Ore. 500.

[a] **The duress of imprisonment** is the subject of the action, in an action to recover money paid under duress of imprisonment. Heckman *v.* Schwartz, 55 Wis. 173, 12 N. W. 439.

89. See *infra*, this note.

[a] **The construction of the will** is the subject of the action in a proceeding to construe a will. O'Brien *v.* Garniss, 25 Hun (N. Y.) 446.

[b] **The payment of the legacy** out of the assets generally is the subject of the action in an action to recover a legacy. Lehleuter *v.* Shano, 49 Misc. 99, 96 N. Y. Supp. 716.

[c] **Damages for Wrongful Execution.**—The money taken under execution is the subject of the action in a suit for damages for wrongful issuance of an execution on a judgment. Davis *v.* Frederick, 6 Mont. 300, 12 Pac. 664.

[d] **In an action on a check** given for the purchase price of ties, the price of the ties is the subject of the action. Hall *v.* Ayer & L. Tie Co., 31 Ky. L. Rep. 508, 102 S. W. 867.

90. Kahle *v.* Crown Oil Co., 180 Ind. 131, 100 N. E. 681; Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Gillenwater *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Mills *v.* Rosenbaum, 103 Ind. 152, 2 N. E. 313; Sterne *v.* First Nat. Bank, 79 Ind. 560; McMahan *v.* Spinning, 51 Ind. 187; Penn-American Plate Glass Co. *v.* Harshaw, F. & G. Co., 46 Ind. App. 645, 90 N. E. 1047; Crowe *v.* Kell, 7 Ind. App. 683, 35 N. E. 186; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672; Hansen *v.* Yturia (Tex.), 48 S. W. 795; Deutschman *v.* Battaile (Tex.), 36 S. W. 489; Beckham *v.* Hunter, 37 Tex. 551; Montgomery *v.* Gallas (Tex. Civ. App.), 202 S. W. 993; Closner *v.* Acker (Tex. Civ. App.), 200 S. W. 421; Guitar *v.* First State Bank (Tex. Civ. App.), 191 S. W. 860; Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56; Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501; J. C. Stewart Produce Co. *v.* Hamilton-Turner Groc. Co. (Tex. Civ. App.), 163 S. W. 1000; Thorndale Mercantile Co. *v.* Evens (Tex. Civ. App.), 146 S. W. 1053; Brown *v.* Dolle (Tex. Civ. App.), 145 S. W. 291; Cunningham *v.* M. W. & B. G. Daves (Tex. Civ. App.), 141 S. W. 808.

[a] **The Texas statute** requires a counterclaim to be founded on a cause arising out of, incident to, or connected with the plaintiff's cause of action. Vernon's Sayles' Ann. Civ. St. 1914, art. 1330. And see Montgomery *v.* Gallas (Tex. Civ. App.), 202 S. W. 993.

91. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

it in respect to the cause of action upon which the complaint rests.[92] The matters set up must be germane to the matter constituting the cause of action alleged in the complaint,[93] and a cause of action entirely independent of the one alleged in the complaint is not available.[94]

(B.) APPLICATIONS OF PROVISION. — The foregoing provision requiring the counterclaim to arise out of the cause of action pleaded has received application in such proceedings among others, as those to recover the purchase price of goods sold,[95] or for services rendered,[96] or upon bills and notes,[97] and in proceedings in ejectment,[98] foreclosure of mortgage,[99] as well as for the foreclosure of mechanic's

92. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

93. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

94. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Avent *v.* Ormand (Tex. Civ. App.), 173 S. W. 239; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[a] **"If a defendant attempts to go beyond this,** and to introduce by a cross-complaint in counterclaim new and distinct matter which does not grow out of that involved in the complaint, and which is not essential to the proper determination of it, although he may show a perfect case against the plaintiff, his pleading will not be a cross-complaint, but an original and independent cause of action, and as such is not germane to the issue." Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8, 12.

[b] **Damages for negligent performance of a former contract** to the one sued on not available as counterclaim although this latter contract by its terms terminated the former one. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

[c] **Damages for breach of contract to renew insurance** cannot be set up under this provision as a counterclaim in an action upon notes executed long prior to the insurance contract. Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

95. Ajax-Grieb Rubber Co. *v.* Byars (Tex. Civ. App.), 153 S. W. 921; Brooks Tire Mach. Co. *v.* Shields, 48 Tex. Civ. App. 531, 108 S. W. 1005.

[a] **Damages for breach of the contract** under which the goods were sold, proper counterclaim. Maury-Cole *v.* Lockhart Grocery Co. (Tex. Civ. App.), 173 S. W. 262.

[b] **A claim for breach of warranty** of chattels sold (1) is connected with the cause of action upon a note given for the price of the chattels. Mills *v.* Rosenbaum, 103 Ind. 152, 2 N. E. 313. (2) And in an action upon a judgment rendered for the purchase price of goods, defendant may base a counterclaim upon a breach of warranty of the goods. Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

96. McMahan *v.* Spinning, 51 Ind. 187; Brown *v.* Dolle (Tex. Civ. App.), 145 S. W. 291; French, F. & Co. *v.* Hicks, 52 Tex. Civ. App. 427, 114 S. W. 691.

[a] **Refusal to abide by arbitrator's award** not proper subjectmatter of counterclaim in an action for the work and labor in respect to which the award was made. McMahan *v.* Spinning, 51 Ind. 187.

[b] **Negligence of attorney** a proper counterclaim in an action by the attorney for services. Rooker *v.* Bruce, 45 Ind. App. 57, 90 N. E. 86.

97. Blue *v.* Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655; Mills *v.* Rosenbaum, 103 Ind. 152, 2 N. E. 313; Avent *v.* Ormand (Tex. Civ. App.), 173 S. W. 239.

[a] **Injunction** against collection of the notes because of fraud in the sale of the land for the purchase price of which the notes were given, a proper counterclaim. Hinkle *v.* Margerum, 50 Ind. 240.

98. See *infra*, this note.

[a] **A counterclaim to quiet title** because of irregularity of the execution sale through which plaintiff's right to the property accrued, proper in ejectement. Gilpin *v.* Wilson, 53 Ind. 443.

99. Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254.

[a] **In a suit upon notes and to foreclose a mortgage** given to secure them, the defendant may counterclaim for breach of a supplemental agree-

lien,[1] injunction,[2] quieting title and removal of cloud,[3] replevin,[4] rescission and cancellation,[5] trespass,[6] and trover and conversion.[7]

(VII.) Claims Arising Out of Independent Contract. — (A.) IN GENERAL. Claims and demands distinct and independent from the matter pleaded by plaintiff are not embraced within the description of counterclaim under some codes,[8] but are provided for under separate code provisions as to set-off.[9] But the majority of codes, similar to that of New York, authorize the interposition of some independent causes of action by way of counterclaim. In actions on contract, they permit the defendant to assert as a counterclaim any other cause of action on contract, existing at the commencement of the action.[10] This

ment concerning the payment of the notes and the possession of the mortgaged property. Montgomery *v.* Gallas (Tex. Civ. App.), 202 S. W. 993.

1. Reichert *v.* Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

[a] **Damages for breach of the contract** under which the building was erected, recoverable as counterclaim in action to foreclose mechanic's lien upon the building. Reichert *v.* Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

2. Sterne *v.* First Nat. Bank, 79 Ind. 560.

3. Thompson *v.* Toohey, 71 Ind. 296.

[a] **A claim for the possession of premises** is connected with the cause of action alleged in a suit to quiet title to the premises. Gillenwater *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477.

4. Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852; Jesse French Piano & Organ Co. *v.* Williams (Tex. Civ. App.), 102 S. W. 948.

[a] **Equitable Lien.**—In replevin for a horse, a counterclaim for foreclosure of an equitable lien on the horse not proper. Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208.

[b] **Money Advanced.**—In an action for the possession of cotton seed, against a bank and others, the bank may set up a counterclaim for moneys advanced by it for the purchase of the seed. Guitar *v.* First State Bank (Tex. Civ. App.), 191 S. W. 860.

5. Tabor *v.* Mackkee, 58 Ind. 290; Grimes *v.* Duzan, 32 Ind. 361; Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477.

[a] **Counterclaim asking to have title quieted** in defendant, proper in an action to rescind the deed to the land. Grimes *v.* Duzan, 32 Ind. 361.

6. See *infra*, this note.

[a] **Trespassing Cattle.**—Where suit is brought for damages done by trespassing cattle, defendant cannot counterclaim for injury done to the cattle in driving them from the premises. Lovejoy *v.* Robinson, 8 Ind. 399.

7. Shelly *v.* Vanarsdoll, 23 Ind. 543; Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981; Block *v.* Swango, 10 Ind. App. 600, 38 N. E. 55; Crowe *v.* Kell, 7 Ind. App. 683, 35 N. E. 186.

Conversion by plaintiff of defendant's property, see *infra*, VII, C, 3, b.

Contract claims set up in conversion, see *infra*, VII, C, 4, b.

8. See *supra*, I, D, 2.

[a] **A demand arising out of a separate and distinct contract,** one having no connection with and wholly independent of the contract sued upon by plaintiff, is not available as a counterclaim. Harris *v.* Warren-Smith Hdw. Co., 44 Okla. 477, 144 Pac. 1050.

9. See *supra*, I, D, 2.

10. **Cal.**—Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616; Richmond *v.* Lattin, 64 Cal. 273, 30 Pac. 818; Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223; Quinn *v.* Smith, 49 Cal. 163; L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187. **Colo.**—Arapahoe *v.* Denver, 30 Colo. 13, 69 Pac. 586; Hyman *v.* Jockey Club W. L. & C. Co., 9 Colo. App. 299, 48 Pac. 671. **Idaho.**—Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832; Rinker *v.* Lauer, 13 Idaho 163, 88 Pac. 1057. **Ia.**—Sherman *v.* Hale, 76 Iowa 383, 41 N. W. 48; Town *v.* Bringolf, 47 Iowa 133. **Kan.** Greer *v.* Greer, 24 Kan. 101; Carver *v.* Shelly & Co., 17 Kan. 472; Orr *v.* Gerrold, 8 Kan. App. 441, 57 Pac. 48. **Minn.**—Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579. **Mo.**—Empire Transp. Co. *v.* Bog-

provision permits but does not require the demand set up as a counterclaim to be independent of the plaintiff's claim,[11] But in so far as it allows the interposition of a cause of action connected with the matter sued on, it calls for no treatment separate from that given to counterclaims of the first class.[12]

The class of independent demands thus designated includes the former set-off,[13] but is broader in its scope than the former legal set-off for it embraces demands for unliquidated damages.[14] It is substantially equivalent to the set-off admitted by those codes having separate provisions upon the subject.[15]

(B.) APPLICATION OF PROVISION. — The cause of action available as a counterclaim under this particular subdivision of the code must arise on contract,[16] though it may consist in a state of facts giving rise to an implied contract,[17] even where defendant waives a tort and sues on an implied contract.[18] Under this provision defendant may in

giano, 52 Mo. 294; Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27; Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; First Nat. Bank *v.* Silver, 45 Mont. 231, 122 Pac. 584. **Nev.**—Foulks *v.* Rhodes, 12 Nev. 225. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Van Brunt *v.* Day, 81 N. Y. 251, 8 Abb. N. C. 336; George F. Root Co. *v.* New York Cent. & H. R. R. Co., 166 App. Div. 137, 151 N. Y. Supp. 702; Paroquette Record Mfg. Co. *v.* Pfaff, 164 N. Y. Supp. 695; Clapp *v.* Wright, 21 Hun 240. **N. C.** Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230; Slaughter *v.* Standard Mach. Co., 148 N. C. 471, 62 S. E. 599; Smith & Co. *v.* French, 141 N. C. 1, 53 S. E. 435; Penn Lumber Co. *v.* McPherson, 133 N. C. 287, 45 S. E. 577; Lynn *v.* Stanly Creek Cotton Co., 130 N. C. 621, 41 S. E. 877; Brown *v.* Carter, 111 N. C. 183, 15 S. E. 934. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ore.**—La Grande Nat. Bank *v.* Oliver, 84 Ore. 582, 165 Pac. 682; Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Watson *v.* McLench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416. **S. C.**—Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; Virginia-Carolina Chemical Co. *v.* Moore, 61 S. C. 166, 39 S. E. 346. **Wash.**—Puget Sound State Bank *v.* Washington Paving Co., 94 Wash. 504, 162 Pac. 870. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Wilson *v.* Runkel, 38 Wis. 526; Chapman *v.* Plummer, 36 Wis. 262.

[a] **A cause of action for negligence** not available under this provision. George F. Root Co. *v.* New York Cent. & H. R. R. Co., 166 App. Div. 137, 151 N. Y. Supp. 702.

[b] **An action on a judgment is an** action on a contract within the statute. Knight *v.* Rothschild, 132 App. Div. 274, 117 N. Y. Supp. 26. *Contra* Rae *v.* Hulbert, 17 Ill. 572, cited and quoted in 14 STANDARD PROC. 767, note 25 [b], where the question is discussed whether a judgment is a contract. Compare also 16 STANDARD PROC. 368, 393, 411, discussing the form of action on judgments.

11. Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280.

[a] **"The language of this clause plainly includes all cases of counterclaim** based on contract when the plaintiff's cause of action is also on contract." Pom. Code Rem. (2nd ed.), §795.

12. See *supra*, VII, C, 2, b, (III), (IV) and (V).

13. Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

As to scope of set-off, see *infra*, VII, C, 2, c.

14. See *infra*, VII, C, 6.

15. See *supra*, I, D, 2.

16. See *infra*, VII, C, 3, a, (I), (A).

17. **Colo.**—Michigan Stove Co. *v.* Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340. **Mont.**—First Nat. Bank *v.* Silver, 45 Mont. 231, 122 Pac. 584. **Ore.**—La Grande Nat. Bank *v.* Oliver, 84 Ore. 582, 165 Pac. 682.

18. See *infra*, VII, C, 5, b.

an action on contract to recover a debt or unliquidated damages, counterclaim for debt or damages arising under another contract,[19] as for nonperformance or negligence in performance of such other contract,[20] or for breach of warranty.[21]

c. *Set-off.* — **(I.) Must Be a Cause of Action.** — The debt or demand which defendant is privileged to assert as a set-off must amount to a cause of an action in him, upon which he could maintain an independent suit against the plaintiff.[22] It must, therefore, as will be seen hereafter, meet with certain requirements in respect to being matured[23] and subsisting[24] and valid and enforceable[25] when interposed.

19. **Colo.**—Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340. **Ky.**—Louisville & N. R. Co. *v.* Thompson, 18 B. Mon. 735. **Minn.** Bidwell *v.* Madison, 10 Minn. 13. **N. Y.** Schubart *v.* Harteau, 34 Barb. 447; Williams *v.* Wieting, 3 Thomp. & C. 439; Lignot *v.* Redding, 4 E. D. Smith 285. **N. C.**—Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230. **Wis.**—Atwater *v.* Schenck, 9 Wis. 160.

[a] **Negligence of bank in not collecting note** set up in an action on another note. Bidwell *v.* Madison, 10 Minn. 13.

[b] **Amount due for price of land** counterclaimed in action on note. Atwater *v.* Schenck, 9 Wis. 160.

[c] **Value of improvements** made by defendant on lands of deceased, counterclaimed in an action by the administratrix with the will annexed to recover the amount which testatrix was compelled to pay as surety on notes for the payment of which the land upon which the improvements were made was sold. Watson *v.* McLench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416.

20. Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340.

[a] **Non-performance of Building Contract.**—Conway *v.* Smith, 13 Wis. 125.

[b] **Loss of profits** by reason of plaintiff's failure to furnish goods purchased by defendant, may be counterclaimed by the latter in an action for the balance due on other goods sold to him by plaintiff. Hoosier Mfg. Co. *v.* Swenson, 87 Neb. 182, 127 N. W. 114.

[c] **Claim for Breach of Special Contract Set-Up in Indebtitatus Assumpsit.**—Where plaintiff working under a special contract sues in indebitatus assumpsit, the defendant may counterclaim for breach of the special contract. Lacy Mfg. Co. *v.* Los Angeles Gas & Electric Co., 12 Cal. App. 37, 106 Pac. 413.

21. Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230.

[a] **In an action on a note** given for the purchase price of goods, a claim for breach of warranty in the sale of a survey subsequently made, counterclaimed. Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230.

22. **Ga.**—Brooks *v.* Cook, 20 Ga. 87. **Ill.**—Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579; Chicago South Branch Dock Co. *v.* Dunlap, 32 Ill. 207. **Ind.**—Stoner *v.* Swift, 164 Ind. 652, 74 N. E. 248; Curran *v.* Curran, 40 Ind. 473. **Kan.** Corlett *v.* Mutual Ben. L. Ins. Co., 60 Kan. 134, 55 Pac. 844. **Me.**—Cutler *v.* Gilbreth, 53 Me. 176. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **Mass.**—Tilton *v.* Goodwin, 183 Mass. 236, 66 N. E. 802; Wheeler *v.* Parks, 15 Gray 527. **Mich.**—Meyer *v.* Montgomery, 87 Mich. 278, 49 N. W. 616. **Miss.**—Red Snapper Sauce Co. *v.* Bolling, 95 Miss. 752, 50 So. 401; Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70. **N. H.**—Weaver *v.* Rogers, 44 N. H. 112; Varney *v.* Brewster, 14 N. H. 49. **N. J.**—Ostheimer *v.* Single, 73 N. J. Eq. 539, 68 Atl. 231. **N. C.**—Battle *v.* Thompson, 65 N. C. 406. **Pa.**—Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. 640, 64 Atl. 398; Ahl *v.* Rhoads, 84 Pa. 319. **Tenn.**—Key *v.* Wilson, 3 Humph. 405. **Tex.**—Holliman *v.* Rogers, 6 Tex. 91. **Vt.**—Brooks Jr., & Co. *v.* Jewell, 14 Vt. 470.

23. See *infra*, VII, C, 5.

24. See *infra*, VII, C, 5, b.

25. See *infra*, VII, C, 5, d.

Disputed Claims. — The fact that the debt or demand is in dispute will not preclude its being used as a set-off.[26]

(II.) Must Be of Character Authorized by Statute. — Set-off, except as practiced in courts of equity,[27] exists by virtue of statutes,[28] and their restrictions and limitations as to the character of debt or demand which defendant may plead as a set-off, must be observed.[29]

(III.) Debts and Demands Available, in General. — The statutes, in general, provide for the setting off of mutual obligations[30] of the same

26. Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131.

27. See *supra*, I, G.

28. See *supra*, I, B, 2.

29. **U. S.**—Louisville & N. R. Co. *v.* Empire State Chemical Co., 189 Fed. 174. **Ala.**—Mooney *v.* Hough, 84 Ala. 80, 4 So. 19; Washington *v.* Timberlake, 74 Ala. 259; Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Steverson *v.* W. C. Agee & Co., 9 Ala. App. 389, 63 So. 794. **Ark.** Southern Tel. Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158; Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131; Epstein *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587. **Ga.** Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478; Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Robson & Evans *v.* Weatherly Lumber Co., 12 Ga. App. 781, 78 S. E. 610. **Ill.**—East *v.* Crow, 70 Ill. 91; Bevier *v.* Horn, 180 Ill. App. 547; Lloyd & Co. *v.* Manufacturers & M. etc. Co., 102 Ill. App. 551. **Ind.**—Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628. **Miss.**—Wilkinson *v.* Searls, 70 Miss. 392, 13 So. 470. **Mo.**—Ashby *v.* Shaw, 82 Mo. 76; Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Pa.**—Thomas *v.* Shoemaker, 6 Watts & S. 179. **Tex.**—Sanchez *v.* Blumberg (Tex. Civ. App.), 176 S. W. 904. **Wash.** Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50; Boston Tow Boat Co. *v.* John J. Sesnon Co., 64 Wash. 375, 116 Pac. 1083.

30. **U. S.**—Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769. **Del.**—Adair *v.* Newlin (Del. Ch.), 100 Atl. 792. **Fla.**—Brash *v.* Ehrman, 56 Fla. 153, 47 So. 937. **Ga.**—Robson & Evans *v.* Weatherly Lumber Co., 12 Ga. App. 781, 78 S. E. 610. **Ill.**—Rector *v.* Duntley Mfg. Co., 189 Ill. App. 562; Sample *v.* Farson, 174 Ill. App. 334; Cary *v.* Niblo, 155 Ill. App. 338. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1. **Mo.**—Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545. **N. Y.**—Mandel *v.* Koerner, 152 N. Y. Supp. 847. **Pa.** Com. *v.* Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574.

As to mutuality, see *infra*, VII, D, 1.

[a] **The test,** in some states to ascertain whether a claim is of the nature usable as a set-off, is will an action of indebitatus assumpsit lie thereon. **Ill.** Cary *v.* Niblo, 155 Ill. App. 338. **Ky.** Jenkins *v.* Richardson, 6 J. J. Marsh. 441, 22 Am. Dec. 82. **Minn.**—Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456. **Miss.**—Cobb *v.* Wilson, Lees & Co., 60 Miss. 343. **N. J.**—Links *v.* Mariowe, 83 N. J. L. 389, 84 Atl. 1056; Edwards *v.* Davis, 6 N. J. L. 394. **Pa.**—Jenkins *v.* Rush Brook Coal Co., 205 Pa. 166, 54 Atl. 715; Russell *v.* Miller, 54 Pa. 154. **Tenn.**—Bolinger *v.* Gordon, 11 Humph. 61. **W. Va.**—Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

[b] " '**A set-off, to be available, must be owned by defendant** in absolute right at the time the suit is brought. It is not enough that, together with another partner, the defendant owns the claim. It must be such demand as that he, in his own name, or in the names of defendants sued, without bringing in the name of a stranger to the suit may maintain an action of debt or indebitatus assumpsit upon it against the party or all the parties suing, as the case may be. Less than that is not mutuality. Ownership at the time of suit brought is of the very essence of the right'' . . . In order to sustain a set-off under the statute, the debts must be

character,[31] kind or quality,[32] and in consequence prohibit the pleading of tort against contract,[33] and contract against tort.[34] The set-off is confined to actions on contract,[35] and the cause of action pleadable as such must, except in a few jurisdictions,[36] be independent of the one sued on,[37] and must be a debt, demand or claim arising[38] upon con-

mutual and the demands must be subsisting causes of action, such as will give to the plaintiff and defendant a simultaneous cause of action, the one against the other at the time the suit is brought." Drennen *v.* Gilmore Bros., 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902.

[c] **Any mutual demand** between the parties existing at the commencement of the suit may be set-off. Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478.

31. Louisville & N. R. Co. *v.* Empire State Chem. Co., 189 Fed. 174.

[a] **In a suit upon a claim for demurrage,** which claim is partly compensatory and partly in the nature of a penalty allowed by statute, defendant cannot set-off a claim based upon failure to furnish cars according to its duty as a carrier. Louisville & N. R Co. *v.* Empire State Chemical Co., 189 Fed. 174.

32. Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1.

33. See *infra,* VII, C, 3, c, (I).

34. See *infra,* VII, C, 4, 5, (III).

35. See *supra,* I, B, 3.

36. McGuire *v.* Bransfield, 147 Ill. App. 541; Leterman *v.* Charlottesville Lumb. Co., 110 Va. 769, 67 S. E. 281.

[a] **The common law right of recoupment** is not impaired by sect. 3299 of the Code providing for a special plea of set-off; it merely permits in addition to recoupment the recovery of any legal damages which defendant can prove in excess of damages claimed by plaintiff. Leterman *v.* Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281.

[b] **Claim for breach of the contract sued on** used as set-off. McGuire *v.* Bransfield, 147 Ill. App. 541.

[c] **Demands for work and labor, board, goods sold and delivered,** are of such a nature that they may be set-off in an action ex contractu whether they arise out of the subject matter of plaintiff's suit or not. Heenan Mercantile Co. *v.* Welter, 144 Ill. App. 279. See also East *v.* Crow, 70 Ill. 91; Lloyd & Co. *v.* Manufacturers & Merchants Warehouse Co., 102 Ill. App. 551; Kelley, Maus & Co. *v.* Caffrey, 79 Ill. App. 278.

37. See *supra,* I, B.

38. **Ark.**—Southern Tel. Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158; Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131; **Epstein** *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587. **Conn.**—Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288. **Del.** Morrow *v.* Frankish, 4 Boyce 534, 89 Atl. 740. **Ga.**—Robson & Evans *v.* Weatherly Lumber Co., 12 Ga. App. 781, 78 S. E. 610; Florida Cent. R. Co. *v.* Cherokee Sawmill Co., 11 Ga. App. 278, 75 S. E. 164. **Ill.**—Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484; Cary *v.* Niblo, 155 Ill. App. 338. **Ind.**—Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Kennedy *v.* Richardson, 70 Ind. 524. **Kan.**—Carver *v.* Shelly & Co., 17 Kan. 472. **Ky.** Montgomery *v.* Montgomery, 25 Ky. L. Rep. 1682, 78 S. W. 465. **Mass.**—American Bridge Co. *v.* Boston, 202 Mass. 374, 88 N. E. 1089. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Ore.**—Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

[a] **Any obligation to pay money** on a promise express or implied is a proper subject matter of set-off. Cary *v.* Niblo, 155 Ill. App. 338. See also Laflin *v.* Howe, 112 Ill. 253; Devine *v.* Edwards, 101 Ill. 138; Allen *v.* Stenger, 74 Ill. 119; Raney *v.* Boyd, 39 Ill. 24.

[b] **"Debt"** under some statutes is made the sole subject of set-off. Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545.

[c] **A debt within the provision of the Bankruptcy Act** as to set-off includes any debt, demand or claim provable in bankruptcy, see Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972.

[d] **The debts need not be connected,** nor grow out of the same trans-

tract or ascertained by the decision of a court.[39]

Implied Contract. — Defendant's cause of action need not necessarily be based on an express contract; one resting on an implied contract is equally available,[40] even though the same state of facts may constitute a tort which defendant has waived.[41]

Quasi-contract. — A claim originating in a quasi-contract, is not, however, a proper subject matter of set-off.[42]

(IV.) Set-offs in Particular Proceedings.[43] — The above rules in respect to the subject matter of set-off need brief illustration. In the notes will be found a number of cases showing the nature and character of causes of action which the statutes of set-off do or do not entitle defendant to plead in particular contract actions such as actions to recover the purchase price of goods or other property sold;[44] or for

action, except in the case of dishonored notes, see Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478.

[e] **That the debts arise in mutual dealings** not necessary. Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111.

[f] **In some statutes the word "demand"** and not "cause of action" is used as descriptive of the claim which may be available to defendant as a set-off. Puget Sound State Bank *v.* Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

39. **Ark.**—Southern Tel. Co. *v.* Banks, 108 Ark. 283, 158 S. W. 158; Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131; Epstein *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587. **Kan.**—Carver *v.* Shelly & Co., 17 Kan. 472. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668.

Set-off of judgments, see 16 STANDARD PROC. 560.

40. **Fla.**—Bates *v.* Lanier, 77 So. 628. **Ga.**—J. I. Case Threshing Mach. Co. *v.* Thurmond, 144 Ga. 21, 85 S. E. 1020; Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502. **Ill.**—Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484; Cary *v.* Niblo, 155 Ill. App. 338. **Kan.**—Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Stevens *v.* Able, 15 Kan. 584; Stewart *v.* Balderston, 10 Kan. 131. **Okla.**—Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977.

[a] **Set-off for money paid under mistake** of fact. Cary *v.* Niblo, 155 Ill. App. 338; Commercial Union Assur. Co. *v.* Scammon, 133 Ill. 627, 23 N. E. 106.

[b] **In allowing a set-off for shortage in milk** shipped the court said: "If, in truth and in fact, by the mistake of appellant, and that of appellee, the amount of the milk was short, and appellee received more money on that account than he was entitled to, he must account for the same, even though the mistake resulted from negligence on the part of appellant as well as on the part of appellee. The real question is as to the fact of the alleged shortage. If that existed, the appellant is entitled to have the wrong corrected by way of set-off." Devine *v.* Edwards, 101 Ill. 138, 141.

[c] **Failure of Consideration.**—Money paid to plaintiff upon a contract, the consideration for which has failed, may be the subject of set-off in an action upon another contract, as the law implies a promise of repayment. Andrews *v.* Artisans' Bank, 26 N. Y. 298.

41. Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Stevens *v.* Able, 15 Kan. 584; Stewart *v.* Balderston, 10 Kan. 131; Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977.

42. Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396.

43. **Tort demands against contract,** see *infra,* VII, C, 3, c, (I).

Contract claims against tort, see *infra,* VII, C, 4, b, (III).

44. See *infra,* this note, and also the title "**Sales.**"

[a] **Breach of warranty** proper set-off (1) in those states which permit claims for breach or non-performance of the contract sued on to be used as set-off. **Ill.**—Cary *v.* Niblo, 155 Ill. App. 338. **Pa.**—Halfpenny *v.* Bell, 82

services rendered,[45] or for rent,[46] or for money loaned,[47] or in actions betweeen a bank and its depositor,[48] and actions upon promissory notes, bills of exchange, or other negotiable instruments.[49]

d. *Recoupment.* — (I.) **In General.** —The subject matter of recoupment is generally not determined by statutes as is the case with set-off and counterclaim, and even where statutes exist as to recoupment they have been declared not to enlarge the class of demands which may be the subject thereof.[50]

Recoupment is peculiarly a contractual right[51] based on the prin-

Pa. 128; Seigworth *v.* Leffel, 76 Pa. 476; Hunt *v.* Gilmore, 59 Pa. 450. **Wash.**—Boston Tow Boat Co. *v.* John J. Sesnon Co., 64 Wash. 375, 116 Pac. 1083. (2) Thus where material for a monument was sold as Barre granite and as being free from sap or iron, defendants when sued in assumpsit on a subsequent contract may show by way of set-off that the material in the monument was not as represented, but was worthless, and that by reason thereof they were damaged, and lost all their labor and expense in putting the monument up and in removing it from the cemetery. Cary *v.* Niblo, 155 Ill. App. 338.

45. See *infra,* this note.

[a] **Contract of Employment.**—In an action for breach of contract the defendant may plead by way of set-off, the breach by plaintiff of a former contract of employment. Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

46. See *infra,* this note.

[a] **Claim for labor performed,** for landlord, proper set-off. **Ala.**—Vandegrift *v.* Abbott, 75 Ala. 487. **Ill.**—East *v.* Crow, 70 Ill. 91. **N. Y.**—*In re* Arkell Pub. Co., 29 Misc. 145, 60 N. Y. Supp. 832. **Wis.**—Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

[b] **Judgment against landlord** (1) may be set off against his claim for rent. Thrall *v.* Omaha Hotel Co., 5 Neb. 295, 25 Am. Rep. 488. (2) But where the judgment has come into defendant's hands by assignment the defendant may set-off only the amount he paid for it, and not the amount of the judgment itself. Thrall *v.* Omaha Hotel Co., 5 Neb. 295, 25 Am. Rep. 488.

47. See *infra,* this note.

[a] **A claim for personal services** set off in an action for money loaned. Morrow *v.* Frankish, 4 Boyce (Del.) 534, 89 Atl. 740.

48. Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689.

[a] **The bank may set off any indebtedness or demand** which it holds against the depositor, when sued by him for the deposit. **N. J.**—Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689. **N. Y.**—Marsh *v.* Oneida Cent. Bank, 34 Barb. 298. **N. C.** Moore *v.* Greenville B. & Tr. Co., 173 N. C. 180, 91 S. E. 793.

[b] **Judgment against depositor** may be set off in his action to recover deposit. Marsh *v.* Oneida Cent. Bank, 34 Barb. (N. Y.) 298.

[c] **Stock Subscription.** — Amount due upon stock subscription may be so set off. Humboldt S. D. & T. Co.'s Assigned Estate, 3 Pa. Co. Ct. 621.

[d] **Note Payable at Bank and Paid by Bank.**—The bank may set off a note payable at such bank, paid by it and charged to depositor. Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, 9 L. R. A. 560.

[e] **A depositor may set off a general deposit** against any contract claim upon which the bank sues such depositor. **U. S.**—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059. **N. Y.**—*In re* Receiver N. A. Sav. Bank *v.* Tartter, 54 How. Pr. 385; Equitable Bank *v.* Claassen, 3 Misc. 151, 23 N. Y. Supp. 311. **N. C.**—State Bank *v.* Armstrong, 15 N. C. 519. **Wash.** Puget Sound State Bank *v.* Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

49. See *infra,* this note.

[a] **In action on note for rent,** a claim for services rendered the landlord proper. Vandegrift *v.* Abbott, 75 Ala. 487.

50. Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514; Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692; Martin Dumee & Co. *v.* Brown, Shipley & Co., 75 Ala. 442.

51. Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E.

ciple that the matter set up as such should grow out of the same subject as the cause of action.[52] It should be a claim or demand springing from the contract or transaction sued on,[53] or of a contract made at the same time and constituting a part and parcel of the same transaction,[54] though the agreements be contained in separate writings,[55] or partly in writing and partly in parol.[56] It cannot be based upon an independent tort,[57] nor upon a breach of a contract wholly independent from the one pleaded by plaintiff.[58] And so defendant

702; Dillon, Beebe's Son *v.* Eakle, 43 W. Va. 502, 27 S. E. 214; Logie *v.* Black, 24 W. Va. 1; Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

52. **U. S.**—Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524. **Ill.**—Turner *v.* Retter, 58 Ill. 264; Stow *v.* Yarwood, 14 Ill. 424; Sample *v.* Farson, 174 Ill. App. 334. **Ind.**—Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254.

53. **Ala.**—Washington *v.* Timberlake, 74 Ala. 259; Bellview Cemetery Co. *v.* Faulks, 6 Ala. App. 137, 60 So. 461. **Ark.**—Berry *v.* Diamond, 19 Ark. 262. **Del.**—Webster *v.* Beebe, 2 Boyce 161, 77 Atl. 769. **Ill.**—Bostrom *v.* Becker, 172 Ill. App. 410; Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Streeter *v.* Streeter, 43 Ill. 155; Stow *v.* Yarwood, 14 Ill. 424. **Ind.**—Miller *v.* Roberts, 106 Ind. 63, 5 N. E. 707; Standley *v.* Northwestern Mut. Life Ins. Co., 95 Ind. 254; Heaston *v.* Colgrove, 3 Ind. 265. **Me.**—Cota *v.* Mishow, 62 Me. 124. **Mass.**—Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214; Stacy *v.* Kemp, 97 Mass. 166. **Mich.**—Sharpless Separator Co. *v.* Brown, 174 Mich. 16, 140 N. W. 528; Helwig *v.* Laschowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378; Haldeman *v.* Berry, 74 Mich. 424, 42 N. W. 57; Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. 263; Holland *v.* Rea, 48 Mich. 218, 12 N. W. 167; Morehouse *v.* Baker, 48 Mich. 335, 12 N. W. 170; Molby *v.* Johnson, 17 Mich. 382. **Miss.**—Postal Telegraph-Cable Co. *v.* W. C. Craig & Co., 106 Miss. 279, 63 So. 573. **Mo.**—Langdon *v.* Markle, 48 Mo. 357; Green *v.* Bell, 3 Mo. App. 291. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447. **N. C.**—Kramer *v.* Thomson-Houston Elec. L. Co., 95 N. C. 277. **Tenn.** Nashville & C. R. Co. *v.* Chulmey, 6 Heisk. 325. **Vt.**—Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620. **Va.**—Leterman *v.* Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281. **W. Va.**—Bowling *v.* Walls, 72 W. Va. 638, 78 S. E. 791; Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E. 702; Dillon Beebe's Son *v.* Eakle, 43 W. Va. 502, 27 S. E. 214; Logie *v.* Black, 24 W. Va. 1; Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

54. **Colo.**—Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298. **Ill.**—Bross *v.* Cairo & V. R. Co., 9 Ill. App. 363. **Md.**—Warfield *v.* Booth, 33 Md. 63. **W. Va.**—Bowling *v.* Walls, 72 W. Va. 638, 78 S. E. 791.

[a] **Conversion of Collateral.**—Plaintiff, who held notes of defendant secured by notes of third parties, surrendered these latter in consideration of defendant's executing new notes to be secured by a mortgage. Defendant, afterward surrendered the collateral notes to the plaintiff who converted them. In an action on the new notes a claim for such conversion was held not to arise out of the contract or transaction and was not therefore, a proper recoupment. Blackshear Mfg. Co. *v.* Stone, 8 Ga. App. 661, 70 S. E. 29.

55. **Ark.**—Key *v.* Henson, 17 Ark. 254. **Colo.**—Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298. **Ga.**—Aultman *v.* Mason, 83 Ga. 212, 9 S. E. 536. **Md.** Warfield *v.* Booth, 33 Md. 63. **W. Va.** Bowling *v.* Walls, 72 W. Va. 638, 78 S. E. 791.

56. **Ark.**—Key *v.* Henson, 17 Ark. 254. **Ga.**—Mell *v.* Moony, 30 Ga. 413. **Ill.**—Bross *v.* Cairo & V. R. Co., 9 Ill. App. 363; Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250.

57. See *infra*, VII, C, 3, a, (III).

58. **Ala.**—Washington *v.* Timberlake, 74 Ala. 259; Walker *v.* McCoy, 34 Ala. 659. **Conn.**—McLean *v.* McLean, 1 Conn. 397. **D. C.**—McGuire *v.* Gerstley, 26 App. Cas. 193. **Ga.**—Dooley *v.* Gorman, 104 Ga. 767, 31 S. E. 203;

cannot in his defense prove another and different contract than the one sued on and recoup damages for breach of such contract.[59]

Questions concerning the maturity of the demand,[60] asserted as recoupment, and whether the same may be unliquidated,[61] or arise ex delicto,[62] are treated in subsequent sections of this article.

(II.) Particular Demands Available. — In actions on contract defendant may recoup any damages for which plaintiff is in good conscience liable to him under the same contract.[63] He may assert a claim based on plaintiff's breach of the contract[64] as for damages for negligent

Mell *v.* Moony, 30 Ga. 413; Gem Knitting Mills *v.* Empire Printing & B. Co., 3 Ga. App. 709, 60 S. E. 365. **Ill.** Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Hubbard *v.* Rogers, 64 Ill. 434; De Forrest *v.* Oder, 42 Ill. 500. **Md.**—Maryland Fidelity & Dep. Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652; Simmons *v.* Haas, 56 Md. 153. **Mass.**—American Bridge Co. *v.* Boston, 202 Mass. 374, 88 N. E. 1089; Isenburger *v.* Hotel Reynolds Co., 177 Mass. 455, 59 N. E. 120; Home Sav. Bank *v.* Boston, 131 Mass. 277. **Mich.** — Sharpless Separator Co. *v.* Brown, 174 Mich. 16, 140 N. W. 528; Forrest *v.* Johnson, 100 Mich. 321, 58 N. W. 1005; Helwig *v.* Laschowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378; Morehouse *v.* Baker, 48 Mich. 335, 12 N. W. 170; Holland *v.* Rea, 48 Mich. 218, 12 N. W. 167. **Miss.**—Fowler *v.* Payne, 49 Miss. 32. **N. J.**—Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373. **Pa.**—Foster *v.* Bell, 2 Miles 399. **Tenn.**—Nashville & C. R. Co. *v.* Chumley, 6 Heisk. 325. **Vt.**—Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620. **W. Va.**—Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E. 702; J. C. Orrick & Son Co. *v.* Dawson, 67 W. Va. 403, 68 S. E. 39; Clark's Cove Guano Co. *v.* Appling, 32 W. Va. 470, 10 S. E. 809; Logie *v.* Black, 24 W. Va. 1. **Wis.**—Racine County Bank *v.* Keep, 13 Wis. 209.

[a] **Breach of a contract subsequent** to that sued upon is not available by way of recoupment. Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846.

59. Sharpless Separator Co. *v.* Brown, 174 Mich. 16, 140 N. W. 528; Haldeman *v.* Berry, 74 Mich. 424, 42 N. W. 57; Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

[a] **Where plaintiff sues on an implied contract,** defendant cannot plead an express contract and recoup for breach thereof. Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

[b] **In assumpsit for the purchase price** of a cream separator, the defendant, who resists the claim on the ground that the sale was a conditional one, cannot set up by way of recoupment a claim for money expended in efforts to make the separator work satisfactorily. Sharpless Separator Co. *v.* Brown, 174 Mich. 16, 140 N. W. 528.

60. See *infra*, VII, C, 6, b.

61. See *infra*, VII, C, 7.

62. See *infra*, VII, C, 3, a, (III).

63. **Ala.**—Bellview Cemetery Co. *v.* Faulks, 6 Ala. App. 137, 60 So. 461. **Ark.**—Mitchell *v.* Caplinger, 97 Ark. 278, 133 S. W. 1032. **Del.**—Webster *v.* Beebe, 2 Boyce 161, 77 Atl. 769. **Ga.**—Block *v.* Happ, 144 Ga. 145, 86 S. E. 316; Park *v.* Carmichael, 20 Ga. App. 36, 92 S. E. 397; Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846. **Ill.**—Waterman *v.* Clark, 76 Ill. 428; Burton Bros. *v.* Gee Oil Co., 173 Ill. App. 548. **Kan.**—Lofsted *v.* Bohman, 88 Kan. 660, 129 Pac. 1168. **Me.** Bailey *v.* Webber, 113 Me. 434, 94 Atl. 758; Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989. **Mich.**—Allen *v.* McKibbin, 5 Mich. 449. **N. J.**—Winter *v.* Schoenfeld, 78 N. J. L. 92, 73 Atl. 42. **N. Y.** Woodward *v.* Fuller, 80 N. Y. 312; Greenberg *v.* Lumb, 129 N. Y. Supp. 182. **R. I.**—McPhillips *v.* Durkin, 103 Atl. 929; Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022. **Va.**—Leterman *v.* Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281. **W. Va.**—Bowling *v.* Walls, 72 W. Va. 638, 78 S. E. 791.

[a] **Any damages may be recouped** for which a cause of action growing out of the same transaction lies at the time of the pleading. Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Leterman *v.* Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281.

64. **Ala.**—Hunter *v.* Waldron, 7 Ala. 753; Bellview Cemetery Co. *v.* Faulks,

performance,[65] or delay in performance[66] thereof. Fraud and deceit practiced by plaintiff in connection with the contract are also proper subjects of recoupment.[67]

6 Ala. App. 137, 60 So. 461. **Ark.** Ewing *v.* Jenson, 57 Ark. 237, 21 S. W. 430; Berry *v.* Diamond, 19 Ark. 262. **Conn.**—Satchwell *v.* Williams, 40 Conn. 371. **D. C.**—Fitzgerald *v.* Wiley, 22 App. Cas. 329. **Ga.**—Wiseberg *v.* Novelty Hat Mfg. Co., 3 Ga. App. 362, 59 S. E. 1112. **Ill.**—Haentze *v.* Brown, 193 Ill. App. 288; Western C. & M. Co. *v.* Western C. & S. Co., 191 Ill. App. 13; Barrett *v.* Regan, 177 Ill. App. 311; Burton Bros. *v.* Gee Oil Co., 173 Ill. App. 548. **Ind.**—Heaston *v.* Colgrove, 3 Ind. 265; Manville *v.* McCoy, 3 Ind. 148. **Me.**—Cota *v.* Mishow, 62 Me. 124. **Mass.**—Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. 146; Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214; Campbell *v.* Somerville, 114 Mass. 334; Stacy *v.* Kemp, 97 Mass. 166; Bee Printing Co. *v.* Hichborn, 4 Allen 63. **Mich.**—Manistee Navigation Co. *v.* Filer & Sons, 185 Mich. 302, 151 N. W. 1025; Sharpless Separator Co. *v.* Brown, 174 Mich. 16, 140 N. W. 528; Alderton *v.* Williams, 130 Mich. 626, 90 N. W. 661; Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297; Molby *v.* Johnson, 17 Mich. 382. **Miss.**—Jefferson County *v.* Arrghi, 51 Miss. 667; Dunlap *v.* Hand, 26 Miss. 460. **Mo.** Yeats *v.* Ballentine, 56 Mo. 530. **Pa.** Wright *v.* Cumpsty, 41 Pa. 102. **R. I.** Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250. **Tenn.**—Crouch *v.* Miller, 5 Humph. 586; Nashville & C. R. Co. *v.* Chulmey, 6 Heisk. 325. **Tex.**—Carroll *v.* Welch, 26 Tex. 147. **Vt.**—Landon *v.* Hunt, 82 Vt. 322, 73 Atl. 865; Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620; Phelps *v.* Paris, 39 Vt. 511. **W. Va.**—Natural Gas Co. *v.* Healy, 33 W. Va. 102, 10 S. E. 56.

[a] **"We consider the doctrine well settled,** that where a plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time and relating to the same subject-matter, the defendant may recoup his damages arising from the breach of that part which is in his favor; and this, whether the different parts are contained in one instrument or several; and though one part be in writing and the other in parol: Aliter, where the contract for the breach of which damages are claimed by defendant, is entirely distinct and independent of the one on which the plaintiff sues." Mell *v.* Moony, 30 Ga. 413.

[b] **In an action on a promissory note,** the consideration of which is an agreement to convey mining stock, the defendant is entitled by way of recoupment to diminish the amount recoverable on the note to the extent of the loss which was sustained by the plaintiff's failure to perform his agreement. Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250.

65. **Ala.**—Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720. **Ark.**—Mitchell *v.* Caplinger, 97 Ark. 278, 133 S. W. 1032; Robinson *v.* Mace, 16 Ark. 97. **Ga.**—Block *v.* Happ, 144 Ga. 145, 86 S. E. 316. **Ill.**—Waterman *v.* Clark, 76 Ill. 428; Parker *v.* Platt, 74 Ill. 430. **Ind.**—Manville *v.* McCoy, 3 Ind. 148. **Kan.**—Lofsted *v.* Bohman, 88 Kan. 660, 129 Pac. 1168. **N. Y.**—Woodward *v.* Fuller, 80 N. Y. 312. **Ohio.** The Wellsville *v.* Geisse, 3 Ohio St. 333. **Tenn.**—Gibson, Lee & Co. *v.* Carlin, 13 Lea 440. **Wis.**—Dewitt *v.* Cullings, 32 Wis. 298.

66. **Ala.**—Huntsville Elks Club *v.* Garrity-Hahn Bldg. Co., 176 Ala. 128, 57 So. 750. **Ill.**—Galbraith *v.* Chicago Architectural Iron Works, 50 Ill. App. 247; Benner *v.* Schmidt, 44 Ill. App. 304. **Md.**—Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. **Miss.**—Postal Telegraph-Cable Co. *v.* W. C. Craig & Co., 106 Miss. 279, 63 So. 573.

67. **Ark.**—Goodwin *v.* Robinson, 30 Ark. 535; Plant *v.* Condit, 22 Ark. 454. **Ill.**—Peck *v.* Brewer, 48 Ill. 54. **Me.** Bailey *v.* Webber, 113 Me. 434, 94 Atl. 758. **Mo.**—Morbrose Inv. Co. *v.* Flick, 137 Mo. App. 528, 174 S. W. 189; Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484. **N. C.**—Fields *v.* Brown, 160 N. C. 295, 76 S. E. 8.

[a] **Recoupment in Equity.**—It is a well-established principle of equity jurisprudence that the mortgagor may defend against the foreclosure of a purchase money mortgage on the ground of fraudulent representations inducing the purchase and that this defense is available where the right to rescind is waived and damages are claimed by way of recoupment. Gabel

(III.) Application to Particular Proceedings. — (A.) ACTIONS FOR SERVICES RENDERED. — Familiar applications of the doctrine of recoupment arise in connection with actions to recover for work and labor done or services rendered. Defendant may always avail himself by way of recoupment of any claim for damages he may have suffered by reason of the plaintiff's violation of the contract,[68] as for failure[69] to per-

v. Armstrong, 88 Ore. 84, 171 Pac. 190.

68. **U. S.**—Ingle *v.* Jones, 2 Wall. 1, 7 L. ed. 762; Hunt *v.* Oregon Pac. Ry. Co., 36 Fed. 481, 13 Sawy. 516, 1 L. R. A. 842. **Ala.**—Hunter *v.* Waldron, 7 Ala. 753; Greene *v.* Linton, 7 Port. 133, 31 Am. Dec. 707. **Ark.**—Brunson *v.* Martin, 17 Ark. 270, 277; Robinson *v.* Mace, 16 Ark. 97. **Conn.**—Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246. **Del.**—Webster *v.* Beebe, 2 Boyce 161, 77 Atl. 769; Draper *v.* Randolph & Co., 4 Harr. 454. **Fla.**—Tunno *v.* Robert, 16 Fla. 738. **Ga.**—Lee *v.* Clements, 48 Ga. 128. **Ill.**—Adlard *v.* Muldoon, 45 Ill. 193; Higgins *v.* Lee, 16 Ill. 495; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15. **Ia.**—Pixler *v.* Nichols, 8 Iowa 106, 74 Am. Dec. 298. **Ky.**—Piper *v.* Menifee, 12 B. Mon. 465, 54 Am. Dec. 547. **Mass.**—Powell *v.* Howard, 109 Mass. 192; Cullen *v.* Sears, 112 Mass. 299, 308; Bee Printing Co. *v.* Hichborn, 4 Allen 63; Higby *v.* Upton, 3 Metc. 409. **Mo.**—Lamb *v.* Brolaski, 38 Mo. 51. **Neb.**—Murphy *v.* Sampson, 2 Neb. (Unof.) 297, 96 N. W. 494. **N. H.** Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621; Johnson *v.* White Mt. C. Assn., 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610; Elliot *v.* Heath, 14 N. H. 131; Britton *v.* Turner, 6 N. H. 481, 495, 26 Am. Dec. 713. **N. Y.** Still *v.* Hall, 20 Wend. 51; Sickels *v.* Pattison, 14 Wend. 257, 28 Am. Dec. 527; Gleason *v.* Clark, 9 Cow. 57. **Ohio.** Steamboat Wellsville *v.* Geisse, 3 Ohio St. 333. **Pa.**—Wade *v.* Haycock, 25 Pa. 382; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700. **Tenn.**—Whitaker *v.* Pullen, 3 Humph. 466; Overton *v.* Phelan, 2 Head 445. **Vt.**—Kelly *v.* Bradford, 33 Vt. 35; Merrow *v.* Huntoon, 25 Vt. 9; Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363. **Wis.**—Dewitt *v.* Cullings, 32 Wis. 298; Norton *v.* Rooker, 1 Pin. 195, 207, 209.

See 19 STANDARD PROC. 451.

[a] **Entire or Separable Contract.** Where, by its terms, a contract of employment makes entire performance by an employe a condition precedent to a right of recovery, he cannot recover his compensation without showing a performance of the entire service. But where the contract is capable of a just division, and employer has had the benefit of his employe's services during a part of the required term, or the benefit of some service, the employe may recover the reasonable value of the service actually rendered, subject to employe's right to deduct any damages caused to him by employe's failure to fully perform. Booth *v.* Tyson, 15 Vt. 515.

[b] **Amount Necessary To Make Work Conform With Contract.**—In action to recover for labor and services defendant may recoup the amount necessary to be paid to make the work conform with the contract. **U. S.** Van Buren *v.* Digges, 11 How. 461, 476, 13 L. ed. 771, 776. **Cal.**—Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826. **Mass.**—Brewer *v.* Tyringham, 12 Pick. 547. **Vt.**—Kelly *v.* Bradford, 33 Vt. 35. **Eng.**—Thornton *v.* Place, 1 M. & R. 218; Cutler *v.* Close, 5 Car. & P. 337, 24 E. C. L. 594. "'Sometimes the measure of damages is the necessary cost of making the work accord to the specifications. . . . The defect may be of such a kind as to diminish the value of the house but little, while to make the work conform literally to the contract would involve reconstruction at unreasonable and disproportionate expense.' The question ordinarily is, how much less is the building fairly worth to the defendant than it would have been if the contract had been performed?" White *v.* McLaren, 151 Mass. 553, 24 N. E. 911, *cited* and *quoted* in Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621, which cites other cases.

69. See *infra*, this section.

[a] **Advertisement Contract.**—Where plaintiff agrees to advertise defendant's business at a fixed sum per year, and, after knowledge of plaintiff's failure to insert certain advertisement, defendant continues to send matter to plaintiff, the latter may recover upon

form it, or for delay in performance,[70] or for negligent or unskilful

a quantum meruit for matter actually printed, subject to defendant's right to recoup damage caused by plaintiff's omission of other matter. Bee Printing Co. *v.* Hichborn, 4 Allen (Mass.) 63.

[b] **Abandonment of Service.**—Where employe abandons the service prior to the expiration of its term, he may recover upon a quantum meruit for the time he was actually engaged in service, but his employer may recoup damages caused by plaintiff's abandonment. **Conn.**—Satchwell *v.* Williams, 40 Conn. 371. **Ia.**—Pixler *v.* Nichols, 8 Iowa 106, 74 Am. Dec. 298. **Mass.** Hunt *v.* Otis Co., 4 Metc. 464. **Neb.** Murphy *v.* Sampson, 2 Neb. (Unof.) 297, 96 N. W. 494. **N. M.**—Elliot *v.* Heath, 14 N. H. 131. **Vt.**—Booth *v.* Tyson, 15 Vt. 515.

[c] **Abandonment of Construction Contract.**—In actions by contractor to recover price of constructing a railroad where plaintiff abandoned the work before completion, defendant may recoup the value of the use of the road during the time it remained incomplete. Hunt *v.* Oregon Pac. Ry. Co., 36 Fed. 481, 13 Sawy. 516, 1 L. R. A. 842.

[d] **Failure To Give Notice.**—Where by a contract or regulation an employe is required to give his employe a certain notice of his intention to quit service, the latter may in the former's suit for wages, recoup damages caused by failure to give such notice. Hunt *v.* Otis Co., 4 Metc. (Mass.) 464.

[e] **Absence During Term.**—(1) Damages caused by employe's failure to labor during the entire stipulative time may be recouped against employe's suit for wages (**Ala.**—Wilson *v.* Smith, 111 Ala. 170, 20 So. 134. **Ark.** Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430. **Cal.**—Stoddard *v.* Treadwell, 26 Cal. 294), even though (2) such absence was caused by illness. Dryer *v.* Lewis, 57 Ala. 551; Jones *v.* Deyer, 16 Ala. 221; Hunter *v.* Waldron, 7 Ala. 753, *citing* Greene *v.* Linton, 7 Port. 133, 31 Am. Dec. 707.

[f] **Money advanced by employer** to employe to enable him to perform the service in question may be recouped against employe's suit for compensation, when plaintiff has not fully performed his agreement. Woodstock I. Co. *v.* Reed, 81 Ala. 305, 1 So. 116.

[g] **Breach of Contract for Convict Labor.**—The state contracted to furnish defendant with a certain number of convicts upon demand during a period of ten years for whose services the defendant agreed to pay fifty cents a day per convict. After the expiration of the ten years, a certain number of convicts were permitted to continue with defendant. Plaintiff, the state, sued for services of the convicts rendered both before and after the ten year period had ended. Defendant was allowed to recoup as against both demands, and to the full extent thereof, a claim based on plaintiff's failure to furnish the required number of convicts per day during the contract period. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376.

70. **Md.**—Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. **N. Y.**—Barber *v.* Rose, 5 Hill 76; Crocker-Wheeler Co. *v.* Varick Realty Co., 104 App. Div. 568, 43 Misc. 645, 88 N. Y. Supp. 412. **S. C.**—Cooke *v.* Rhine, 1 Bay 16. **Eng.** Duckworth *v.* Alison, 1 Mees. & W. 412, 1 Tyrw. & Gr. 742.

[a] **Measure of damage allowed in recoupment** is the rent lost to defendant during the delay. **Md.**—Abbott *v.* Gatch, 13 Md. 314, 334, 71 Am. Dec. 635, 642. **N. Y.**—Crocker-Wheeler Co. *v.* Varick Realty Co., 104 App. Div. 568, 88 N. Y. Supp. 412, 94 N. Y. Supp. 23. **S. C.**—Cooke *v.* Rhine, 1 Bay 16.

[b] **Actual Damage Necessary.**—But defendant must show that he has been actually damaged by plaintiff's delay, and where defendant attempts to recoup damages caused by plaintiff's failure to complete improvements by a certain time, it must appear that such delay prevented defendant's securing a tenant. Wagner *v.* Corkhill, 40 Barb. (N. Y.) 175.

[c] **But it is a sufficient defense to such recoupment** that plaintiff's delay was caused by defendant's delay in doing part of the work required of him by the contract. Grannis & H. Lumb. Co. *v.* Deeves, 72 Hun 171, 25 N. Y. Supp. 375, 55 N. Y. St. 674.

[d] **Delay in Delivering Message.** Where a telegraph company sues for charges due it for transmitting messages for defendant the latter may recoup damages resulting from delay in

performance,[71] as for negligence in rendering professional services,[72] or in making or repairing chattels,[73] or in rendering other services[74]

the delivery of one of the messages. Postal Telegraph-Cable Co. *v.* W. C. Craig & Co., 106 Miss. 279, 63 So. 573.

[e] **Delay in completing a building contract** proper, subject of recoupment in an action on the contract. Huntsville Elks Club *v.* Garrity-Hahn Bldg. Co., 176 Ala. 128, 57 So. 750.

[f] **By merely allowing the work to go on to completion** after the expiration of the time named in the contract, the owner does not waive its claim to damages for delay, and is entitled, when sued on the contract, to recoup the damages sustained by such delay. Huntsville Elks Club *v.* Garrity-Hahn Bldg. Co., 176 Ala. 128, 57 So. 750.

[g] **By accepting work done after the time** specified in the contract, the party does not waive his claim for damages for the contractor's delay, and when sued on the contract, may recoup damages sustained in consequence thereof. Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720; Bellview Cemetery Co. *v.* Faulks, 6 Ala. App. 137, 60 So. 461; Gazzam *v.* Kirby, 8 Port. (Ala.) 253.

71. **Ala.**—Krou *v.* Verkentoren, 90 Ala. 113, 7 So. 428; Mobile & M. R. Co. *v.* Clanton, 59 Ala. 392, 399, 31 Am. Rep. 15; Dryer *v.* Lewis, 57 Ala. 551. **Ill.**—Addems *v.* Suver, 89 Ill. 482. **N. Y.**—Still *v.* Hall, 20 Wend. 51.

See 19 STANDARD PROC. 451.

[a] **In an action by the conductor of a railway train** to recover wages, defendant may recoup damages caused by plaintiff's permitting a car to become detached from his train thereby being run into by a following train. Mobile & M. R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15.

[b] **Shipmaster laying up ship** in such manner that it was run into by ice and sunk. Still *v.* Hall, 20 Wend. (N. Y.) 51.

[c] **Failure of plaintiff to enforce the performance of agreements made by third persons** to work for plaintiff, is a proper subject matter for recoupment. Lee *v.* Clements, 48 Ga. 128.

[d] **In an action for towage**, the loss, through plaintiff's negligence, of scows which plaintiff contracted to tow, proper matter of recoupment. American Towing & Lightering Co. *v.* Baker-Whiteley Coal Co., 111 Md. 504, 75 Atl. 341.

72. See 21 STANDARD PROC. 379.

[a] **Attorney's negligence** in rendering service may be recouped in his action to recover compensation for such service. Rooker *v.* Bruce, 45 Ind. App. 57, 90 N. E. 86.

[b] **Physician Communicating Disease to Patient.**—If, in the course of treating a patient a physician communicates a disease to such patient, after having been warned that he must not attend his patient, if he also attends persons affected by that disease, the patient may in the physician's action for services recoup damages sustained by reason of the communication of such disease to defendant and his family. The facts attending the communication of disease arose out of the contract employing the physician. Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

73. **N. Y.**—Spalding *v.* Vandercook, 2 Wend. 431; Snook *v.* Fries, 19 Barb. 313. **Ohio.**—Steamboat Wellsville *v.* Geisse, 3 Ohio St. 333. **Pa.**—Wright *v.* Cumpsty, 41 Pa. 102, 111.

[a] **Making Brick.**—Robinson *v.* Mace, 16 Ark. 97.

[b] **Making Water Wheel To Propel Machinery.**—Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381; Butler *v.* Titus, 13 Wis. 429.

[c] **In action for repairs upon a boat** damages for failure to perform the work according to the contract, recouped. Webster *v.* Beebe, 2 Boyce (Del.) 161, 77 Atl. 769.

[d] **Price of Material Furnished by Employer.**—(1) Where the employer agrees to furnish material from which plaintiff agrees to make an article for defendant, and the work is not done according to agreement, defendant may recoup the cost of material against plaintiff's claim for payment for services. Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381. (2) So, where the employe agrees to furnish material, but fails to do so, and empolyer furnishes them, the latter may recoup the value of such materials against employe's suit for value of services. Newton *v.* Forster, 12 Mees. & W. (Eng.) 772.

74. **Ala.**—Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720. **Vt.**—Booth *v.*

in regard to chattels, or negligence in managing defendant's business,[75] or in constructing or repairing buildings or other improvements on land,[76] or in cultivating or caring for land,[77] or crops or trees on defendant's land,[78] or in drilling wells upon land,[79] or for tortious acts

Tyson, 15 Vt. 515. **Wis.**—Dewitt *v.* Cullings, 32 Wis. 298.

[a] **Negligence in Dyeing Goods.** Where defendant employed plaintiff to render services in defendant's dyeworks, defendant may, in plaintiff's action to recover compensation, recoup damages caused by defendant's ruining goods left with defendant to be dyed. Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720.

75. Johnson *v.* White Mt. C. Assn., 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610.

76. **U. S.**—Van Buren *v.* Digges, 11 How. 461, 474, 13 L. ed. 771, 776; Ingle *v.* Jones, 2 Wall. 1, 7 L. ed. 762. **Ala.**—Aarnes *v.* Windham, 137 Ala. 518, 34 So. 816; Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188; English *v.* Wilson, 34 Ala. 201. **Ill.**—Snell *v.* Cottingham, 72 Ill. 161, 171; Estep *v.* Fenton, 66 Ill. 467; Queen *v.* Doolan, 55 Ill. 526; Adlard *v.* Muldoon, 45 Ill. 193; Higgins *v.* Lee, 16 Ill. 495; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15, 25. **Ind.**—Clark *v.* Wildridge, 5 Ind. 176; Manville *v.* McCoy, 3 Ind. 148; McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470. **Ia.**—McClay *v.* Hedge, 18 Iowa 66; Tait *v.* Sherman, 10 Iowa 60; Mitchell *v.* The Wiscotta Land Co., 3 Iowa 209. **Md.**—Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. **Mass.** Hayward *v.* Leonard, 7 Pick. 181, 19 Am. Dec. 268. **Mo.**—Haysler *v.* Owen, 61 Mo. 270; Yeats *v.* Ballentine, 56 Mo. 530; Lee *v.* Ashbrook, 14 Mo. 378, 55 Am. Dec. 110. **N. Y.**—Ives *v.* Van Epps, 22 Wend. 155; Barber *v.* Rose, 5 Hill 76; Bloodgood *v.* Ingoldsby, 1 Hilt. 388. **Pa.**—Bayne *v.* Gaylord, 3 Watts 301; Liggett *v.* Smith, 3 Watts 331, 27 Am. Dec. 358. **Tenn.**—Gibson, Lee & Co. *v.* Carlin, 13 Lea 440; Overton *v.* Phelan, 2 Head 445. **Vt.**—Kelly *v.* Bradford, 33 Vt. 35. **Wis.**—Norton *v.* Rooker, 1 Pin. 195, 207. **Eng.**—Duckworth *v.* Alison, 1 Mees. & W. 412, 1 Tyr. & G. 742; Thornton *v.* Place, 1 M. & R. 218; Chapel *v.* Hickes, 2 C. & M. 214, 4 Tyr. 43, 3 L. J. Ex. 38; Basten *v.* Butter, 7 East 479, 103 Eng. Reprint 185.

[a] **For Defective Performance of Building Contract.**—Bostrom *v.* Becker, 172 Ill. App. 410; Sturts *v.* Ziegler, 44 Pa. Super. 124.

[b] **Builder's failure to comply with specifications** is ground for recoupment in an action by the builder to recover balance due him. Haentze *v.* Brown, 193 Ill. App. 288.

[c] **Where a contractor sues for extras,** damages for unworkmanlike performance of the original contract may be recouped. McPhillips *v.* Durkin (R. I.), 103 Atl. 929.

[d] **Recoupment for Materials Furnished.**—In an action to recover for work done in building a porch, defendant may recoup for materials furnished to do the work and which were destroyed through plaintiff's negligence. Bye *v.* George W. McCaulley & Son Co., 7 Penne. (Del.) 115, 76 Atl. 621.

[e] **Negligence of Architect.**—Damages from architect's negligence in preparation of building plans and in supervising the work of construction may be recouped in an action by the architect against the owners for his fee. Block *v.* Happ, 144 Ga. 145, 86 S. E. 316.

[f] **Negligent Performance of Street Work.**—In plaintiff's action to recover for work done upon a public street, the city may recoup the amount of a judgment paid to a person as damages sustained by falling into an excavation left unguarded by plaintiff. Campbell *v.* Somerville, 114 Mass. 334.

[g] **Breach of Warranty of Character of Work.**—Recoupment for plaintiff's breach of a warranty of the character or quality of an improvement constructed on defendant's land. **Tenn.** Gibson, Lee & Co. *v.* Carlin, 13 Lea 440, 448. **Vt.**—Allen *v.* Hooker, 25 Vt. 137. **Wis.**—Butler *v.* Titus, 13 Wis. 429.

77. Houston *v.* Young, 7 Ind. 200.

78. Allen *v.* Cameron, 1 Cromp. & Mees. (Eng.) 832, 840, 3 Tyrr. 907.

79. See *infra,* this note.

[a] **Failure of plaintiff to pull a casement in drilling an oil well** where the contract for drilling the well fairly imposed upon plaintiff an obligation

in connection with his duties under the contract.[80]

(B.) Actions Upon Leases. — In many instances, recoupment has been asserted in actions brought upon contracts of lease. Where, for example, a landlord or lessor sues to recover the rent reserved by the lease, defendant has been permitted to recoup damages caused by plaintiff's breach of a covenant to repair,[81] or of quiet enjoyment,[82] or of some other covenant or agreement[83] contained in the lease or implied by law. Any act of the landlord, in fact, which impairs the

to pull the casement, is proper subject matter for recoupment in an action for balance due under the contract. Burton Bros. *v.* Gee Oil Co., 173 Ill. App. 548.

80. **Bixby** *v.* **Parsons**, 49 Conn. 483, 44 Am. Rep. 246. See *infra*, VII, C, 3, c, (III).

81. **Ala.**—Murphy *v.* Farley, 124 Ala. 279, 27 So. 442; Rowe *v.* Baber, 93 Ala. 422, 8 So. 865; Vandegrift *v.* Abbott, 75 Ala. 487; Culver *v.* Hill, 68 Ala. 66, 44 Am. Rep. 134; Martin *v.* Hill, 42 Ala. 275; Hill *v.* Bishop, 2 Ala. 320. **Ill.**—Burroughs *v.* Clancey, 53 Ill. 30; Lunn *v.* Gage, 37 Ill. 19, 29, 87 Am. Dec. 233; Wright *v.* Lattin, 38 Ill. 293. **Ind.**—McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208. **Miss.**—Fowler *v.* Payne, 49 Miss. 32. **Mo.**—Cox *v.* Volkert, 86 Mo. 505, 512; Hay *v.* Short, 49 Mo. 139; Green *v.* Bell, 3 Mo. App. 291. **N. Y.**—Myers *v.* Burns, 35 N. Y. 269; Dorwin *v.* Potter, 5 Den. 306; Whitbeck *v.* Skinner, 7 Hill 53. **Va.**—Caldwell & Co. *v.* Pennington, 3 Gratt. (44 Va.) 87, 93.

[a] **But it is essential to such recoupment** that the landlord was bound to make the repairs in question by the terms of the lease, or by law. **Mass.** Leighton *v.* Ricker, 173 Mass. 564, 54 N. E. 254. **N. Y.**—Westlake *v.* De Graw, 25 Wend. 669. **Okla.**—Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664. See also Bullock-McCall-McDonnell Electric Co. *v.* Coleman, 136 Ala. 610, 33 So. 884.

[b] **The fact that defendant's stock did part of the damage** in question does not affect the lessee's right to recoup, when it appears that the defective condition of fences was the result of the lessor's failure to repair according to his agreement. Rowe *v.* Baber, 93 Ala. 422, 8 So. 865; South & N. A. R. Co. *v.* Henlein, 56 Ala. 368.

[c] **The fact that the covenant to pay rent and the covenant to repair are independent** and separate does not affect lessee's right of recoupment. Green *v.* Bell, 3 Mo. App. 291.

82. **Mass.**—Holbrook *v.* Young, 108 Mass. 83. **N. Y.**—Blair *v.* Claxton, 18 N. Y. 529; Mayor *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538, *reversing s. c.* 2 Duer 401. **Okla.**—Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664.

[a] **Injury to tenant's goods** by leaky roof caused by raising the building to the grade of the street. Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664.

[b] **Damages caused by total or partial eviction** from the leased premises may be recouped against landlord's claim for rent. Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

83. Nichols *v.* Ruckells, 4 Ill. 298; Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250; Nichols *v.* Dusenbury, 2 N. Y. 283.

[a] **Agreement to supply steam power** to be used in the conduct of the business carried on by tenant on the premises. Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 339.

[b] **Agreement to install water-wheel** having a certain horse power. Pewaukee Milling Co. *v.* Howitt, 86 Wis. 270, 56 N. W. 784.

[c] **Agreement to furnish appliances** to raise and maintain building on the premises. Nichols *v.* Ruckells, 4 Ill. 298.

[d] **For failure to deliver personal property** agreed by the lease in question to be delivered to enable the lessee to work the leased premises. Horton *v.* Miller, 84 Ala. 537, 4 So. 370.

[e] **Agreement to construct a building** on the leased premises. Haven *v.* Wakefield, 39 Ill. 509.

[f] **Covenant Against Sale of Liquor.** — Recoupment for breach of landlord's covenant not to permit the sale of liquor on premises contiguous to the leased premises. Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250.

value of the leased premises or renders them untenantable or less fit and useful for the purposes of the tenancy, may be the subject of recoupment.[84]

The lessor's misrepresentations concerning the quantity, capacity, or condition of the leased premises constitute a proper basis of recoupment.[85] But a lessee when sued for rent cannot recoup for plaintiff's trespass upon the leased premises,[86] or for independent torts of the landlord;[87] nor can the landlord in the tenant's action against him for trespass recoup unpaid rents,[88] though in such an action for unlawfully distraining a crop the landlord may recoup the expense of harvesting the crop.[89] Other instances of recoupment in proceedings respecting leased premises are set out in the notes.[90]

(C.) ACTIONS TO RECOVER PURCHASE PRICE. — (1.) *Purchase Price of Land.* In actions by the vendor of real property to recover the purchase price, the vendee may assert a claim in recoupment for damages resulting from fraudulent representations of the vendor as to the quantity or quality of the land, or from breach of covenants, or a claim for the value of the use and occupation of the land when possession is wrongfully withheld.[91] But a vendee in possession cannot set up a partial failure of title by way of recoupment in the absence of an eviction or of fraud or insolvency of the vendor.[92]

(2.) *Purchase Price of Personalty.* — Recoupment, within its proper limitations as above set forth, is available as against a plaintiff suing to recover the purchase price of goods and chattels sold.[93] It may consist in a claim for breach by the plaintiff of the terms of the contract of sale,[94] as by plaintiff's failure to deliver the property con-

84. Lynch *v.* Baldwin, 69 Ill. 210; Eldred *v.* Leahy, 31 Wis. 546.

[a] **Shutting Off Light.**—Eldred *v.* Leahy, 31 Wis. 546, where lessor so changed the grade of a sidewalk as to prevent the basement of the leased premises from being sufficiently lighted.

85. **Ala.**—Cage *v.* Phillips, 38 Ala. 382. **Conn.**—Avery *v.* Brown, 31 Conn. 398. **N. Y.**—Whitney *v.* Allaire, 1 Hill 484, *affirmed*, 4 Denio 554.

86. Bartlett *v.* Farrington, 120 Mass. 284; Cram *v.* Dresser, 2 Sandf. (N. Y.) 120; Levy *v.* Bend, 1 E. D. Smith (N. Y.) 169.

But *compare supra*, this section, as to breach of covenant of quiet enjoyment.

[a] **Trespass of landlord's animals** upon the leased premises, not proper matter of recoupment. Hulme *v.* Brown, 3 Heisk. (Tenn.) 679.

87. **Tort of landlord** as subject of recoupment in actions for rent, see *infra*, VII, C, 3, c, (III).

88. Sharp *v.* Kinsman, 18 S. C. 108, 115.

89. Bates *v.* Courtwright, 36 Ill. 518.

90. See *infra*, this note.

[a] **In trespass for distraining a crop** the landlord may recoup the expense of harvesting the crop. Bates *v.* Courtwright, 36 Ill. 518.

[b] **Where tenant sues landlord for conversion** of chattels, defendant may recoup amount of his landlord's lien upon such chattels. Jones *v.* Horn, 51 Ark. 19, 9 S. W. 309, 14 Am. St. Rep. 17.

[c] **In actions for forcible entry and detainer** a lessee defendant may not recoup damages caused by lessor's violation of the lease under which defendant occupied the premises in question. Johnson *v.* Hoffman, 53 Mo. 504.

91. See the title "**Vendor and Purchaser.**"

92. See the title "**Vendor and Purchaser.**"

93. See generally the title "**Sales.**"

94. **Ala.**—Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; Eagon Co. *v.* Johnson, 82 Ala. 233, 2 So. 302. **Ill.**

tracted for,[95] or by his delay in delivery,[96] or his conversion of chattels sold,[97] or his failure to render service agreed to be rendered for the purpose of preserving or protecting the chattel after its purchase,[98] or his failure to permit the vendee to use vendor's land for the purpose of preparing the property in question for sale,[99] or by his erroneous instructions as to the manner in which the vendee should prepare the chattel or machine for use.[1] If, by reason of improper

Cooke *v.* Preble, 80 Ill. 381. **Ind.** Epperly *v.* Bailey, 3 Ind. 72. **Me.** Rogers *v.* Humphrey, 39 Me. 382; Herbert *v.* Ford, 29 Me. 546. **Md.**—Harman *v.* Bannon, 71 Md. 424, 18 Atl. 862. **Mass.**—Bowker *v.* Hoyt, 18 Pick. 555. **Mich.**—Platt *v.* Brand, 26 Mich. 173. **Mo.**—Koeltz *v.* Bleckman, 46 Mo. 320. **N. Y.**—King *v.* Paddock, 18 Johns. 141; Spalding *v.* Vandercook, 2 Wend. 431; Batterman *v.* Pierce, 3 Hill 171.

95. **U. S.**—McDonough *v.* Evans Marble Co., 112 Fed. 634, 50 C. C. A. 403; Saunders *v.* Short, 86 Fed. 225, 30 C. C. A. 462, 58 U. S. App. 689. **Ala.** Young *v.* Cureton, 87 Ala. 727, 6 So. 352; Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Harralson & Co. *v.* Stein, 50 Ala. 347; Robertson *v.* Davenport, 27 Ala. 574. **Cal.**—Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288. **Del.** Shimp *v.* Siedel, 6 Houst. 421. **Ill.** Richards *v.* Shaw, 67 Ill. 222. **Me.** Rogers *v.* Humphrey, 39 Me. 382. **Mass.** Bowker *v.* Hoyt, 18 Pick. 555. **Mich.** Platt *v.* Brand, 26 Mich. 173. **N. H.** Horn *v.* Batchelder, 41 N. H. 86; Flanders *v.* Putney, 58 N. H. 358. **N. Y.**—Schubart *v.* Harteau, 34 Barb. 447; King *v.* Paddock, 18 Johns. 141; Per Lee *v.* Beebe, 13 Hun 89. **Ohio.** Upton & Co. *v.* Julian & Co., 7 Ohio St. 95. **Pa.**—Fessler *v.* Love, 43 Pa. 313; Dailey *v.* Green, 15 Pa. 118, 126; Noble *v.* James, 2 Grant Cas. 278, 285; Shaw *v.* Badger, 12 Serg. & R. 275. **Tenn.**—Porter *v.* Woods, Stacker & Co., 3 Humph. 56, 39 Am. Dec. 153. **Wis.**—Goodwin *v.* Merrill, 13 Wis. 658.

[a] **If part only of the goods are delivered** without payment of the agreed price, (1) and there is a suit for the price of the part delivered, the vendee may recoup damages caused by vendor's failure to deliver the balance (**Ala.**—Harralson & Co. *v.* Stein, 50 Ala. 347. **Cal.**—Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288. **Ill.**—Richards *v.* Shaw, 67 Ill. 222), when (2) the contract is separable or apportionable. Goodwin *v.* Merrill, 13 Wis. 658.

[b] **Money expended by defendant** to obtain property not delivered. Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288, where defendant was allowed to recoup money spent in sending lighters to remove a portion of the lumber which plaintiff failed to deliver.

96. **U. S.**—United States *v.* Molloy, 144 Fed. 321, 75 C. C. A. 283, 11 L. R. A. (N. S.) 487. **Ga.**—Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. **Mo.**—Koeltz *v.* Bleckman, 46 Mo. 320. **N. Y.**—Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Fabricotti *v.* Launitz, 3 Sandf. 743. **Vt.**—Dennis *v.* Stoughton, 55 Vt. 371; Eddy *v.* Clement, 38 Vt. 486. **Wis.** Schweickhart *v.* Stuewe, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

[a] **Essential to Claim of Delay.** But to sustain a right of recoupment on this ground, it must appear that the vendor agreed to deliver the goods at a certain time, or that he knew the purpose for which the goods were purchased. Buffalo Barb Wire Co. *v.* Phillips, 64 Wis. 338, 25 N. W. 208.

97. See *infra*, VII, C, 3, a, (III).

98. Batterman *v.* Pierce, 3 Hill (N. Y.) 171.

[a] **Agreement To Care for Trees.** Where trees are sold, the vendor agreeing to keep them in order during a fixed period, vendee may recoup damages caused by vendor's failure to keep such trees in order. Allen *v.* Cameron, 1 C. & M. 832, 3 Tyr. 907, 2 L. J. Ex. 263.

99. Harman *v.* Bannon, 71 Md. 424, 18 Atl. 862.

[a] **Where plaintiff sold wood to defendant,** agreeing that the latter might convert the same into charcoal on plaintiff's land, and then refused permission to so use such land, defendant was held entitled to recoup damages caused by being compelled to burn his wood elsewhere and sell it at a loss against vendor's suit for purchase price. Harman *v.* Bannon, 71 Md. 424, 18 Atl. 862.

1. Dennis *v.* Stoughton, 55 Vt. 371.

packing or arrangement by the vendor, the chattel is diminished in quantity, the vendee may recoup the loss so caused, against the vendor's claim for the price.[2]

Breach of Warranty. — A proper recoupment may be based on a breach of warranty expressed or implied in the contract of sale,[3] as for breach of warranty of the quality of the articles or property sold,[4]

2. Briggs & Bro. *v.* Montgomery & Co., 3 Heisk. (Tenn.) 673, where, by vendor's negligence oil was packed in insufficient barrels, and lost by leakage.

3. **U. S.**—Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810; Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847; Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524. **Ala.**—Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; Ward *v.* Reynolds, 32 Ala. 384, 393; Eckles *v.* Carter, 26 Ala. 563; Craddock *v.* Stewart's Admr., 6 Ala. 77. **Ark.**—Williams *v.* Miller, 21 Ark. 469. **Conn.**—Hitchcock *v.* Hunt, 28 Conn. 343. **Ill.**—Welch *v.* Hoyt, 24 Ill. 117; Crabtree *v.* Kile, 21 Ill. 180. **Ind.** Merchants' & Mechanics' Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378. **Ky.**—Miller *v.* Gaither, 3 Bush 152; Culver *v.* Blake, 6 B. Mon. 528. **Mass.** Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Goodwin *v.* Morse, 9 Metc. 278. **Mo.**—Wade *v.* Scott, 7 Mo. 509; Brown *v.* Weldon, 27 Mo. App. 251, 263, *s. c.*, 99 Mo. 564, 13 S. W. 342, 34 Mo. App. 378; Voss *v.* McGuire, 18 Mo. App. 477. **N. Y.** Briggs *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Muller *v.* Eno, 14 N. Y. 597; Pease Oil Co. *v.* Monroe Oil Co., 78 Misc. 284, 138 N. Y. Supp. 177; Hills *v.* Bannister, 8 Cow. 31; Judd *v.* Dennison, 10 Wend. 512; Warren *v.* Van Pelt, 4 E. D. Smith 202. **N. C.**—Hurst *v.* Everett, 91 N. C. 399. **Ohio.**—Timmons *v.* Dunn, 4 Ohio St. 680; The Wellsville *v.* Geisse, 3 Ohio St. 333. **Pa.**—Steigleman *v.* Jeffries, 1 Serg. & R. 477, 7 Am. Dec. 626. **S. D.**—Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. **Tex.**—Aultman & Taylor Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861. **Vt.**—Walker *v.* Hoisington, 43 Vt. 608. **Wis.**—Buffalo Barb Wire Co. *v.* Phillips, 67 Wis. 129, 30 N. W. 295, *s. c.*, on other points, 64 Wis. 338, 25 N. W. 208; Getty *v.* Rountree, 2 Pin. 379, 390, 2 Chand. 28, 54 Am. Dec. 138.

[a] **Limited Warranty by Plaintiff To Remedy Defects.**—But if the agreement of warranty provides that plaintiff will remedy specified defects, defendant cannot recoup damages unless he shows he has given the vendor an opportunity to remedy the defect alleged. Hills *v.* Bannister, 8 Cow. (N. Y.) 31.

[b] **Elements of Damage.**—Defendant may recoup the amount necessarily expended by him in remedying the defects in the article sold. **Conn.** Hitchcock *v.* Hunt, 28 Conn. 343, where defendant was allowed the cost of repairing leaky barrels warranted to be sound. **Ill.**—Welch *v.* Hoyt, 24 Ill. 117. **Mass.**—Goodwin *v.* Morse, 9 Met. 278. **N. Y.**—Cassidy *v.* Le Fevre, 45 N. Y. 562; Muller *v.* Eno, 14 N. Y. 597, 606; Rawley *v.* Woodruff, 2 Lans. 419.

4. **U. S.**—Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810. **Ala.**—Weaver *v.* Shropshire, 42 Ala. 230; Wood *v.* Fowler, 37 Ala. 55. **Conn.**—Hitchcock *v.* Hunt, 28 Conn. 343; McAlpine *v.* Lee, 12 Conn. 129, 30 Am. Dec. 609. **Ga.**—Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. **Ill.**—Murray *v.* Carlin, 67 Ill. 286; Crabtree *v.* Kile, 21 Ill. 180; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560. **Ky.**—Culver *v.* Blake, 6 B. Mon. 528. **Me.**—Morse *v.* Moore, 83 Me. 473, 22 Atl. 362, 23 Am. St. Rep. 783, 13 L. R. A. 224. **Mass.** Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Harrington *v.* Stratton, 22 Pick. 510. **Mo.**—Voss *v.* Maguire, 18 Mo. App. 477. **N. Y.**—Briggs *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Muller *v.* Eno, 14 N. Y. 597; Pease Oil Co. *v.* Monroe Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; Sill *v.* Rood, 15 Johns. 230; McAllister *v.* Reab, 4 Wend. 483, *s, c.*, 8 Wend. 109; Hills *v.* Bannister, 8 Cow. 31; Burton *v.* Stewart, 3 Wend. 236, 20 Am. Dec. 692; Lewis *v.* Wilson, 1 Edw. Ch. 305. **N. C.**—Hurst *v.* Everett, 91 N. C. 399. **Ohio.**—Dayton *v.* Hooglund, 39 Ohio St. 671, 682. **Pa.**—Price *v.* Lewis, 17 Pa. 51, 55 Am. Dec. 536; Dailey *v.*

or of the soundness of the article sold,[5] or of the pedigree of an animal,[6] or of the fitness of the property for a particular purpose.[7]

Fraud inducing the purchase is also a proper subject of recoupment in an action for the purchase price.[8]

(D.) FREIGHT CARRIERS. — (1.) *Actions by Carrier.* — In an action by a carrier to recover freight, defendant may recoup damages caused to the goods by plaintiff's negligence,[9] or by his failure to deliver all

Green, 15 Pa. 118, 126. **Tenn.**—Hogg *v.* Cardwell, 4 Sneed 151; Porter *v.* Woods, Stacker & Co., 3 Humph. 56, 39 Am. Dec. 153. **Tex.**—Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264. **Vt.**—Best *v.* Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; Andrews *v.* Eastman, 41 Vt. 134, 98 Am. Dec. 570. **Wis.**—Buffalo Barb Wire Co. *v.* Phillips, 67 Wis. 129, 30 N. W. 295, *s. c.*, on other points, 64 Wis. 338, 25 N. W. 208; Morehouse *v.* Comstock, 42 Wis. 626; Pearson *v.* Martin, 38 Wis. 265; Ketchum *v.* Wells, 19 Wis. 25, 32.

5. **Ala.** — Craddock *v.* Stewart's Admr., 6 Ala. 77. **Ark.**—Williams *v.* Miller, 21 Ark. 469. **Mass.**—Harrington *v.* Stratton, 22 Pick. 510. **Mo.** Wade *v.* Scott, 7 Mo. 509; Brown *v.* Weldon, 27 Mo. App. 251.

[a] **Diseased Animal.—Ill.**—Peck *v.* Brewer, 48 Ill. 54, 62; Crabtree *v.* Kile, 21 Ill. 180. **Mass.**—Harrington *v.* Stratton, 22 Pick. 510. **N. D.**—McCormick Harv. Mach. Co. *v.* Taylor, 5 N. D. 53, 63 N. W. 890, 57 Am. St. Rep. 538.

6. Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572.

7. See *infra*, this note.

[a] **Animal Warranted Fit for Breeding Purposes.**—Merchants' & Mechanics' Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341; Brown *v.* Weldon, 27 Mo. App. 251, *s. c.*, 99 Mo. 564, 13 S. W. 342, and 34 Mo. App. 378.

[b] **Oil** warranted to be machine oil. Warren *v.* Van Pelt, 4 E. D. Smith (N. Y.) 202.

[c] **Seed** warranted to be growing seed. Poulton *v.* Lattimore, 9 Barn. & Cres. 259, 17 E. C. L. 122, 109 Eng. Reprint 96.

[d] **Warranty that machinery or apparatus** will accomplish the purpose for which it was sold. **Ill.**—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40. **Minn.**—Stevens *v.* Johnson, 28 Minn. 172, 9 N. W. 677. **Neb.** — Punteney-Mitchell Mfg. Co. *v.* Northwall Co., 70 Neb. 688, 97 N. W. 1040, *s. c.*, on another appeal, 66 Neb. 5, 91 N. W. 863. **Pa.**—Dean *v.* Herrold, 37 Pa. 150. **Wis.**—Getty *v.* Rountree, 2 Pin. 379, 2 Chand. 28, 54 Am. Dec. 138; Merrill *v.* Nightingale, 39 Wis. 247.

[e] **Implied warranty** of fitness for the purpose. Getty *v.* Rountree, 2 Pin. (Wis.) 379, 390, 2 Chand. 28, 54 Am. Dec. 138.

8. Bailey *v.* Webber, 113 Me. 434, 94 Atl. 758; Sharp *v.* Ponce, 76 Me. 350; Rogers *v.* Humphrey, 39 Me. 382.

[a] **Fraud inducing purchase of automobile** proper basis of recoupment in an action upon a note given for the purchase price. Morbrose Inv. Co. *v.* Flick, 187 Mo. App. 528, 174 S. W. 189.

9. **U. S.**—Snow *v.* Carruth, 1 Sprague 324, 22 Fed. Cas. No. 13,144; Kennedy *v.* Dodge, 1 Ben. 311, 14 Fed. Cas. No. 7,701; Dedekam *v.* Vose, 3 Blatch. 44, 7 Fed. Cas. No. 3,729; Bradstreet *v.* Heran, 1 Abb. Adm. 209, 3 Fed. Cas. No. 1,792; Bearse *v.* Ropes, 1 Sprague 331, 3 Fed. Cas. No. 1,192. **Haw.** Le Motte *v.* Angel, 1 Hawaii 237. **Ill.** Edwards *v.* Todd, 2 Ill. 462. **Ky.**—Boggs *v.* Martin, 13 B. Mon. 239. **Mass.** Fitchburg & W. R. Co. *v.* Hanna, 6 Gray 539, 66 Am. Dec. 427. **Mich.** Ward *v.* Fellers, 3 Mich. 281. **N. Y.** Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415; Gleadell *v.* Thomson, 56 N. Y. 194; Byrne *v.* Weeks, 7 Bosw. 372, 380; Ogden *v.* Coddington, 2 E. D. Smith, 317, 324. **Pa.**—Leech *v.* Baldwin, 5 Watts 446; Humphrey *v.* Reed, 6 Whart. 435. **S. C.**—Manning *v.* Watson, Cheves 60.

[a] **Consignee cannot recoup amount paid for insuring** against a risk to which the goods were never exposed. Nye *v.* Ayres, 1 E. D. Smith (N. Y.) 532, where it was held that consignee could not recoup insurance premiums paid for insurance, in consequence of carrier's deviation in voyage, it appearing that when such premium was

the property received by him for transportation,[10] or by his delay in delivery.[11]

Not Barred by Accepting Part. — Consignee's right of recoupment is not barred by his acceptance of part of the goods in question.[12]

(2.) *Actions Against Carrier.* — A carrier sued for damages caused to consigned goods by his negligence,[13] or for conversion of the goods shipped,[14] may recoup a claim for freight.

(E.) MISCELLANEOUS PROCEEDINGS. — The rules in respect to the subject of recoupment may be further illustrated by application to various other proceedings, such as actions for hire of chattels,[15] actions upon[16]

paid the goods were safely at port of consignment.

10. Hinsdell *v.* Weed, 5 Denio (N. Y.) 172.

11. Nichols *v.* Tremlett, 1 Spr. 361, 18 Fed. Cas. No. 10,247; Thatcher *v* McCulloh, 23 Fed. Cas. No. 13,862.

12. Byrne *v.* Weeks, 7 Bosw. (N. Y.) 372, 381, 382.

[a] **Connecting Lines.**—(1) If a carrier agrees to transport goods over connecting lines, not forming parts of such carrier's system, to his action to recover freight for the entire passage, consignee may recoup damages caused by the negligence of any connecting carrier, although the freight was divided among all carriers transporting such goods. Fitchburg & W. R. Co. *v.* Hanna, 6 Gray (Mass.) 539, 66 Am. Dec. 427. (2) But when one carrier sues to recover freight for transporting goods over several connecting lines, including freight charges paid by plaintiff to a preceding carrier for transportation over part of the route, consignor cannot recoup damages caused to other goods by a connecting carrier not a party to the action. Monteith *v.* Kirkpatrick, 3 Blatchf. 279, 17 Fed. Cas. No. 9,721; Merrick *v.* Gordon, 20 N. Y. 93.

13. Ewart *v.* Kerr, 2 McMull. (S. C.) 141.

14. Briggs *v.* Boston & L. R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626.

15. See *infra*, this note.

[a] **Contract for Use of Chattels.** In an action for breach of covenant contained in an instrument whereby plaintiff gave defendant the use of chattels, defendant may recoup damages caused by the fact that the chattels were not in the condition represented by plaintiff. Peck *v.* Brewer, 48 Ill. 54, 63. In this case plaintiff gave defendant the use of a flock of sheep, to be returned at a fixed time, a certain quantity of wool to be delivered for each sheep. Held defendant could recoup damages caused by the diseased condition of the sheep, such condition existing when the sheep were received.

[b] **Damages caused to defendant by any defect in the chattel,** or by any condition of the chattel, occurring without fault of the hirer, whereby the latter sustains damage, may be recouped, in actions for hire of chattels. Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

[c] **Expenses of Former Litigation.** In action for hire of a chattel defendant cannot recoup expenses of defending successfully an action in trover brought by plaintiff to recover the chattel in question. Deens *v.* Dunklin, 33 Ala. 47.

[d] **Use of Machinery.**—In action to recover the value of the use of machinery leased to defendant the latter may recoup damages caused by plaintiff's breach of an agreement as to condition or capability of such machine. Heaston *v.* Colgrove, 3 Ind. 265.

16. Bowling *v.* Walls, 72 W. Va. 638, 78 S. E. 791.

[a] **Loss of Collateral.**—In a suit upon a note, the defendant may set up a claim for loss of collateral deposited with plaintiff to secure the note, although the loss resulted from the negligence of plaintiff's agent. Farmers' Nat. Bank *v.* Nelson, 255 Pa. 455, 100 Atl. 136, L. R. A. 1917E, 506.

[b] **Breach of Agistment Contract.** In a suit on a note given to discharge a lien for agistment, the defendant may recoup for damages suffered to the cattle while in plaintiff's posses-

negotiable instruments, actions for fraud and deceit,[17] and other proceedings.[18]

e. *Compensation.* — Compensation takes place only between two debts having equally for their objects a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable.[19] A cause of action arising

sion. Waterman *v.* Clark, 76 Ill. 428.

[c] **Contract for Sale of Good Will.** (1) In an action on a note given as consideration for the sale of a store, the maker of the note may claim recoupment for damages arising from breach by the vendor of his agreement made in the transaction of the sale not to go into the mercantile business as a competitor of the vendee for a stipulated period, though the agreement is contained in a separate writing (Bowling *v.* Walls, 72 W. Va. 638, 78 S. E. 791), and (2) conversely where the action is brought to recover for breach of the agreement not to engage in the business or profession, the good will of which has thus been sold, defendant may base a recoupment on a note given for the purchase price. Warfield *v.* Booth, 33 Md. 63.

[d] **Physician's Breach of Agreement Not To Practice.**—In action on note given as purchase price of a medical practice, defendant may recoup damages caused by plaintiff's breach of his agreement not to resume practice in the locality in question. Mell *v.* Mooney, 30 Ga. 413; Herbert *v.* Ford, 29 Me. 546.

17. Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

[a] **In an action of case for deceit** in inducing the plaintiff to build a cellar and to do mason work on a lot, represented by the defendant to belong to himself, but which in fact was the property of his wife, defendant permitted to recoup damages resulting from the poor quality of the work done by plaintiff. Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

18. See *infra*, this note.

[a] **In an action for the value of animals taken** and sold as having been forfeited to the owner of lawfully inclosed premises, by virtue of proceedings under section three of chapter sixty of the code, the damages done to the property by the animals can neither be recouped nor set off against their value. Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E. 702.

[b] **In an action on an open account** to recover a general balance due on a contract for plumbing and heating, defendant may recoup a claim for cost of repairing and altering the heating system to make it conform to the requirements of the contract. "Plaintiff cannot defeat a right to recoup on a contract which he must prove in order to recover by including other items with it in his declaration and making a general claim for balance due on the whole under an open account." Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260.

[c] **Pasturage, Damage to Cattle.** (1) In an action to recover the price of pasturing cattle defendant may recoup damages caused to cattle by plaintiff's failure to construct, as agreed, means of permitting cattle access to water. Addems *v.* Suver, 89 Ill. 482. (2) Defendant allowed damages where cattle were overworked and poorly kept. Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363. (3) Also where plaintiff, who had agreed to pasture defendant's ewes, permitted his own rams within the same pasture, thus causing the ewes to produce offspring at an unseasonable time. Phelps *v.* Paris, 39 Vt. 511.

[d] **Moving Cattle From Pasture.** When, by reason of plaintiff's negligence, other animals enter the pasture and deplete the food supply, defendant may recoup the cost of moving his cattle to other pastures against plaintiff's suit for the agreed pasturage. Brackett *v.* Morse, 23 Vt. 554.

[e] **Failure To Put Product in Proper Condition.**—If employe agrees to raise from defendant's land ore of a certain quality or in certain condition, defendant may recoup against employe's suit for compensation damages caused by defects in quality and condition of ore delivered. Draper *v.* Randolph, 4 Harr. (Del.) 454.

19. Franz *v.* Schiro, 136 La. 841, 67 So. 925.

[a] **Promissory Notes.** — An indorser on a note, with waiver of de-

out of the contract or transaction pleaded by plaintiff may be interposed by way of compensation.[20]

f. *Reconvention.* — Reconvention, except under certain circumstances,[21] cannot be based on disconnected demands,[22] but is confined to those arising out of the main cause of action.[23] As against a nonresident, defendant may recover any cause of action which he may have.[24]

3. Tort Demands. — a. *In General.* — (I.) Counterclaim. — (A.) Independent Torts. — If exception be made for codes permitting any cause of action to be used as a counterclaim,[25] the rule is quite general that demands based upon independent torts cannot be used as counterclaims,[26] unless the tort also constitutes a breach of contract,

mand, protest and notice of protest, is unconditionally bound thereon, and he may plead in compensation notes against the payee, acquired before the payee protested the note as holder. Lewy *v.* Wilkinson, 135 La. 105, 64 So. 1003.

[b] **Claims Secured by Mortgage.** California Code Civil Procedure §440, providing for compensation, has no application to claims, one of which is secured by a mortgage and the other unsecured. Moore *v.* Gould, 151 Cal. 723; McKean *v.* German-American Sav. Bank, 118 Cal. 330.

20. Patterson *v.* New Orleans, 20 La. Ann. 106; Fagot *v.* Porche, 7 La. 562.

21. Texas & P. R. Co. *v.* Chatwin Bros., 135 La. 143, 64 So. 1017.

[a] **Thus where the plaintiff resides out of the state,** or in the state, but in a different parish from the defendant the defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with or incidental to the main cause of action. Texas & P. R. Co. *v.* Chatwin Bros., 135 La. 143, 64 So. 1017; Andrews *v.* Sheehy, 125 La. 217, 51 So. 122.

[b] **The word "resides"** as used in the code refers, with reference to a foreign corporation, to its chief office or place of business, or to the place where its authorized agent in the state, upon whom process may be served resides. Texas & P. R. Co. *v.* Chatwin Bros., 135 La. 143, 64 So. 1017.

[c] **In an action to annul a judgment** brought by a nonresident, the defendant may in reconvention ask judgment on the original demand in case the former judgment is not sustained. Andrews *v.* Sheehy, 125 La. 217, 51 So. 122.

22. Duncan *v.* Magette, 25 Tex. 245; Egery *v.* Power, 5 Tex. 501; Britton *v.* Thrash, 1 White & W. Civ. Cas. (Tex.), §1237.

23. Texas & P. R. Co. *v.* Chatwin Bros., 135 La. 143, 64 So. 1017; Hynson & Co. *v.* Wheeler, 15 La. Ann. 409; Wilcoxon *v.* Buford's Heirs, 10 La. 183; Jesse French Piano & O. Co. *v.* Williams (Tex. Civ. App.), 102 S. W. 948.

[a] **In an action for assault and battery** defendant cannot in reconvention plead a subsequent and separate assault committed by the plaintiff. McCormick *v.* Schtrenck (Tex. Civ. App.), 130 S. W. 720.

[b] **A claim for prior malicious prosecution** not available in assault and battery. Shook *v.* Peters, 59 Tex. 393.

24. Hafner Mfg. Co. *v.* Lieber Lumber & Shingle Co., 127 La. 348, 53 So. 646.

25. Coats *v.* Milner (Ark.), 203 S. W. 701. See *supra.*, VII, C, 2, b, (II).

26. Cal.—Glide *v.* Kayser, 142 Cal. 419, 76 Pac. 50; Wigmore *v.* Buell, 116 Cal. 94, 47 Pac. 927. **Colo.**—Michigan Stove Co. *v.* Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340; Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379. **Ga.** Fambrough *v.* De Vane, 138 Ga. 47, 74 S. E. 762; Potts-Thompson Liquor Co. *v.* Capital City Tobacco Co., 137 Ga. 648, 74 S. E. 279; Ray *v.* Anderson, 119 Ga. 926, 47 S. E. 205; Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100. **Kan.** Arkansas City Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22. **Ky.**—Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407; Abernathy *v.* Myer-Bridges Coffee, etc. Co., 30 Ky. L. Rep. 844, 99 S. W. 942; Brannin *v.* Crouch, 10 Ky. L. Rep.

in which case defendant may waive the tort and base his counterclaim on the contract whether express or implied.[27]

(B.) TORTS CONNECTED WITH MATTER PLEADED. — It is equally well settled that tort claims arising out of the contract, transaction or subject of action are proper subjects of counterclaim,[28] and, within the

773. **Minn.**—Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1; Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260; Reamer *v.* Morrison Express Co., 93 Mo. App. 501, 67 S. W. 718. **Mont.**—Collier *v.* Ervin, 3 Mont. 142. **Neb.**—Watts *v.* Gantt, 42 Neb. 869, 61 N. W. 104; Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. Y.**—Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359; New York *v.* Parker Vein Steamship Co., 8 Bosw. 300, 21 How. Pr. 289, 12 Abb. Pr. 300; Murden *v.* Priment, 1 Hilt. 75; Finkelmeier *v.* Bates, 16 Jones & S. 433; Riddle *v.* Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58; Lundine *v.* Callaghan, 82 App. Div. 621, 81 N. Y. Supp. 1052; Hall *v.* Werney, 18 App. Div. 565, 46 N. Y. Supp. 33; Marshall *v.* Cohen, 11 Misc. 397, 32 N. Y. Supp. 283, 65 N. Y. St. 310; Ruderman *v.* Bloch, 145 N. Y. Supp. 913. **N. C.** Merritt Mill Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4; Lee *v.* Eure, 93 N. C. 5; Trotter *v.* Swain, 90 N. C. 455. **N. D.**—Hanson *v.* Skogman, 14 N. D. 445, 105 N. W. 90; Braithwaite *v.* Aikin, 3 N. D. 365, 56 N. W. 133. **Ohio.** Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519. **Okla.**—Hazlett *v.* Wilkin, 42 Okla. 20, 140 Pac. 410. **Ore.**—Miser *v.* O'Shea, 57 Ore. 231, 62 Pac. 491, 82 Am. St. Rep. 751; Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179. **S. C.**—Liles *v.* Harris-Grimes Co., 76 S. E. 115; Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240; Lenhardt *v.* French, 57 S. C. 493, 35 S. E. 761; Simkins *v.* Columbia & G. R. Co., 20 S. C. 258. **Tex.**—Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56; J. C. Stewart Produce Co. *v.* Hamilton-Turner Grocery Co. (Tex. Civ. App.), 163 S. W. 1000. **Wis.**—Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Rylander *v.* Laursen, 113 Wis. 461, 89 N. W. 488; Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745.

27. See *infra*, VII, C, 3, d, (II).

28. **U. S.**—Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810; American Sign Co. *v.* Electro-Lens Sign Co., 211 Fed. 196. **Ia.**—First Nat. Bank *v.* O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. Rep. 313. **Ky.**—Hall *v.* Ayer & L. Tie Co., 31 Ky. L. Rep. 508, 102 S. W. 867; Tinsley *v.* Tinsley, 15 B. Mon. 454. **La.**—Miller *v.* Stewart, 12 La. Ann. 170; Kennedy *v.* Mason, 10 La. Ann. 519. **Minn.** Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1. **Mo.**—Ruth *v.* McPherson, 150 Mo. App. 694, 131 S. W. 474. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Thomson *v.* Sanders, 118 N. Y. 252, 23 N. E. 374; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694; Still *v.* Hall, 20 Wend. 51; Allaire Works *v.* Guion, 10 Barb. 55; Carpenter *v.* Manhattan Life Ins. Co., 22 Hun 49; Ter-Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5, 63 N. Y. St. 355; Siebrecht *v.* Siegel-Cooper Co., 38 App. Div. 549, 56 N. Y. Supp. 425; Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315; Kneeland *v.* Pennell, 49 Misc. 94, 96 N. Y. Supp. 403; Murphy *v.* McQuade, 20 Misc. 671, 46 N. Y. Supp. 382. **N. C.**—Branch *v.* Chappell, 119 N. C. 81, 25 S. E. 783; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Bitting *v.* Thaxton, 72 N. C. 541; Walsh *v.* Hall, 66 N. C. 233. **N. D.**—Hanson *v.* Skogman, 14 N. D. 445, 105 N. W. 90; Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679. **Ohio.**—Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433; Barholt *v.* Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535. **Ore.** Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179. **S. C.**—Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803. **Tex.**—Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56; Scott *v.* Mexican Nat. R. Co. (Tex. Civ. App.), 18 S. W. 137, 4 Wills. Civ. Cas., §287. **Utah.**—Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6. **Wis.**—Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982; McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139; Vilas *v.* Mason, 25 Wis. 310.

limitations thus stated defendant has been permitted to counterclaim demands based on assault and battery,[29] conspiracy,[30] conversion,[31] fraud and deceit,[32] libel and slander,[33] trespass,[34] waste,[35] and other torts.[36]

(II.) Set-off. — A set-off under the statutes generally must be a cause of action arising upon contract, or ascertained by a decision of court, such as a judgment, and demands arising ex delicto are therefore not available as such.[37] But under some statutes demands

[a] "**The first subdivision would therefore be unmeaning** as a separate definition if it neither contemplated cases in which the action was not brought on the contract itself in the sense in which these words are ordinarily used, nor counterclaims which did not themselves arise on contract." Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372, 389.

[b] "**The word 'transaction'** is not limited to causes of action arising upon contract, but is broad enough to permit causes of action arising from tort to be the subject of counterclaim in a proper case." Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315.

29. **Ky.**—Slone *v.* Slone, 2 Metc. 339. **N. Y.**—Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360; Murphy *v.* McQuade, 20 Misc. 671, 46 N. Y. Supp. 382. **Wis.**—Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887.

30. Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832.

31. **Cal.** — Waugenheim *v.* Graham, 39 Cal. 169. **Ind.**—Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981. **Ky.**—Tinsley *v.* Tinsley, 15 B. Mon. 454. **Neb.**—Carson *v.* Buckstaff, 57 Neb. 262, 77 N. W. 670. **N. Y.** Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Wadley *v.* Davis, 63 Barb. 500.

See also *infra,* VII, C, 3, c, (II), (B), (2).

32. **Cal.**—Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122. **Colo.**—Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767. **Idaho.** Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Minn.**—King *v.* Coe Commission Co., 93 Minn. 52, 100 N. W. 667. **N. Y.**—Green *v.* Parsons, 47 Hun 631, 14 N. Y. St. 97; Heidelbach *v.* Kilpatrick, 3 Civ. Proc. 209. **N. C.**—Walsh *v.* Hall, 66 N. C. 233.

See also *infra,* VII, C, 3, c, (II), (B), (2).

[a] **The language of Pomeroy** (Code Remedies [4th ed.], sec. 663) in respect to counterclaims based on fraud, is "It would seem that little or no difficulty would be met in giving such a construction to the statutory definition as will embrace the cases, of damages resulting from the plaintiff's frauds. If the action was on contract, such damages formed a most familiar example of the former 'recoupment,' and it is only necessary to extend that doctrine to analogous cases in which a 'transaction' is to be substituted in place of a contract." This language has been quoted approvingly in Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315.

Fraud in inducing the contract, see *supra,* VII, C, 2, b, (III), (C), and *infra,* VII, C, 3, c, (II), (B), (2).

33. **Neb.**—Watts *v.* Gantt, 42 Neb. 869, 61 N. W. 104. **N. C.**—Merritt Mill. Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4. **Wis.**—Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113.

34. Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58. See *infra,* VII, C, 3, c, (II), (B), (2).

35. Carpenter *v.* Manhattan Life Ins. Co., 93 N. Y. 552.

36. See *infra,* this note.

[a] **For Malicious Prosecution.**—Insurance Co. of North America *v.* Parker, 64 Neb. 411, 89 N. W. 1040; Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433.

[b] **Counterclaim for Negligence.** McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139. See also *infra,* VII, C, 3, c, (II), (B), (2).

37. **D. C.**—McGuire *v.* Gerstley, 26 App. Cas. 193. **Fla.**—Brash *v.* Ehrman, 56 Fla. 153, 47 So. 937; Moulie *v.* Hughes, 28 Fla. 617, 10 So. 94; Matthews *v.* Lindsay, 20 Fla. 962. **Ga.**

not sounding in damages merely, whether arising ex delicto or ex contractu may be the subject of set-off.[38] Where the statute permits a set-off in equity of any demand which might be the subject of an independent suit, a claim arising ex delicto is available.[39]

(III.) Recoupment. — Recoupment, like counterclaims of the class which is analogous to recoupment, includes tort demands arising out of the contract or transaction pleaded,[40] but not those based upon independent wrongs,[41] though closely connected with the matter sued on in point of time.[42]

b. *Tort Against Tort.* — **(I.) Independent Torts.** — It is stated in some cases that tort is not available as an offset against tort,[43] and

Ray *v.* Anderson, 119 Ga. 926, 47 S. E. 205; Green *v.* Combs, 81 Ga. 210, 6 S. E. 582. **Ill.**—Robison *v.* Hibbs, 48 Ill. 408. **Ind.**—Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Kan.** Fanson *v.* Linsley, 20 Kan. 235; Atchison, T. & S. F. R. Co. *v.* Phelps, 4 Kan. App. 139, 46 Pac. 183. **Neb.** Boyer *v.* Clark, 3 Neb. 161. **N. J.** Cooper *v.* Crane, 9 N. J. L. 173. **Ohio.** Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519. **Pa.**—Jenkins *v.* Rush Brook Coal Co., 205 Pa. 166, 54 Atl. 715; Groetzinger *v.* Latimer, 146 Pa. 628, 23 Atl. 393; Halfpenny *v.* Bell, 82 Pa. 128. **S. C.**—Liles *v.* Harris-Grimes Co., 76 S. E. 115; Gibbes *v.* Mitchell, 2 Bay 351. **Vt.**—Sampson *v.* Warner, 48 Vt. 247; Hudson *v.* Nute, 45 Vt. 66.

[a] **Damages sustained by reason of annoying suits,** malicious prosecution, slander of title, injury to one's credit occasioned by such proceedings, though relating to the subject matter of plaintiff's claim, cannot be set off. Matthews *v.* Lindsay, 20 Fla. 962. See also Brash *v.* Ehrman, 56 Fla. 153, 47 So. 937.

[b] **Unlawful Combination.** — Damages arising from plaintiff's entering into an unlawful combination with third persons to reduce the price of cotton seed, cannot be made the subject of set-off. Epstein *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587.

38. Debter *v.* Henry, 144 Ala. 552, 39 So. 72; Steverson *v.* W. C. Agee & Co., 9 Ala. App. 389, 63 So. 794.

[a] **Claim for Conversion.**—In a suit for a balance due on account defendant may use as a set-off a claim for conversion by plaintiff of cotton mortgaged to defendant by a third person, where the amount of cotton so converted is definite and the extent to which defendant's mortgage lien is impaired may be measured in money. Debter *v.* Henry, 144 Ala. 552, 39 So. 72.

39. Bates *v.* Lanier (Fla.), 77 So. 628.

[a] **Set-off for Conversion.**—In a suit to enforce a mortgage lien on lands, the defendant may set off a claim for moneys converted by the complainant. Bates *v.* Lanier (Fla.), 77 So. 628.

40. Ala. — Hatchett *v.* Gibson, 13 Ala. 587. **Ark.**—Brunson *v.* Martin, 17 Ark. 270. **Conn.**—Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246; Avery *v.* Brown, 31 Conn. 398. **Del.**—Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858. **Ga.**—Lee *v.* Clements, 48 Ga. 128; Swift *v.* Oglesby & Smith, 8 Ga. App. 540, 70 S. E. 97. **Ill.**—Scott *v.* Kenton, 81 Ill. 96; Waterman *v.* Clark, 76 Ill. 428; Garfield *v.* Huls, 54 Ill. 427; Streeter *v.* Streeter, 43 Ill. 155; Kingman *v.* Draper, 14 Ill. App. 577. **Md.**—Fidelity & D. Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652. **Pa.**—Gogel *v.* Jacoby, 5 Serg. & R. 117, 9 Am. Dec. 339. **W. Va.**—Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E. 702.

41. Conversion not arising out of the contract or transaction, not a proper subject of recoupment. Blackshear Mfg. Co. *v.* Stone, 8 Ga. App. 661, 70 S. E. 29.

42. Blackshear Mfg. Co. *v.* Stone, 8 Ga. App. 661, 70 S. E. 29.

43. McCormick *v.* Schtrenck, 59 Tex. Civ. App. 139, 130 S. W. 720.

[a] **"Can a tort be set off against a tort,** as a libel against an assault and battery with a cowhide? To ad-

the rule undoubtedly is that in tort actions, cross-demands based on independent torts cannot be interposed,[44] even though they have reference to the same property.[45] Claims for independent trespasses cannot be used to balance each other,[46] nor can independent claims for damages arising from assault and battery,[47] or conversion,[48] or fraud

mit such a plea would establish the rule in effect, that a trespass might be justified by a previous libel, if the jury should think the injury inflicted by the libel and trespass about equal. Or in other terms, it would permit one who was slandered to obtain his redress by an assault, instead of a suit, provided he could establish that he had imposed no greater injury on the assaulted than had been done to him by the slander. The common law tolerates no rule which would permit such a retaliation of injuries. . . . Such a case as this is evidently not included within the provisions of our statute of 'discounts and set-offs.'" Hart *v.* Davis, 21 Tex. 411.

44. **Ala.**—Western Ry. Co. *v.* Russell, 144 Ala. 142, 39 So. 311, 113 Am. St. Rep. 24. **Cal.**—McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. **Ill.**—White *v.* Bourquin, 204 Ill. App. 83, 95. **Ind.**—Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Shelly *v.* Vanarsdoll, 23 Ind. 543; Lovejoy *v.* Robinson, 8 Ind. 399. **Minn.**—Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1. **N. Y.**—Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58; Barhyte *v.* Hughes, 33 Barb. 320; Beardsley *v.* Maynard, 4 Wend. 336, 358; Schnaderbeck *v.* Worth, 8 Abb. Pr. 37; Askins *v.* Hearns, 3 Abb. Pr. 184. **N. D.**—Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679. **Tex.**—Shook *v.* Peters, 59 Tex. 393; Hart *v.* Davis, 21 Tex. 411; Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56. **Utah.**—Smith *v.* Alford, 31 Utah 346, 88 Pac. 16.

45. Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58.

[a] **Committed on Same Premises.** Where defendant's trespass consisted in entering upon plaintiff's land and destroying crops, and plaintiff's trespass consisted in obstructing defendant's use of an alleged highway over such land, it was held that the two trespasses were independent, and did not arise out of one transaction. Hall *v.* Werney, 18 App. Div. 565, 46 N. Y. Supp. 33.

46. **Ind.**—Shelly *v.* Vanarsdoll, 23 Ind. 543; Lovejoy *v.* Robinson, 8 Ind. 399. **Kan.**—Fanson *v.* Linsley, 20 Kan. 235. **Ky.**—Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407. **N. Y.**—Hall *v.* Werney, 18 App. Div. 565, 46 N. Y. Supp. 33; Murden *v.* Priment, 1 Hilt. 75. See Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58. **Ore.** Miser *v.* O'Shea, 37 Ore. 231, 62 Pac. 491, 82 Am. St. Rep. 751. **Tex.**—Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56; McCormick *v.* Schtrenck, 59 Tex. Civ. App. 139, 130 S. W. 720.

[a] **In an action for damages to growing crops,** a counterclaim for damages caused by plaintiff's obstructing a highway, refused. Hall *v.* Werney, 18 App. Div. 565, 46 N. Y. Supp. 33.

[b] **Flooding Land Against Trespass.**—Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888.

[c] **Eaves' Drip Against Drain.** In action to recover damages for defendant's negligently permitting water to drip from his eaves upon plaintiff's land, defendant cannot counterclaim damages caused by plaintiff's permitting water from an underground drain to escape upon defendant's land. Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181.

47. **Barhyte *v.* Hughes,** 33 Barb. (N. Y.) 320; Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y.) 37; McCormick *v.* Schtrenck, 59 Tex. Civ. App. 139, 130 S. W. 720.

[a] **A prior or subsequent assault and battery** committed by the plaintiff upon the defendant, cannot, where wholly independent from plaintiff's claim for assault and battery, be set up by defendant. McCormick *v.* Schtrenck, 59 Tex. Civ. App. 139, 130 S. W. 720.

48. Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632; Smith *v.* Bates (Tex. Civ. App.), 27 S. W. 1044.

[a] **Conversion by plaintiff of defendant's cattle** is not a proper subject of counterclaim in an action against defendant for conversion of plaintiff's

and deceit,[49] or libel and slander,[50] or other unconnected torts.[51]

(II.) Connected Torts. — Since set-off is only available in contract actions,[52] it is obvious that in an action ex delicto, damages for a tort, even though connected with the one sued on, cannot be set off. Recoupment, however, is available in certain actions which are in form ex delicto, but in which the transaction out of which the tort arises is contractual in its nature.[53] In such cases the defendant may recoup damages for a tort which arises out of the same transaction.[54] So

cattle. Smith *v* Bates (Tex. Civ. App.), 27 S. W. 1044.

49. See *infra*, this note.

[a] **In actions to set aside deed on ground of fraud,** defendant cannot counterclaim damages caused by plaintiff's fraud relating to other land, and committed prior to the fraud alleged by plaintiff. Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379.

50. **La.**—Harrison *v.* Jurgielewiez, 28 La. Ann. 238. **N. Y.**—Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Supp. 1119, 53 N. Y. St. 438. **N. D.**—Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679. **Va.**—McAlexander *v.* Harris, 6 Munf. (20 Va.) 465.

[a] **Although the two slanders are uttered in the course of the same conversation,** and before the same witnesses. Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679.

51. See *infra*, this note.

[a] **Damages for trespass of a horse** cannot be counterclaimed in an action for the wrongful killing of the horse some time subsequently. Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56.

[b] **Assault Against Conversion.** Miller *v.* Black, 56 Tex. Civ. App. 320, 120 S. W. 559.

[c] **Libel Against Assault.** — McDougall *v.* Maguire, 35 Cal. 274, 281, 95 Am. Dec. 98; Hart *v.* Davis, 21 Tex. 411.

[d] **Slander Against Assault.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123.

[e] **Negligence Against Assault.** Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624.

[f] **Trespass Against Conversion.** In action to recover damages for defendant's tortious entry upon premises and conversion of plaintiff's chattels, defendant cannot set off damages caused by defendant's prior entry on the same premises, defendant alleging that such premises belonged to him. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873.

[g] **Trespass Against Malicious Prosecution.**—Noonan *v.* Orton, 30 Wis. 356.

[h] **Fraud Against Malicious Prosecution.**—Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858, *affirming* 57 Hun 135, 10 N. Y. Supp. 427, 19 Civ. Proc. 58, 32 N. Y. St. 560.

[i] **Fraud Against Trespass.**—Chamboret *v.* Cagney, 10 Abb. Pr. N. S. (N. Y.) 31, 41 How. Pr. 125.

[j] **Malicious Prosecution Against Assault.**—Shook *v.* Peters, 59 Tex. 393.

[k] **Malicious Prosecution Against Conversion.**—Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132.

[l] **Damage by Lessee Against Conversion.**—Schwulst *v.* Neely (Tex. Civ. App.), 50 S. W. 608.

[m] **Seduction of Minor Child Against Obtaining Money by Duress.** Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439.

[n] **Trespass Against Negligence.** Railway company sued for damages for negligent killing of horses cannot recoup damages caused to defendant's train by such horses' trespass on its right of way. **Ind.**—Terre Haute & I. R. Co. *v.* Pierce, 95 Ind. 496; Lake Shore & M. S. Ry. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119. **Ky.** Chesapeake & O. Ry. Co. *v.* Roe, 21 Ky. L. Rep. 1145, 54 S. W. 1. **S. C.** Simkins *v.* Columbia & G. R. Co., 20 S. C. 258.

[o] **Negligent Loss of Chattels Against Conversion of Other Chattels.** Reamer *v.* Morrison Express Co., 93 Mo. App. 501, 511, 67 S. W. 718.

52. See *supra*, I, B, 3; V, B, 2, a.

53. See *supra*, V, B, 3, b.

Where plaintiff may elect to sue in tort or contract, see *infra*, VII, C, 5, a.

54. Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494.

under the code counterclaim in a tort action a tort which arises out of the same transaction, or is connected with the subject of the action, may properly be counterclaimed,[55] whether they be of the same[56] or of a different[57] kind.

[a] **Negligence Against Negligence.** In action for damage caused by defendant's negligence, defendant may recoup damages caused by plaintiff's negligence committed in the course of the transaction set forth in plaintiff's complaint. Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692.

Recouping for breach of contract in tort action, see *infra,* VII, C, 4, b, (II).

55. Ia.—Shoemaker *v.* Jackson, 128 Iowa 488, 104 N. W. 503, 1 L. R. A. (N. S.) 137. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1. **Mo.**—Tarwater *v.* Hannibal & St. J. R. Co., 42 Mo. 193. **N. Y.**—Carpenter *v.* Manhattan Life Ins. Co., 93 N. Y. 552; Carpenter *v.* Manhattan Life Ins. Co., 22 Hun 49; Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58. **N. C.**—Walsh *v.* Hall, 66 N. C. 233. **Ohio.**—Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433; Mogle *v.* Black, 5 Ohio C. C. 51, 3 Ohio Cir. Dec. 27. **R. I.**—Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022. **S. D.**—Northwestern Port Huron Co. *v.* Iverson, 22 S. D. 314, 117 N. W. 372, 133 Am. St. Rep. 920. **Tex.**—See Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56. **Wis.**—Powell *v.* Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139.

56. Ind.—Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 33, 80 N. E. 981. **N. Y.**—Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Supp. 497, 20 N. Y. St. 639. **Tex.**—Boyd *v.* Clark, 21 Tex. 426.

[a] **Fraud Against Fraud.**—**Cal.** Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122. **Mass.**—Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494. **Mich.** Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297. **N. C.**—Walsh *v.* Hall, 66 N. C. 233.

[b] In an action to recover damages caused by defendant's false and fraudulent representations as to the validity of a mortgage assigned to plaintiff as part payment for property, and which was held void in a suit to foreclose it, defendant may recoup damages caused by plaintiff's false representations of the condition and quality of the property in payment for which the mortgage was transferred. Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297.

[c] **In an action for assault and battery** a counterclaim for an assault and battery committed by the plaintiff at the same time, and as a part of the same affray, may be counterclaimed. **Ky.**—Slone *v.* Slone, 2 Metc. 339. **N. Y.**—Deagan *v.* Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641, 10 N. Y. Ann. Cas. 360; Murphy *v.* McQuade, 20 Misc. 671, 46 N. Y. Supp. 382. **Wis** Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887.

[d] **Trespass Against Trespass.** Where plaintiff seeks to enjoin trespasses by defendant, the latter may counterclaim for trespasses by plaintiff, that are connected with the subject of the action. Kelly *v.* Webster, 143 App. Div. 737, 128 N. Y. Supp. 58.

57. See *infra,* this note.

[a] **Denial of Possession and Waste Against Fraud.**—In an action to rescind a contract for the sale of land, on the ground of defendant's fraudulent misrepresentations, defendant may recoup damages caused by plaintiff's keeping him out of possession of such land, and by plaintiff's waste committed thereon. Grimes *v.* Duzan, 32 Ind. 361; Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477.

[b] **Assault Against Libel.**—Ransone *v.* Christian, 49 Ga. 491, 505.

[c] **Assault Against Malicious Prosecution.**—Horton *v.* Pintchunck, 110 Ga. 355, 35 S. E. 663.

[d] **Malicious Prosecution Against Libel.**—Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433.

[e] **Waste Against Conversion.** Carpenter *v.* Manhattan Life Ins. Co., 93 N. Y. 552.

[f] **Damages for plaintiff's negli-**

c. *Tort Against Contract.* — (I.) **Set-off.** — (A.) AT LAW. — Since tort claims are not proper subjects of set-off,[58] they cannot be used as such in contract actions at law.[59] But where a cause of action in tort has been reduced to judgment, according to some authorities it

gence in causing a break in a canal may be counterclaimed in an action for injuries to plaintiff's boat while passing through the canal, alleged to have been caused by the break resulting from defendant's negligence. McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139.

[g] **In a suit to restrain interference with a road** defendant may counterclaim for damages caused by the construction of the road. Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1.

58. See *supra,* VII, C, 3, a, (II).

59. **U. S.**—Dushane *v.* Benedict, 120 U. S. 630, 643, 7 Sup. Ct. 696, 30 L. ed. 810 (construing Pennsylvania statutes and decisions); Simonton *v.* Shaw, 246 Fed. 683, 158 C. C. A. 639, applying law of Georgia. **Ala.**—Martin, Dunee & Co. *v.* Brown, S. & Co., 75 Ala. 442; Walker *v.* McCoy, 34 Ala. 659. **Colo.**—Hart *v.* Francis, 2 Colo. 719. **Fla.**—Bates *v.* Lanier, 77 So. 628; Brash *v.* Ehrman, 56 Fla. 153, 47 So. 937; Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687; Matthews *v.* Lindsay, 20 Fla. 962; Robinson *v.* L'Engle, 13 Fla. 482. **Ga.**—J. I. Case Threshing Mach. Co. *v.* Thurmond, 144 Ga. 21, 85 S. E. 1020; Ray *v.* Anderson, 119 Ga. 926, 47 S. E. 205, *s. c.,* 114 Ga. 975, 41 S. E. 60; Hecht *v.* Snook & Austin Furniture Co., 114 Ga. 921, 41 S. E. 74; Mashburn *v.* Inman, 97 Ga. 396, 24 S. E. 39; Green *v.* Combs, 81 Ga. 210, 6 S. E. 582; Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846; Janes *v.* City of Cedartown, 14 Ga. App. 72, 80 S. E. 339; Blackshear Mfg. Co. *v.* Stone, 8 Ga. App. 661, 70 S. E. 29; Swift *v.* Oglesby & Smith, 8 Ga. App. 540, 70 S. E. 97; Howe *v.* Bernheim Distilling Co., 8 Ga. App. 771, 70 S. E. 176. **Ind.**—Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8; Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Harris *v.* Rivers, 53 Ind. 216; Roback *v.* Powell, 36 Ind. 515; Indianapolis & C. R. Co. *v.* Ballard, 22 Ind. 448. **Kan.**—First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22. **Mass.**—Adams *v.* Manning, 17 Mass. 178. **Minn.**—Steinhart *v.* Pitcher, 20 Minn. 102; Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456. **Mo.** Barnes *v.* McMullins, 78 Mo. 260, 274; Gantt *v.* Duffy, 71 Mo. App. 91. **Neb.** Vanderlip *v.* Barnes, 101 Neb. 573, 163 N. W. 856; Watts *v.* Gantt, 42 Neb. 869, 878, 61 N. W. 104. **N. J.**—Edwards *v.* Davis, 6 N. J. L. 394. **N. Y.** Dean *v.* Allen, 8 Johns. 390; Kurtz *v.* McGuire, 5 Duer 660. **Okla.**—Hazlett *v.* Wilkin, 42 Okla. 20, 140 Pac. 410. **Pa.**—Mintz *v.* Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285; Groetzinger *v.* Latimer, 146 Pa. 628, 23 Atl. 393; Schalcher *v.* Bergdoll, 41 Pa. Super. 547. **Tex.**—J. C. Stewart Produce Co. *v.* Hamilton-Turner Groc. Co. (Tex. Civ. App.), 163 S. W. 1000. **Eng.** Gillett *v.* Mawman, 1 Taunt. 137, 127 Eng. Reprint 784.

[a] **Conspiracy Against Rent.**—Robinson *v.* L'Engle, 13 Fla. 482, 498.

[b] **Libel or Slander Against Bill of Exchange.**—Martin, Dunee & Co. *v.* Brown, S. & Co., 75 Ala. 442.

[c] **Malicious Civil Suit and Attachment Against Purchase Price or Note.**—Brash *v.* Ehrman, 56 Fla. 153, 47 So. 937; Matthews *v.* Lindsay, 20 Fla. 962, 977.

[d] **Damages for malpractice** cannot be used as a set-off in physician's suit for services. McKleroy *v.* Sewell, 73 Ga. 657.

[e] **In action on note,** a claim for trespass or conversion is not available as set-off. Janes *v.* City of Cedartown, 14 Ga. App. 72, 80 S. E. 339; Henderson *v.* Hardeman, 21 Ga. App. 297, 94 S. E. 317.

[f] **Destruction of Property against Debt.**—Duncan *v.* Magette, 25 Tex. 245.

[g] **Illegal Landlord's Warrant Against Rent.**—Groetzinger *v.* Latimer, 146 Pa. 628, 23 Atl. 393.

[h] **Negligence Against Money Advanced or Note.**—In actions for money advanced defendant cannot set off bad debts negligently made by plaintiff in selling defendant's goods. Winchester *v.* Hackley, 2 Cranch (U. S.) 342, 2 L. ed. 299.

[i] **Damages caused by plaintiff's unauthorized sale of defendant's chat-**

thereby becomes a contractual liability which may be set off as such.[60]

(B.) In Equity. — Where grounds justifying such relief exist,[61] equity will permit the defendant to establish a set-off based on tort in an action ex contractu.[62] There are jurisdictions, however, wherein torts have not been brought within the scope of equitable set-off.[63]

(II.) Counterclaim. — (A.) Independent Torts. — In an action on contract, defendant cannot counterclaim a tort demand that is entirely independent of the matter sued on,[64] unless the tort also constitute a breach of contract and he bases his counterclaim on the latter.[65] The rule against interposing counterclaims for independent torts in actions upon contract has been invoked to exclude demands for wrongful attachment,[66] conversion,[67] as well as claims for damages for action-

tel, held by plaintiff as warehouseman and sales agent, cannot be set off against a note. Brannin *v.* Crouch, 10 Ky. L. Rep. 773.

60. Taylor *v.* Root, 4 Keyes (N. Y.) 335, 4 Abb. Dec. 382. See also *supra*, VII, C, 3, c.

Judgment as contract, see 14 Standard Proc. 766, 767, note 25 [b], and Knight *v.* Rothschild, 132 App. Div. 274, 117 N. Y. Supp. 26.

61. **Grounds justifying equitable set-off**, see *supra*, I, G, 3.

62. Janes *v.* City of Cedartown, 14 Ga. App. 72, 80 S. E. 339; Swift *v.* Oglesby & Smith, 9 Ga. App. 540, 70 S. E. 97.

63. Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288.

64. **Ark.**—Epstein *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587. **Cal.**—Clark *v.* Kelley, 163 Cal. 207, 124 Pac. 846. **Colo.**—Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008. **Minn.**—McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Schmidt *v.* Bickenbach, 29 Minn. 122, 12 N. W. 349; Steinhart *v.* Pitcher, 20 Minn. 102; Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456. **Mo.**—Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27. **Neb.**—Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. Y.**—Gallup *v.* Albany R. Co., 65 N. Y. 1; Kurtz *v.* McGuire, 5 Duer 660; Drake *v.* Cockroft, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How. Pr. 377; Thorp *v.* Philbin, 15 Daly 155, 3 N. Y. Supp. 939, 22 N. Y. St. 27; Piser *v.* Stearns, 1 Hilt. 86; Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; Turner *v.* Fulcher, 165 N. Y. Supp. 282; Safran *v.* Silverman, 129 N. Y. Supp. 116; Biershenk *v.* Stokes, 18 N. Y. Supp. 854, 43 N. Y. St. 788, 46 N. Y. St. 179. **N. C.**—Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277; Devries & Co. *v.* Warren, 82 N. C. 356; Street *v.* Bryan, 65 N. C. 619. **N. D.**—Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354. **Okla.** Hazlett *v.* Wilkin, 42 Okla. 20, 140 Pac. 410. **Ore.**—Chamberlain *v.* Townsend, 72 Ore. 207, 142 Pac. 782, 143 Pac. 924; Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552. **S. C.**—Humbert *v.* Brisbane, 25 S. C. 506; Copeland *v.* Young, 21 S. C. 275. **S. D.**—Hoeven *v.* Morley, 36 S. D. 421, 155 N. W. 191; Tuthill *v.* Sherman, 32 S. D. 103, 142 N. W. 257. **Wash.**—Russell *v.* Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341.

[a] **That plaintiffs unlawfully combined to injure defendant** by buying up claims against defendant and forcing him into bankruptcy, is not available as a set-off or counterclaim in plaintiff's action upon assigned notes. Liles *v.* Harris-Grimes Co. (S. C.), 76 S. E. 115.

[b] **A counterclaim for personal injuries** not connected with the matter pleaded, is not available in an action for wages. Weiss *v.* Rosenbaum, 115 N. Y. Supp. 121.

65. See *infra*, VII, C, 3, d, (II).

66. **Cal.**—Clark *v.* Kelley, 163 Cal. 207, 124 Pac. 846. **Minn.**—Jones *v.* Swank, 54 Minn. 259, 55 N. W. 1126. **S. D.**—Hoeven *v.* Morley, 36 S. D. 421, 155 N. W. 191; Tuthill *v.* Sherman, 32 S. D. 103, 142 N. W. 257.

Attachment in same action, see *infra*, VII, C, 5, f.

[a] **Damages for attachment in former action** upon a note not proper counterclaim in suit to foreclose a mortgage securing the note. Clark *v.* Kelley, 163 Cal. 207, 124 Pac. 846.

67. **N. Y.**—Bell *v.* Lesbini, 66 How

able conspiracy,[68] eviction,[69] fraud and deceit,[70] libel and slan-

Pr. 385, 4 Civ. Proc. 367; Slade *v.* Montgomery, 53 App. Div. 343, 65 N. Y. Supp. 709; Ludlow *v.* McCarthy, 5 App. Div. 517, 38 N. Y. Supp. 1075; Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. Supp. 456; De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Supp. 358, 29 Civ. Proc. 250. **N. D.**—Braithwaite *v.* Aikin, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Broch *v.* Becher, 5 Ohio Dec. Reprint 519. **Ore.** Chamberlain *v.* Townsend, 72 Ore. 207, 142 Pac. 782, 143 Pac. 924; Title Guar. & Abstract Co. *v.* Nasburg, 58 Ore. 190, 113 Pac. 2.

[a] **Conversion** of a note by plaintiff is (1) not a good counterclaim to plaintiff's action for services and disbursements. Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547. (2) Conversion of goods not included in the sale is not a proper subject of counterclaim in an action for the purchase price. Kurtz *v.* McGuire, 5 Duer (N. Y.) 660; Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. Supp. 456. (3) Conversion of fixtures held not a proper subject matter of counterclaim in an action on bond given to secure rent. New York *v.* Parker Vein S. Co., 8 Bosw. (N. Y.) 300, 21 How. Pr. 289, 12 Abb. Pr. 300. (4) A conversion of abstracts is not a proper basis of counterclaim in suit to recover for services of the abstracter in connection with other abstracts. Title Guar. & Abstract Co. *v.* Nasburg, 58 Ore. 190, 113 Pac. 2.

[b] **Wrongful appropriation of securities** of defendant not a proper counterclaim in an action on a check. Riddle *v.* Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15.

[c] **In an action for rent** defendant (1) cannot counterclaim for conversion committed on the premises after the lease had expired (Ludlow *v.* McCarthy, 5 App. Div. 517, 38 N. Y. Supp. 1075. See also McKensie *v.* Farrell, 4 Bosw. [N. Y.] 192), nor (2) for damages caused by plaintiff's fraud in regard to the sale of personal property, the lease and the sale not being one transaction. Roberts *v.* Carter, 38 N. Y. 107.

68. First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22; Thomson-Houston Electric Co. *v.* Henderson Electric & Gas Light Co., 116 N. C. 112, 21 S. E. 951.

[a] **Damages for conspiracy in instituting an action** on a note, not proper counterclaim in such action since they do not arise out of the contract or transaction, nor are they connected with the subject of the action. First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22.

69. Safran *v.* Silverman, 72 Misc. 14, 129 N. Y. Supp. 116; Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Supp. 948, 24 Civ. Proc. 121, 62 N. Y. St. 517; Humbert *v.* Brisbane, 25 S. C. 506.

[a] **In action for rent,** a counterclaim arising in tort for eviction from the premises is not allowable where it is entirely independent from the contract, or transaction sued on or from the subject of the action. Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Faber *v.* Phillips, 26 Misc. 723, 56 N. Y. Supp. 1028; Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Supp. 948, 24 Civ. Proc. 121, 62 N. Y. St. 517.

[b] **In a foreclosure of a mortgage,** damage for eviction which occurred some time subsequent to the execution of the mortgage is not available as a counterclaim. Humbert *v.* Brisbane, 25 S. C. 506.

70. **Ark.**—Daniel *v.* Gordy, 84 Ark. 218, 105 S. W. 256. **Okla.**—Hazlett *v.* Wilkin, 42 Okla. 20, 140 Pac. 410. **Ore.**—Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552.

[a] **In an action to foreclose a mortgage** made to secure a note given for the purchase price of mining property, a demand for money obtained from defendant by fraudulent representations in respect to the mines, was held not to arise out of the contract or transaction. Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552.

[b] **In an action upon a promissory note,** (1) defendant cannot counterclaim damages caused by plaintiff's fraudulent representations as to the quality and quantity of goods sold to defendant in a transaction entirely independent of that which resulted in the note in suit. Harris *v.* Rivers, 53 Ind. 216; Barnes *v.* McMullins, 78 Mo. 260, 274. (2) In an action on notes given for shares of stock, a counter-

der,[71] malicious prosecution,[72] negligence,[73] trespass,[74] and other torts.[75]

claim is not proper when based on fraudulent misrepresentations of plaintiff as to its financial condition which induced defendant to advance money to the corporation. Story *v.* Richardson, 91 App. Div. 381, 86 N. Y. Supp. 843, *affirmed* in 181 N. Y. 584, 74 N. E. 1126.

71. **Neb.**—Watts *v.* Gantt, 42 Neb. 869, 61 N. W. 104. **N. Y.**—Uvalde Asphalt Pav. Co. *v.* Morgan Contracting Co., 120 App. Div. 498, 104 N. Y. Supp. 1118. **N. C.**—Merritt Mill. Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4.

Compare supra, VII, C, 2, b, (IV), (D), (2).

72. **Kan.**—Carver *v.* Shelly & Co., 17 Kan. 472. **Minn.**—Jones *v.* Swank, 54 Minn. 259, 55 N. W. 1126. **Neb.**—Insurance Co. of North America *v.* Parker, 64 Neb. 411, 89 N. W. 1040. **Wis.** Akerly *v.* Vilas, 21 Wis. 88.

73. **Minn.**—Steinhart *v.* Pitcher, 20 Minn. 102. **Mo.**—Gantt *v.* Duffy, 71 Mo. App. 91. **N. Y.**—Gager *v.* Small, 19 Abb. L. J. 400; Western U. Tel. Co. *v.* Milliken, 14 Daly 170.

[a] **In actions for rent,** damage caused by tortious acts of the plaintiff in no wise connected with the contract, transaction or subject of action, is not a proper counterclaim. Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359; Thorpe *v.* Philbin, 15 Daly 155, 3 N. Y. Supp. 939, 22 N. Y. St. 27; Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34, 1 Abb. Pr. 203, 10 How. Pr. 377.

[b] **Damages in making street improvement** are not available as a counterclaim in an action to foreclose a street assessment. Himmelmann *v.* Spanagel, 39 Cal. 389. See also Engebretsen *v.* Gay, 158 Cal. 27, 109 Pac. 879.

[c] **Negligence Against Note.**—Indianapolis & C. R. Co. *v.* Ballard, 22 Ind. 448; Presnall *v.* McLeary (Tex. Civ. App.), 50 S. W. 1066.

74. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Conn.**—Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288. **Kan.**—Christy *v.* Jones, 39 Kan. 183, 18 Pac. 56. **Minn.**—McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601. **N. Y.** Drake *v.* Cockroft, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How. Pr. 377; Cupi *v.* Craftsman's Club, 33 Misc. 757, 67 N. Y. Supp. 956; Ruderman *v.* Bloch, 145 N. Y. Supp. 913.

[a] **In an action by a vendor** upon a land contract, a counterclaim for damages for plaintiff's trespass upon the land is not proper. McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601.

[b] **Trespass of Landlord.**—Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644; George A. Fuller Co. *v.* Manhattan Const. Co., 44 Misc. 219, 88 N. Y. Supp. 1049; Gerry *v.* Siebrecht, 88 N. Y. Supp. 1034. In Edgerton *v.* Page, 20 N. Y. 281, which was an action for rent, a claim for trespasses or acts of negligence of the landlord upon the premises was disallowed, the court saying: "The demand of the defendant, set out in the answer, does not arise out of the contract set forth in the complaint. That contract is for the payment of rent upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff in permitting water to leak and run into the premises, and in causing or permitting it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of leasing upon which the action is brought. The demands are not connected with the subject of the action; that is, the rent agreed to be paid for the use of the premises." See also McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192; New York *v.* Parker Vein S. Co., 21 How. Pr. (N. Y.) 289, 12 Abb. Pr. 300, 8 Bosw. 300; Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994, and *infra,* the following note. See in this connection *infra,* VII, C, 3, c, (II), (B), (2).

[c] **Where tenant sues to recover a deposit** made with the landlord to secure the making of repairs, a counterclaim cannot be interposed based upon the fact that plaintiff entered upon the building without the knowledge or consent of the landlord and completely ruined it, maliciously and wrongfully destroying and dismantling the building beyond repair for the sole purpose of injuring the landlord. Ruderman *v.* Bloch, 145 N. Y. Supp. 913.

75. Weiss *v.* Rosenbaum, 115 N. Y. Supp. 121; Devries & Co. *v.* Warren, 82 N. C. 356.

[a] **In an action for the purchase price of land,** (1) the vendee's coun-

(B.) TORTS CONNECTED WITH THE MATTER SUED ON. — (1.) *In General.* Except in a few cases,[76] it is generally recognized that in an action on contract a cause of action in tort may be counterclaimed if it arises out of the contract or transaction sued on or is connected with the subject of the action.[77]

terclaim for damages caused by plaintiff's duress employed after making the sale-contract, to compel defendant to execute notes for the purchase price, does not arise out of the contract of sale and is not proper. Lilienthal *v.* Bechtel Brewing Co., 118 App. Div. 205, 102 N. Y. Supp. 1051 (2) In a suit on bond for the purchase price of land, wáste committed prior to the sale is not a proper subject matter of counterclaim. Devries & Co. *v.* Warren, 82 N. C. 356.

[b] **Slander of Title.** — Defendant cannot in an action to foreclose a purchase-money mortgage recover damages caused by plaintiff's slander of defendant's title to the land involved. Akerly *v.* Vilas, 21 Wis. 88, 111.

[c] **Tortious acts of other tenants** are not a proper subject of counterclaim in an action for rent. Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170.

[d] **Counterclaim for landlord's failure to make repairs** was denied in an action for rent on the ground that it was an independent tort, the "obligation" to repair not being contractual and not arising out of contract or transaction sued on, nor connected with the subject of the action. Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585. See preceding note. *Compare* 18 STANDARD PROC. 496, and *infra,* VII, C, 3, c, (II), (B), (2).

76. Gantt *v.* Duffy, 71 Mo. App. 91; Western U. Tel. Co. *v.* Milliken, 14 Daly (N. Y.) 170; Lundine *v.* Callaghan, 82 App. Div. 621, 81 N. Y. Supp. 1052; Marshall *v.* Cohen, 11 Misc. 397, 32 N. Y. Supp. 283, 65 N. Y. St. 310. See Collier *v.* Ervin, 3 Mont. 142.

[a] **The reason assigned therefor** is the impossibility of legal connection between the two events. See Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454.

[b] **In commenting on earlier Montana decisions** the court in Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454, says: "It is quite true that some detached sentences in the earlier decisions of this court may be quoted contrary in effect to the conclusions above stated; but these utterances, occasioned by circumstances easily distinguishable from the present case and made arguendo, are no authority for affirming that in no instance can a counterclaim technically in tort arise out of the same transaction as the plaintiff's demand when the latter is ex contractu in form."

77. **U. S.**—Caraway & Sons *v.* Kentucky Ref. Co., 163 Fed. 189, 90 C. C. A. 59; American Sign Co. *v.* Electro-Lens Sign Co., 211 Fed. 196; *In re* Harper, 175 Fed. 412. **Ark.**—Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319. **Ky.**—Louisville & N. R. Co. *v.* Thompson, 18 B. Mon. 735; Nolle *v.* Thompson, 3 Metc. 121; Tinsley *v.* Tinsley, 15 B. Mon. 454; Hall *v.* Ayer & L. Tie Co., 31 Ky. L. Rep. 508, 102 S. W. 867. **Minn.**—Schmidt *v.* Bickenbach, 29 Minn. 122, 12 N. W. 349. **Mo.** Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314. **N. Y.**—Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Wadley *v.* Davis, 63 Barb. 500; Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566. **N. D.**—Hanson *v.* Skogman, 14 N. D. 445, 105 N. W. 90. **S. C.**—Humbert *v.* Brisbane, 25 S. C. 506. **S. D.**—Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51; Northwestern Port Huron Co. *v.* Iverson, 22 S. D. 314, 117 N. W. 372, 133 Am. St. Rep. 920; McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766. **Tex.** Streeper *v.* Thompson (Tex. Civ. App.), 23 S. W. 326. **Wis.**—Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263; Vilas *v.* Mason, 25 Wis. 310; Ainsworth *v.* Bowen, 9 Wis. 348.

[a] **"It has long been settled** that . . . a defendant, when sued upon a contract, may file a counterclaim, even though it be in the nature of a tort arising out of the same transaction." Caraway & Sons *v.* Kentucky Ref. Co., 163 Fed. 189, 90 C. C. A. 59.

[b] **Asserted in Municipal Court.**

(2.) *Rule Applied to Particular Tort Demands.* — Within the limits of the foregoing general rule governing connected torts, the defendant may counterclaim tort demands for conspiracy,[78] conversion,[79] fraud and deceit,[80] libel and slander,[81] malicious prosecution,[82] negli-

Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566.

78. Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832.

[a] **Conspiracy affecting the property** to which an action to foreclose a mortgage relates, is a proper subject of counterclaim. Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832.

79. **Ark.**—Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319. **Cal.**—Waugenheim *v.* Graham, 39 Cal. 169. **Ga.** Turner *v.* Commercial Savings Bank, 17 Ga. App. 631, 87 S. E. 918. **Ky.** Tinsley *v.* Tinsley, 15 B. Mon. 454. **Neb.**—Carson *v.* Buckstaff, 57 Neb. 262, 77 N. W. 670. **N. Y.**—Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Carrington *v.* Ward, 71 N. Y. 360; Wadley *v.* Davis, 63 Barb. 500; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650. **N. H.**—Haskell *v.* Africa, 68 N. H. 421, 41 Atl. 73. **N. J.** Donnell *v.* Wyckoff, 49 N. J. L. 48, 7 Atl. 672. **S. D.**—McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766. **Wis.**—Vilas *v.* Mason, 25 Wis. 310; Ainsworth *v.* Bowen, 9 Wis. 348.

[a] **Conversion of the property pledged or mortgaged** to secure the debt sued on. **N. Y.**—Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Kneeland *v.* Pennell, 49 Misc. 94, 96 N. Y. Supp. 403; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650; Stearns *v.* Marsh, 4 Denio 227, 47 Am. Dec. 248. **N. D.**—Hanson *v.* Skogman, 14 N. D. 445, 105 N. W. 90. **S. D.**—Northwestern Port Huron Co. *v.* Iverson, 22 S. D. 314, 117 N. W. 372, 133 Am. St. Rep. 920. **Wis.** — Ainsworth *v.* Bowen, 9 Wis. 348.

[b] **In an action on a lease,** against the tenant, a counterclaim for conversion of chattels which defendant had placed upon the premises was sustained. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Littman *v.* Coulter, 23 Abb. N. C. 69, 7 N. Y. Supp. 1. **Wis.**—Vilas *v.* Mason, 25 Wis. 310.

[c] **In an action for services** in connection with personal property, a claim for conversion of part of the property may be counterclaimed. Wadley *v.* Davis, 63 Barb. (N. Y.) 500.

80. **U. S.**—American Sign Co. *v.* Electro-Lens Sign Co., 211 Fed. 196; *In re* Harper, 175 Fed. 412. **Idaho.** Wollan *v.* McKay, 24 Idaho 691, 135 Pac. 832. **Ind.**—Vail *v.* Jones, 31 Ind. 467. **Ia.**—Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **Mo.**—Garnett & A. Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736. **N. Y.**—Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Thomson *v.* Sanders, 118 N. Y. 252, 23 N. E. 374; Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Isham *v.* Davidson, 52 N. Y. 237. **N. C.** Fields *v.* Brown, 160 N. C. 295, 76 S. E. 8. **Ohio.**—Pierce *v.* Tiersch, 40 Ohio St. 168; Allen *v.* Shackelton, 15 Ohio St. 145. **Wis.**—Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

But see Jones *v.* Moore, 42 **Mo.** 413.

[a] **Fraud in issuance of bonds** may be set up as a counterclaim in a suit upon the coupons attached to the bonds. Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

[b] **Fraud inducing the purchase** of property (1) is a proper subject of counterclaim in a suit upon a note given for the purchase price (Isham *v.* Davidson, 52 N. Y. 237. See also *In re* Harper, 175 Fed. 412; and *supra*, VII, C, 2, b, [III], [C]), or (2) in an action on a foreign judgment obtained upon the note. Secor *v.* Siver, 165 Iowa 673, 146 N. W. 845.

[c] **In a mortgage foreclosure,** defendant may show that the mortgage was for the purchase-price of land and may counterclaim damages caused by plaintiff's fraud inducing defendant to purchase. Hanna *v.* Hope, 86 Ore. 303, 168 Pac. 618. See also Moberly *v.* Alexander, 19 Iowa 162.

[d] **Fraud inducing execution of bond** sued on. Thomson *v.* Sanders, 118 N. Y. 252, 23 N. E. 374.

81. Watts *v.* Gantt, 42 Neb. 869, 61 N. W. 104; Merritt Mill. Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4.

82. Insurance Co. of North America *v.* Parker, 64 Neb. 411, 89 N. W. 1040,

gence,[83] replevin,[84] trespass,[85] waste,[86] and other tort demands.[87]

(III.) Recoupment. — A claim in tort may be recouped[88] against one

83. Ia.—First Nat. Bank *v.* O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. Rep. 313. **Ky.**—Cranor Smith Lumber Co. *v.* Frith, 118 S. W. 307. **N. Y.**—Whitelegge *v.* De Witt, 12 Daly 319; Ft. Miller Pulp & Paper Co. *v.* Bratt, 119 App. Div. 685, 104 N. Y. Supp. 350. **N. C.**—Branch *v.* Chappell, 119 N. C. 81, 25 S. E. 783.

[a] **Negligent loss of securities pledged to secure the note** sued on. First Nat. Bank *v.* O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. Rep. 313; Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935.

84. See *infra*, this note.

[a] **Cause of action in replevin for a note** is a proper counterclaim in an action upon the note which plaintiff obtained through fraud. Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374.

85. Ky.—Cranor Smith Lumber Co. *v.* Frith, 118 S. W. 307; Tinsley *v.* Tinsley, 15 B. Mon. 454. **Minn.**—Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847. **Neb.**—Smith *v.* Fife, 2 Neb. 10. **N. Y.**—Ayres *v.* O'Farrell, 4 Robt. 668.

[a] **Trespass of Landlord.**—In an action for rent an answer setting up facts showing that the landlord during the term filled the demised premises with smoke, soot and steam, alleges a good counterclaim. Ayres *v.* O'Farrell, 4 Robt. (N. Y.) 668. To the same effect see Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847. But trespasses of the landlord have been disallowed in actions for rent on the ground that they constituted independent torts. See *supra*, VII, C, 3, c, (II), (A).

[b] **Damages for Cutting Trees.**—In a suit for breach of contract for sale of standing timber, defendant may counterclaim damages resulting from the cutting of other trees than those specified in the contract. Cranor Smith Lumber Co. *v.* Frith (Ky.), 118 S. W. 307.

86. Smith *v.* Fife, 2 Neb. 10.

[a] **Waste Upon Mortgaged Premises.**—Where waste is committed upon mortgaged premises after the decree of foreclosure and before the sale of the premises, it may constitute the basis of a counterclaim in a suit by the mortgagee to recover the balance of the mortgage debt after sale. Smith *v.* Fife, 2 Neb. 10.

87. See Everding *v.* Gebhardt Lumb. Co., 86 Ore. 239, 168 Pac. 304.

88. U. S.—Dushane *v.* Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. ed. 810; Caraway & Sons *v.* Kentucky Ref. Co., 163 Fed. 189, 90 C. C. A. 59. **Ark.**—Brunson *v.* Martin, 17 Ark. 270, where employe killed his employer's slave. **Ill.**—Scott *v.* Kenton, 81 Ill. 96; Burroughs *v.* Clancy, 53 Ill. 30; Streeter *v.* Streeter, 43 Ill. 155; Brigham *v.* Hawley, 17 Ill. 38; Kingman *v.* Draper, 14 Ill. App. 577. **Mass.** Higby *v.* Upton, 3 Metc. 409. **N. Y.** Allaire Works *v.* Guion, 10 Barb. 55. **Pa.**—Price *v.* Lewis, 17 Pa. 51, 55 Am. Dec. 536; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700.

[a] **Damages to Land.**—In an action upon notes executed in consideration of plaintiff's surrender of land occupied by him as defendant's tenant, defendant may recoup damages to the land caused by plaintiff's negligence and acts in the nature of waste. Streeter *v.* Streeter, 43 Ill. 155.

[b] **A claim for conversion of chattels sold** may be set up in a suit for the purchase price. Kingman *v.* Draper, 14 Ill. App. 577.

[c] **Crops Taken or Sold by Vendor.** In a suit on a note given by the vendor of land for the purchase money defendant may recoup the value of the crop taken from the land by the vendor. Walker *v.* Sedgwick, 8 Cal. 398; Gordon *v.* Bruner, 49 Mo. 570.

[d] **Conversion of Fixtures.**—In an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment damages for the removal of fixtures without his knowledge or consent, after the contract of sale and before a formal transfer of the land and the execution of the bonds. Grand Lodge *v.* Knox, 20 Mo. 433.

In actions between vendor and purchaser of land, see the title "**Vendor and Purchaser.**"

Fraud inducing purchase as a subject of recoupment in an action for the purchase price, see *supra*, VII, C, 2, d, (III), (C), (2).

[e] **Conversion of Pledge Against Secured Note.—U. S.**—Rush *v.* First

founded on contract if the two claims arise out of the same transaction, but not otherwise.[89]

4. Demands Based on Contract. — a. *In General.* — There can be no question respecting the right to assert as a cross-demand an otherwise proper claim or indebtedness based on contract. Such a cause of action is within the scope of recoupment;[90] is authorized by the code provisions in respect to counterclaim,[91] and constitutes in general the sole basis of set-off,[92] and of that class of counterclaims analogous to set-offs.[93]

Nat. Bank, 71 Fed. 102, 17 C. C. A. 627. **Conn.**—Bulkeley *v.* Welch, 31 Conn. 339. **N. J.**—Connell *v.* Wyckoff, 49 N. J. L. 48, 7 Atl. 672.

[f] **Trespass Against Value of Use of Division Fence.**—In an action to recover the value of the use of a division fence between lands of plaintiff and defendant the latter may recoup damages caused by plaintiff's cattle breaking through such fence and trespassing on defendant's land; in such case the subject matter is the division fence. Scott *v.* Kenton, 81 Ill. 96.

[g] **Negligence Against Contract.** When, by the terms of a lease the lessee was to construct additions to the leased premises, in an action for the price of such additions the lessor may recoup damages caused by plaintiff's negligence resulting in the destruction by fire of the leased building. Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179.

[h] **Embezzlement, Conversion or Destruction of Chattels.**—In assumpsit for work and labor the defendant may plead damages caused by plaintiff's embezzlement or conversion of chattels the care of which was imposed upon plaintiff by the contract of employment. Brigham *v.* Hawley, 17 Ill. 38.

[i] **In an action for services** the employer (1) may recoup damages caused by employe's concealing tools furnished to him wherewith to do the work in question. Brigham *v.* Hawley, 17 Ill. 38. (2) So also in such an action the employer may recoup damages caused by the employe's seduction of defendant's daughter, committed during the time of employment. In every contract of service there is implied an agreement by employe not to be guilty of any immoral conduct. The employe's conduct in that case constituted a breach of such agreement. Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246.

89. Roberts *v.* Carter, 38 N. Y. 107; Edgerton *v.* Page, 20 N. Y. 281 (*affirming* 1 Hilt. 320, which reverses 12 How. Pr. 58); New York *v.* Parker V. S. Co., 21 How. Pr. 289, 12 Abb. Pr. 300, 8 Bosw. 300; Cram *v.* Dresser, 2 Sandf. 120; Drake *v.* Cockroft, 1 Abb. Pr. 203, 4 E. D. Smith 34, 10 How. Pr. 377.

90. Harman *v.* Bannon, 71 Md. 424, 18 Atl. 862. See *supra*, VII, C, 2, d.

91. **Cal.**—Dennis *v.* Belt, 30 Cal. 247. **Ind.**—Curtis *v.* Chicago & E. Ry. Co. (Ind. App.), 119 N. E. 723. **Mo.** Dyas *v.* Hanson, 14 Mo. App. 363. **Mont.**—Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083. **N. Y.**—McDougall *v.* Walling, 48 Barb. 364; Shipman *v.* Lansing, 25 Hun 290; Harrington *v.* Jaeckel, 133 N. Y. Supp. 933.

See *supra*, VII, C, 2, b.

92. **Ark.**—Epstein *v.* Buckeye Cotton Oil Co., 106 Ark. 241, 153 S. W. 587. **Conn.**—Downing *v.* Wilcox, 84 Conn. 437, 80 Atl. 288. **Del.**—Morrow *v.* Frankish, 4 Boyce 534, 89 Atl. 740. **Fla.**—Brash *v.* Ehrman, 56 Fla. 153, 47 So. 937; Matthews *v.* Lindsay, 20 Fla. 962. **Ga.**—Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361; Robson & Evans *v.* Weatherly Lumber Co., 12 Ga. App. 781, 78 S. E. 610. **Ill.**—Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484. **Kan.** — Sponenbarger *v.* Lemert, 23 Kan. 55; Carver *v.* Shelly & Co., 17 Kan. 472; Harrison *v.* Slone, 4 Bush 577. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Pa.** Halfpenny *v.* Bell, 82 Pa. 128. **S. C.** Manning *v.* Watson, Cheves 60. **Vt.** Herrick *v.* Richardson, 17 Vt. 375.

See *supra*, VII, C, 2, c.

93. See *supra*, VII, C, 2, b, (VII).

b. *Contract Against Tort.* — (I.) Counterclaim. — (A.) When Not Connected With Tort Sued on. — A counterclaim in contract is not available in a tort action where it has no connection with the transaction.[94] Thus a debt or demand based on contract cannot be set up in a tort action for independent conversion,[95] fraud and deceit,[96] libel and slan-

94. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; People *v.* Dennison, 84 N. Y. 272; Smith *v.* Hall, 67 N. Y. 48; Chambers *v.* Lewis, 28 N. Y. 454, 16 Abb. Pr. 433. **N. C.**—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Holliday *v.* McMillan, 83 N. C. 270; Mauney *v.* Ingram, 78 N. C. 96. **Okla.** First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668. **Tex.**—Hillman *v.* Edwards (Tex. Civ. App.), 74 S. W. 787. **Utah.**—Kunkel *v.* Utah Lumber Co., 29 Utah 13, 81 Pac. 897. **Wis.** Ring *v.* Ogden, 45 Wis. 303.

95. **Ind.**—Block *v.* Swango, 10 Ind. App. 600, 38 N. E. 55. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972. **N. D.**—Roney *v.* H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688. **Wis.** Scheunert *v.* Kaehler, 23 Wis. 523.

[a] **In an action for conversion of goods,** the defendant (1) is not entitled to plead by way of counterclaim a liability of plaintiff as a stockholder in a certain corporation (Chambers *v.* Lewis, 28 N. Y. 454), or (2) a debt owing defendant by plaintiff on stated account. Curlee *v.* Rogan (Tex. Civ. App.), 136 S. W. 1126.

[b] **An independent claim for services** (1) cannot be asserted in an action for conversion. Comer *v.* Board of Comrs., 32 Ind. App. 477, 70 N. E. 179; Barker *v.* Platt, 1 N. Y. Supp. 415; Rochester Dist. Co. *v.* O'Brien, 72 Hun 462, 25 N. Y. Supp. 281, 55 N. Y. St. 149. (2) In an action against an attorney for conversion of his client's funds, a counterclaim for defendant's services is not allowable, unless it be alleged that such services were rendered in the action in which the money in question was recovered. Rochester Dist. Co. *v.* O'Brien, 72 Hun 462, 25 N. Y. Supp. 281, 55 N. Y. St. 149.

[c] **Replevin Bond Against Conversion.**—A claim for breach of a replevin bond is not available as counterclaim in conversion although such bond was executed in an unsuccessful action by plaintiff to recover the property alleged to have been converted. Majerus *v.* Hoscheid, 11 Minn. 243.

[d] **A warehouseman sued for conversion** of personal property cannot counterclaim a demand for the costs of its storage. Schaefer *v.* Empire Lith. Co., 28 App. Div. 469, 51 N. Y. Supp. 104.

[e] **A counterclaim for use and occupation** of premises cannot be asserted in an action for conversion of rents and profits collected by defendant as agent of plaintiff upon other premises. Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Supp. 344.

[f] **Defendant cannot assert a lien for keep of a horse** as a counterclaim in an action for conversion of the horse in which plaintiff claims the horse through a contract subsequent to the one invoked by defendant. Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130.

[g] **Rent Against Conversion.**—In an action for money had and received, based upon a landlord's tortious conversion of defendant's money upon the leased premises, rent of such premises does not arise out of, nor is it connected with, such conversion. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873.

[h] **In conversion for refusal to deliver the subject of a pledge** after payment of the debt which it was intended to secure, a counterclaim growing out of the indorsement of promissory notes and in no way connected with the transaction set forth in the complaint is not available. Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972.

[i] **Judgment Against Conversion.** A judgment against plaintiff cannot be counterclaimed against his demand for damages for conversion of chattels. Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494, *reversing* (Mo. App.), 79 S. W. 743.

[j] **Stockholder's Liability Against Conversion.** — Chambers *v.* Lewis, 11 Abb. Pr. (N. Y.) 210.

96. Hanson *v.* Byrnes, 96 Minn. 50, 104 N. W. 762; Pattison *v.* Richards, 22 Barb. (N. Y.) 143.

der,[97] or other tort,[98] unless permitted by statute.[99]

(B.) When Connected With Tort Sued on. — A counterclaim in contract may, however, be pleaded in a tort action when it arises out of the transaction or subject of the action.[1] Thus counterclaims based on contract have been asserted when connected with the conversion[2]

[a] **Labor and Material Against Fraud.**—In action to recover damages caused by defendants having obtained overpayment for labor and material through false and fraudulent misrepresentations as to quantity of labor and material furnished, defendant cannot counterclaim the money alleged to be due upon the contract under which such services were to be performed. People *v.* Dennison, 84 N. Y. 272.

[b] **Breach of Loan Contract Against Fraud.**—Where lender sues for damages caused by defendant's fraud consisting in failure to use the borrowed money to remove incumbrances upon the mortgaged premises, defendant may counterclaim the amount of the loan which was given by plaintiff to his agent to remove incumbrances, and by such agent converted to his own use. The loan contract was the transaction, and both plaintiff's and defendant's claims were connected therewith. Bowman & Co. *v.* Lickey, 86 Mo. App. 47.

97. Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304.

98. Davis *v.* Frederick, 6 Mont. 300, 12 Pac. 664.

[a] **In an action to recover damages for unlawful arrest** on civil process defendant cannot counterclaim the judgment rendered in his favor in the action in which such arrest was made. Ferris *v.* Armstrong Mfg. Co., 57 Hun 592, 10 N. Y. Supp. 750, 32 N. Y. St. 908.

[b] **In a suit for injunction against trespasses upon land,** a claim based on independent cause of action for services rendered plaintiff as domestic, not available. Davis *v.* Davis, 93 Ark. 93, 124 S. W. 525.

99. See *infra*, this note.

[a] **Allowable Under Statute.** — A claim for damages for breach of contract may be counterclaimed in an action for conversion under statute providing that, where plaintiff is a nonresident, defendant may, by way of counterclaim, set up any cause of action he may have against plaintiff, without regard to the nature of plaintiff's action. Phoenix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151, *citing* Rev. St. Wis., 1882, §2656. Same provision in §2656 Wis. St. 1915.

1. **Ind.**—Curtis *v.* Chicago & E. Ry. Co. (Ind. App.), 119 N. E. 723; Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852; Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981. **Kan.** Sponenbarger *v.* Lemert, 23 Kan. 55. **Mo.**—Ritchie *v.* Hayward, 71 Mo. 560. **Mont.**—Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083. **N. Y.**—Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 378, 394, 2 Bosw. 694; Ter Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5, 63 N. Y. St. 355; Harrington *v.* Jaeckel, 133 N. Y. Supp. 933. **N. C.** Bitting *v.* Thaxton, 72 N. C. 541; Walsh *v.* Hall, 66 N. C. 233.

2. Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694; Ter Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5, 63 N. Y. St. 355; New York, L. E. & W. R. Co. *v.* Davies, 38 Hun 477.

[a] **In an action for conversion** of sacks, a counterclaim was admitted which showed that the sacks were delivered to defendant under a contract by which the plaintiff agreed to purchase wheat of the defendant to be delivered in the sacks and that plaintiff had not fulfilled his part of the contract. Hutchings *v.* Dean, 11 Ky. L. Rep. 310.

[b] **The balance of purchase price** of an automobile may be counterclaimed in an action by the buyer against the seller for conversion of the machine. Kinsman *v.* Stanhope, 50 Mont. 41, 144 Pac. 1083.

[c] **Balance due on note** counterclaimed in an action for damages for conversion of the note. Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387, 27 Civ. Proc. 273, 5 N. Y. Ann. Cas. 238.

or matter sued on in replevin,[3] trespass,[4] and other tort proceedings.

(II.) Recoupment. — In an action ex delicto defendant may recoup a claim based on contract which is connected with the transaction pleaded.[5]

(III.) Set-off. — Set-off is not available in actions ex delicto,[6] and so no set-off consisting of a cause of action in contract can be pleaded in a tort action,[7] such as an action for wrongful attachment,[8] for conver-

[d] **A claim for money due under a contract of agency** is a proper subject matter of counterclaim in an action for conversion of the money collected. Ter Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Supp. 5, 63 N. Y. St. 355.

3. Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852.

[a] **Claim for repairing automobile** counterclaimed in replevin for the machine. Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852.

[b] **A counterclaim for payments made under a conditional sale contract** interposed in replevin for the chattel sold. Ross P. Curtice Co. *v.* Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723.

[c] **Damages for breach of contract** by a subcontractor to finish his work within a specified time, are a proper subject of counterclaim in his action in replevin for tools taken by the contractor after cancelling the contract for failure to complete the work in the time specified. Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281.

[d] **Breach of Covenant To Repair.** In replevin for furniture to pay rent, the lease authorizing it to be taken for unpaid rent, defendant may counterclaim a breach of a covenant to repair. Collins *v.* Morrison, 91 Wis. 324, 64 N. W. 1000.

4. See *infra*, this note.

[a] **Where defendant wrongfully removes plaintiff's track** and is sued in tort for the damage, he can counterclaim for breach of the contract by which the track was constructed. Curtis *v.* Chicago & E. Ry. Co. (Ind. App.), 119 N. E. 723.

5. Turner *v.* Retter, 58 Ill. 264; Stow *v.* Yarwood, 14 Ill. 424.

[a] **A claim for services in collecting a note** recouped in a suit for conversion of the note. Turner *v.* Retter, 58 Ill. 264.

[b] **In trover for conversion of an engine** the defendant may recoup for repair work done on the engine. Stow *v.* Yarwood, 14 Ill. 424.

Recoupment in tort actions, see *supra*, V, B, 3, b; of tort claim in tort action, see *supra*, VII, C, 3, b, (II).

6. See *supra*, V, B, 3, a.

Setting off tort claim in tort action, see *supra*, VII, C, 3, b.

7. **Colo.**—Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108. **Conn.** Lovell *v.* Hammond & Co., 66 Conn. 500, 508, 34 Atl. 511. **Ga.**—Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878. **Ill.** Pugh *v.* Palmer, 201 Ill. App. 371. **Ind.**—Vancleave *v.* Beach, 110 Ind. 269, 11 N. E. 228; Boil *v.* Simms, 60 Ind. 162; Humphrey *v.* Merritt, 51 Ind. 197; Allen *v.* Randolph, 48 Ind. 496; Collins *v.* Groseclose, 40 Ind. 414; Comer *v.* Board of Comrs., 32 Ind. App. 477, 70 N. E. 179; Block *v.* Swango, 10 Ind. App. 600, 38 N. E. 55. **Md.**—Fishwick's Admr. *v.* Sewell, 4 Har. & J. 393, 404, 429. **Mich.**—Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674. **Minn.**—Hanson *v.* Byrnes, 96 Minn. 50, 104 N. W. 762. **Mo.**—Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494; State *v.* Modrell, 15 Mo. 421; State *ex rel.* Hinde *v.* United States Fidelity & Guaranty Co., 135 Mo. App. 160, 115 S. W. 1081. **Okla.**—First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668, Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977. **Pa.** Arthur *v.* Sylvester, 105 Pa. 233. **Tex.** Craddock *v.* Goodwin, 54 Tex. 578; Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181; Knight *v.* Old, 2 Wills. Civ. Cas., §§76, 78.

[a] **Although defendant pleads a judgment,** the rule applies. Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494.

[b] **Benefit to Plaintiff No Ground of Set-off.**—That the commission of the tort in question confers a benefit upon plaintiff or his property does not constitute a ground of set-off. Talbot *v.* Whipple, 7 Gray (Mass.) 122.

8. Williams *v.* Stratton, 45 Conn.

sion,[9] fraud,[10] negligence,[11] or for other tort.[12]

5. In Cases Where Party May Elect Contract or Tort. — a. *Where Plaintiff May Elect.* — The form of the action chosen by plaintiff when he has an election to sue for a tort or on a contract cannot affect the defendant's right to interpose a counterclaim[13] or recoupment.[14] The plaintiff cannot, where the defendant would have the right to plead a recoupment,[15] or a counterclaim of the class embracing recoupment,[16] to an implied promise growing out of a certain state of facts, defeat the cross-demand by adapting an action in form tort under the same circumstances.

566; Craddock *v.* Goodwin, 54 Tex. 578; Wheat *v.* Ball (Tex. Civ. App.), 68 S. W. 181.

9. **Ind.**—Vancleave *v.* Beach, 110 Ind. 269, 11 N. E. 228. **Mich.**—Dole *v.* McGraw, 71 Mich. 106, 38 N. W. 686. **N. Y.**—Adams *v.* Loomis, 54 Hun 638, 8 N. Y. Supp. 17, 28 N. Y. St. 444, 4 Silv. 558.

[a] **"We can see no good reason** why defendant's claim set forth in his cross-petition ought not to be allowed except that the universal holding of the courts seems to be against it." The above language was used in a case where defendant when sued in conversion attempted to interpose an implied contract as a set-off. Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977.

[b] **Claim on Note Not Available.** First Nat. Bank *v.* Thompson, 41 Okla. 88, 137 Pac. 668.

[c] **Claim for Money Lent.**—Sinamaker *v.* Rose, 62 Ill. App. 118; Fishwick's Admr. *v.* Sewell, 4 Har. & J. (Ind.) 393, 404, 429.

[d] **Breach of Sale Contract Against Trover.**—Harden *v.* Lang, 110 Ga. 392, 399, 36 S. E. 100; Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878.

[e] **Breach of Warranty Against Conversion.**—Lee *v.* Rutledge, 51 Md. 311.

[f] **Landlord's Breach of Lease Against Conversion.**—Crowe *v.* Kell, 7 Ind. App. 683, 35 N. E. 186.

[g] **Contribution by Co-Tenant Against Conversion.**—Russell *v.* Russell *v.* Russell, 62 Ala. 48.

10. Hess *v.* Young, 59 Ind. 379.

11. Collins *v.* Groseclose, 40 Ind. 414.

[a] **In a tort action for unliquidated damages** a cause of action upon a promissory note cannot be set-off. First Nat. Bank *v.* Mangum (Tex. Civ. App.), 176 S. W. 1197.

12. See Corpman *v.* **Backistow, 2** Pearson (Pa.) 199.

13. Gordon *v.* Bruner, 49 Mo. 570; Thompson *v.* Kessel, 30 N. Y. 383.

[a] **In an action for conversion of goods** a counterclaim of damages from breach of the contract between the parties out of which the plaintiff's cause of action arose was rejected, the court adding that it must also have been rejected even had the plaintiff brought his suit in form on the contract, which he might have done, because the right of action would still in fact be in tort. Scheunert *v.* Kaehler, 23 Wis. 523.

14. Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494.

15. Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297. See statement in note —— under ——. The court said that plaintiff could have sued in assumpsit or in tort, that, in the former case, defendant's right of recoupment would not have been questioned, that the proofs would have been the same in either case, and defendant should not be deprived of his right by plaintiff's election.

16. Ritchie *v.* Hayward, 71 Mo. 560; Gordon *v.* Bruner, 49 Mo. 570; Kamerick *v.* Castleman, 23 Mo. App. 481, 489.

[a] **In an action to compel delivery of bills of lading** wherein the plaintiffs based their case of the wrongful detention, and the defendant counterclaimed in conversion for the value of the goods the court said: "I do not think it lies with the plaintiff . . . to allege that his taking was a mere tort for the purpose of defeating the counterclaim. And even if an action, sounding in tort, might be maintained by the defendants . . . for the taking . . . I am still of the opinion that the cause of action for the value of the goods would constitute a good

b. *Election by Defendant.* — Though a tort cannot, at law, be set off against a contract,[17] the defendant may, in certain cases, elect[18] to waive[19] the tort and base his set-off,[20] or his counterclaim of the class analogous to set-off,[21] on the implied promise to pay a definite

counterclaim in such a case as this.'' Thompson *v.* Kessell, 30 N. Y. 383.

17. See *supra,* VII, C, 3, c.

18. **As to when a party has an election,** see the titles ''**Assumpsit;**'' ''**Choice and Election of Remedies,**'' and titles dealing with particular classes of cases.

19. See *infra,* this note.

[a] **Determining Question of Waiver.**—''At common law, where the form made clear the character of action brought, whether on tort or contract, it was not difficult to determine whether in conversion, the pleader relied upon the damages for a breach of the implied contract or sued on account of the wrong committed. Under the reformed procedure, however, this is not always so easy of determination for in the statement of all causes of action the facts constituting the same are pleaded, and in conversion these facts, whether the party relies upon the wrong done by the tort or the damages occasioned by the failure to comply with the terms of the implied contract, are the same unless the pleader specifically states his election, or in some other way indicates it. . . . In order to determine the question of whether the action sounds in tort or contract, the measure of damages the demand for judgment, and prayer may be consulted.'' If the cause of action set forth is doubtful or ambiguous as to whether the allegations set out present an action in contract or tort, every intendment will be given to construe the cause as in contract and not in tort. Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977. See 4 STANDARD PROC. 625; 5 STANDARD PROC. 103, 117, 362; 10 STANDARD PROC. 219, 222.

[b] **No express waiver** of the tort need appear upon the face of defendant's pleadings. First Nat. Bank *v.* Silver, 45 Mont. 231, 122 Pac. 584.

[c] **Allegation of Negligence as Fixing Character.**—Where defendant relies as a set-off upon an assigned contract claim, an allegation that plaintiff's liability to the assignor was caused by negligence, does not fix defendant's demand as one founded upon tort. Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340.

20. **Fla.**—Bates *v.* Lanier, 77 So. 628. **Ga.**—J. I. Case Threshing Mach. Co. *v.* Thurmond, 144 Ga. 21, 85 S. E. 1020; Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478; Park *v.* Carmichael, 20 Ga. App. 36, 92 S. E. 397. **Okla.**—Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977. **Tex.**—Cato *v.* Philips, 28 Tex. 101.

[a] ''It is true the defendants might have treated the unwarranted detention of their collaterals as a conversion of the same and have maintained an action of trover for their recovery, in which they might have had a verdict, either for the collaterals themselves, or for their value. But the defendants were not obliged to pursue this course and had, beyond question, the right to bring an action for the breach of the implied promise to return; and if they could bring an action of the latter kind, they surely could obtain the same results by filing a set-off to an action brought against themselves by the plaintiffs, a plea of set-off being really in the nature of a cross-action.'' McAllister *v.* Millhiser & Co., 96 Ga. 474, 23 S. E. 502.

[b] **Tort for fraud and deceit** waived and suit brought in contract. Bullinger *v.* Marshall, 70 N. C. 520.

[c] **Illegal Execution-Levy Against Note.**—Woodruff *v.* Hoard, 9 Ind. 186.

[d] **Negligence Against Contribution.**—Briggs *v.* Call, 5 Metc. (Mass.) 504.

[e] **Claim Not Made Available by Waiver.**—Where statute provides that, to constitute a set-off, matter must arise out of debt, duty or contract, defendant cannot, by waiving his right in tort, make his claim based thereon the subject of a set-off, although by the law of the jurisdiction he would have the right to so waive in bringing an action as plaintiff. Richey *v.* Bly, 115 Ind. 232, 17 N. E. 296; Piser *v.* Stearns, 1 Hilt. (N. Y.) 86; Mayor *v.* Parker V. S. Co., 8 Bosw. (N. Y.) 300.

21. **Colo.**—Michigan Stove Co. *v.*

sum. The rule is most frequently applied to cases where plaintiff has been guilty of conversion, and defendant waives the tort and sues in

Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340. **Ind.**—Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; Rooker *v.* Bruce, 45 Ind. App. 57, 90 N. E. 86. **Kan.**—Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Fanson *v.* Linsley, 20 Kan. 235. **Ky.** Eversole *v.* Moore, 3 Bush 49. **Minn.** Brady *v.* Brennan, 25 Minn. 210. **Mo.** Barnes *v.* McMullins, 78 Mo. 260, 275; Gordon *v.* Bruner, 49 Mo. 570; Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27; Garnett & Allen Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736; Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280; McCuin *v.* Frazier, 38 Mo. App. 63. **Mont.** First Nat. Bank *v.* Silver, 45 Mont. 231, 122 Pac. 584. **N. Y.**—Wood *v.* Mayor, 73 N. Y. 556; Coit *v.* Stewart, 50 N. Y. 17, *affirming* 12 Abb. Pr. (N. S.) 216; Starr Cash Car Co. *v.* Reinhardt, 2 Misc. 116, 20 N. Y. Supp. 733, 52 N. Y. St. 942; Harway *v.* New York, 1 Hun 628, 4 Thomp. & C. 167. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **N. C.**—Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230. **Ore.**—La Grande Nat. Bank *v.* Oliver, 84 Ore. 582, 165 Pac. 682; Zigler *v.* McClellan, 15 Ore. 499, 16 Pac. 179. **Pa.**—Heber *v.* Estate of Heber, 139 Wis. 472, 121 N. W. 329; Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782.

[a] **"Where such right of election** obtains and the suit is in contract, the law is well-nigh universal to the effect that one may, under the second subdivision of the statute, set forth a counterclaim as also arising on contract, though it originated in the tortious act of plaintiff, if the tort is waived and an implied contract declared upon provided a right of recovery therefor existed at the commencement of the action." Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27.

[b] **Where a bank converts proceeds from sale of grain** a landlord who is entitled to such proceeds by reason of a lien on the grain, may, when sued by the bank on a note, waive the tort and counterclaim against the bank for money had and received. La Grande Nat. Bank *v.* Oliver, 84 Ore. 582, 165 Pac. 682.

[c] **Negligence in Loading Goods.** In a suit on an account for goods, wares and merchandise, the defendant may counterclaim a demand for damages caused by plaintiff's negligence in loading defendant's goods on cars, where such negligence grows out of a breach of contract. Michigan Stove Co. *v.* Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340.

[d] **For Use of Wagon and Harness.**—In an action on account, defendants allowed to counterclaim for plaintiffs having deprived defendant of the use of a wagon and harness. Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27.

[e] **Overpayments secured from defendant by fraud** consisting in plaintiffs invoicing purchases of paper at weights in excess of the true weights, may be recovered by way of counterclaim for money had and received, interposed in a suit for the purchase price of the paper. Garnett & Allen Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736.

[f] **Trespass Against Book Account.** In action upon book account, defendant may set off the value of pasturage of plaintiff's cattle which have trespassed upon defendant's land, upon the theory that defendant waives the tort and sues upon plaintiff's implied agreement to pay the reasonable value of pasturing his cattle while trespassing. Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782.

[g] **Fraud Against Account.**—In an action on account defendant may counterclaim damages caused by plaintiff's fraudulent representations concerning an article sold, although such article is not included in the account sued on. Bryce *v.* Parker, 11 S. C. 337.

[h] **Money Illegally Received by Official Against His Claim for Services.** Wood *v.* Mayor, 73 N. Y. 556.

[i] **Collusion or Fraud by Public Contractor.**—In action by assignee of a city's creditor, defendant may show that such creditor by collusion with, or deception of city officials, plaintiff's assignor obtained payments on account, to which he was not entitled. Harway *v.* New York, 1 Hun (N. Y.) 628, 4 Thomp. & C. 167.

[j] **Breach of Attachment Bond.** Although the breach of such a bond

assumpsit.[22] Where the relation of the parties is such that the law will not imply a contract on plaintiff's part, the rule as to waiver of tort has no application.[23]

c. *Election by Both Parties.* — Where plaintiff having a cause of action based upon tort, elects to waive the tort, and sue upon an implied assumpsit, defendant, having a similar cause of action, may also waive the tort and present a counterclaim based upon an implied assumpsit.[24]

6. Subsisting Cause of Action. — a. *In General.* — The matter which defendant interposes as a set-off, recoupment or counterclaim, must amount to a cause of action upon which he himself could maintain suit.[25]

b. *Matured and Existing.* — A mere contingent liability cannot be made the basis of a cross-demand in an action at law,[26] a rule which

involves a tort, a cause of action for such breach arises ex contractu. State *ex rel.* Hinde *v.* United States Fid. & G. Co., 135 Mo. App. 160, 115 S. W. 1081.

[k] **The mere use of the terms "carelessly and negligently"** in connection with a bailment does not make the counterclaim one in tort where it otherwise appears to be on contract. See Russell *v.* Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341. *Compare* 10 STANDARD PROC. 222.

22. U. S.—Allen *v.* United States, 17 Wall. 207, 21 L. ed. 553, 8 Ct. Cl. 90. **Ala.**—Sledge *v.* Swift, Murphy & Co., 53 Ala. 110. **Conn.**—Bulkeley *v.* Welch, 31 Conn. 339. **Ga.**—Sanderlin *v.* Willis, 94 Ga. 171, 21 S. E. 291. **Minn.** Downs *v.* Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Brady *v.* Brennan, 25 Minn. 210. **Mo.**—Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27. **N. Y.**—Coit *v.* Stewart, 50 N. Y. 17; Starr Cash Car Co. *v.* Reinhardt, 2 Misc. 116, 20 N. Y. Supp. 733, 52 N. Y. St. 942. **N. C.**—Wall *v.* Williams, 91 N. C. 477. **S. C.**—Gibbes *v.* Mitchell, 2 Bay 351. **Va.**—Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864, 8 Ann. Cas. 736. **Wis.**—Heber *v.* Estate of Heber, 139 Wis. 472, 121 N. W. 329.

[a] **Conversion of money waived** and set off based on the implied promise to pay back the money to defendant. Bates *v.* Lanier (Fla.), 77 So. 628.

[b] **A defendant sued on an open account** can plead in set-off that he was damaged by plaintiff's wrongful refusal, after demand, to return certain notes belonging to defendant, and pledged as collateral for another debt due the plaintiff, which was paid. McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502.

[c] **Conversion Against Freight.** Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133.

[d] **Conversion Against Labor.** Fanson *v.* Linsley, 20 Kan. 235.

[e] **Conversion Against Money Had and Received.**—McCabe *v.* Winship, 15 Fed. Cas. No. 8,668.

23. See *infra*, this note.

[a] **Obligation for Rent Not Implied When Use Adverse.**—When, in action on contract defendant attempts to counterclaim the value of the use and occupation of certain land, and it appears that plaintiff's possession was adverse and under a claim of title, no contract to pay rent is implied, and counterclaim is not allowable. Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456.

24. Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 36, 80 N. E. 981.

25. See *supra*, I, A; VII, C, 1.

26. Ia.—Hagan *v.* Merchants & B. Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493. **Kan.**—Abeles *v.* Cohen, 8 Kan. 180. **Ky.**—McGraw *v.* Hutton, 15 Ky. L. Rep. 653; Robinson & Co. *v.* Shelton, 4 Ky. L. Rep. 996; Adams *v.* Craycroft, 1 Ky. L. Rep. 330. **N. H.**—Toppan *v.* Jenness, 21 N. H. 232. **N. Y.**—Lacour *v.* Landry, 9 Rob. 529; Pennsylvania Steel Co. *v.* Sussewein, 132 App. Div. 659, 117 N. Y. Supp. 436. **Ohio.**—Colvin *v.* Carter, 4 Ohio 354. **Pa.**—Garrison *v.* Paul, 1 Penny. 380. **S. C.**—McCullough *v.*

is frequently invoked to prevent the setting off of a contingent liability of a debtor to a garnishee.[27] Defendant's claim or demand[28] must have

Madison, 1 Rice Eq. 38. **Vt.**—Carpenter *v.* Coit, 1 D. Chip. 88. **Wash.** Batley *v.* Dewalt, 56 Wash. 431, 105 Pac. 1029.

[a] **A mere obligation to pay plaintiff's notes** cannot constitute a set-off for until the notes are actually paid by defendant he has no cause of action against plaintiff. Second Baptist Church *v.* Beecham (Mo. App.), 180 S. W. 1065.

[b] **Mere interference with contractual relations** does not give rise to a cause of action available as a cross-demand unless the person through whose fault the contract is breached is guilty of some act amounting to a tort and damages are suffered as a result thereof. Turner *v.* Fulcher, 165 N. Y. Supp. 282.

Where personal liability on secured debt is contingent on deficiency after foreclosure sale, see *infra,* VII, C, 6, d, (IV), (B).

27. U. S.—Taylor *v.* Gardner, 2 Wash. C. C. 488, 23 Fed. Cas. No. 13,791. **Ark.**—Watkins *v.* Field, 6 Ark. 391. **D. C.**—Rhodes *v.* Bowling Green, etc. Co., 43 App. Cas. 298. **Ill.** National Bank of America *v.* Indiana Bkg. Co., 114 Ill. 483, 494, 2 N. E. 401. **Minn.**—Milliken *v.* Mannheimer, 49 Minn. 521, 52 N. W. 139. **Vt.** Husted *v.* Stone, 69 Vt. 149, 37 Atl. 253.

[a] **Liability of defendant as indorser of note discounted by garnishee** and not mature, is a contingent liability which cannot be set off. National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Husted *v.* Stone, 69 Vt. 149, 37 Atl. 253.

[b] **A note not discounted or used,** signed for defendant's accommodation and delivered to him does not constitute a set-off. Milliken *v.* Mannheim, 49 Minn. 521, 52 N. W. 139.

[c] **Surety as Garnishee.** — Surety cannot offset the debt for which he is surety until he has paid the same. **Ark.**—Watkins *v.* Field, 6 Ark. 391. **Me.**—Ingalls *v.* Dennett, 6 Me. 79. **Pa.** Roig *v.* Tim, 103 Pa. 115.

[d] **Acceptor of Draft Before Payment.**—Burke, W. & Co. *v.* Taylor, 15 La. 236.

[e] **A garnishee who has given an insurance company a premium note** cannot, before loss, set off the policy for which such note was given. Marrett *v.* Equitable Ins. Co., 54 Me. 537.

28. Ala.—St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; O'Brien *v.* Anniston Pipe-Works, 93 Ala. 582, 9 So. 415; Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303; Collins *v.* Greene, 67 Ala. 211; Deens *v.* Dunklin, 33 Ala. 47. **Ark.**—Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929; Jenkins *v.* Neal, 52 Ark. 418, 12 S. W. 1015. **Cal.** McKean *v.* German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656; Story & Isham Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671; Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Quinn *v.* Smith, 49 Cal. 163; Belleau *v.* Thompson, 33 Cal. 495; Wakeman *v.* Vanderbilt, 3 Cal. 380; L. Scatena & Co. *v.* Van Loren Sels, 19 Cal. App. 187, 126 Pac. 187. **Colo.** Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846; Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209; Canfield *v.* Arnett, 17 Colo. App. 426, 68 Pac. 784. **Conn.** Parsons *v.* Root, 41 Conn. 161. **Del.** Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858. **Ill.**—Chicago Southern Branch Dock Co. *v.* Dunlap, 32 Ill. 207; Ryan *v.* Barger, 16 Ill. 28; Jones *v.* Adams, 81 Ill. App. 183. **Ind.** Stoner *v.* Swift, 164 Ind. 652, 74 N. E. 248; Indiana Mut. Bldg. & L. Assn. No. 2 *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Boil *v.* Simms, 60 Ind. 162; Reynolds *v.* Roudabush, 59 Ind. 483; Tabor *v.* Mackkee, 58 Ind. 290; Brake *v.* King, 54 Ind. 294; Lovejoy *v.* Robinson, 8 Ind. 399; Morrison *v.* Gliddon, 7 Ind. 561; Conner *v.* Winton, 7 Ind. 523. **Ia.**—Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797; Exline *v.* Lowery, 46 Iowa 556; McCrary *v.* Deming, 38 Iowa 572; Reed *v.* Darlington, 19 Iowa 349; Reed *v.* Chubb, 9 Iowa 178. **Kan.**—Corlett *v.* Mutual Benefit L. Ins. Co., 60 Kan. 134, 55 Pac. 844; Collins *v.* Martin, 43 Kan. 182, 23 Pac. 95; Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Abeles *v.* Cohen, 8 Kan. 180. **Ky.**—Clark *v.* Finnell, 16 B. Mon. 329;

Brown *v.* Farmers' Bank, 6 Bush 198; Hutchings *v.* Moore, 4 Metc. 110; Bennett *v.* McCrocklin, 3 Metc. 322; Slone *v.* Slone, 2 Metc. 339; Bramblett *v.* Slemp, 32 Ky. L. Rep. 1329, 108 S. W. 339; Robinson & Co. *v.* Skelton, 4 Ky. L. Rep. 996. **Me.**—Cutler *v.* Gilbreth, 53 Me. 176. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **Mass.** Tilton *v.* Goodwin, 183 Mass. 236, 66 N. E. 802; Spaulding *v.* Backus, 122 Mass. 553; Fargo *v.* Saunders, 4 Allen 378; Cutler *v.* Middlesex Factory Co., 14 Pick. 483. **Mich.**—Wyckoff *v.* Bishop, 115 Mich. 414, 73 N. W. 392; Backus *v.* Morrill, 107 Mich. 466, 65 N. W. 273; Meyer *v.* Montgomery, 87 Mich. 278, 49 N. W. 616; Widrig *v.* Taggart, 51 Mich. 103, 16 N. W. 251. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Brackett *v.* Osborne, 31 Minn. 454, 18 N. W. 153; Linn *v.* Rugg, 19 Minn. 181; Barker *v.* Walbridge, 14 Minn. 469; Englebrecht *v.* Rickert, 14 Minn. 140; Swift *v.* Fletcher, 6 Minn. 550. **Miss.**—Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488; Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70. **Mo.**—Missouri Pac. R. Co. *v.* Kansas City & I. Air Line Co., 189 Mo. 538, 88 S. W. 3; Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Berthold *v.* O'Hara, 121 Mo. 88, 96, 25 S. W. 845; Ritchie *v.* Hayward, 71 Mo. 560; Russell *v.* Owen, 61 Mo. 185; Holzbauer *v.* Heine, 37 Mo. 443; Miller *v.* Crigler, 83 Mo. App. 395; Heman *v.* McNamara, 77 Mo. App. 1; Reed *v.* Peper Tobacco Warehouse Co., 2 Mo. App. 82. **Mont.**—Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943; Ryan *v.* Dunphy, 4 Mont. 342, 1 Pac. 710. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Wehn *v.* Fall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397; Shabata *v.* Johnston, 53 Neb. 12, 73 N. W. 278; Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. H.**—Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442; Weaver *v.* Rogers, 44 N. H. 112; Toppan *v.* Jenness, 21 N. H. 232; Molineux *v.* Eastman, 14 N. H. 504. **N. J.**—Ostheimer *v.* Single, 73 N. J. Eq. 539, 68 Atl. 231. **N. Y.**—Evernghim *v.* Ensworth, 7 Wend. 326; Franklin Bank *v.* Raymond, 3 Wend. 69; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 2 Bosw. 694; Curtis *v.* Barnes, 30 Barb. 225; Coakley *v.* Mahar, 36 Hun 157; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537; Nichols *v.* Riley, 118 App. Div. 404, 103 N. Y. Supp. 554; Theobold *v.* Gotham Waist Co., 169 N. Y. Supp. 498; Turner *v.* Fulcher, 165 N. Y. Supp. 282; Pennsylvania Steel Co. *v.* Susswein, 117 N. Y. Supp. 463. **N. C.** Askew *v.* Koonce, 118 N. C. 526, 24 S. E. 218; Devries & Co. *v.* Warren, 82 N. C. 356; Battle *v.* Thompson, 65 N. C. 406. **N. D.**—J. L. Owens Co. *v.* Doughty, 17 N. D. 368, 116 N. W. 340; Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **Ohio**—Peter *v.* Farrel Foundry & M. Co., 53 Ohio St. 534, 42 N. E. 690; Quebec Bank *v.* Weyand, 30 Ohio St. 126; Marthens *v.* Dudley, 7 Ohio Dec. (Reprint) 215; Hill *v.* Butler, 6 Ohio St. 207. **Okla.**—Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009. **Ore.**—Maffett *v.* Thompson, 32 Ore. 546, 52 Pac. 565, 53 Pac. 854; Loewenberg *v.* Rosenthal, 18 Ore. 178, 22 Pac. 601; Burrage *v.* Bonanza Gold, etc. Min. Co., 12 Ore. 169, 6 Pac. 766. **Pa.**—Com. *v.* Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574; Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. 640, 64 Atl. 398; Ahl *v.* Rhoads, 84 Pa. 319. **S. C.** Daniel *v.* Ray, 1 Hill 32; Massey *v.* Craine, 1 McCord 489. **S. D.**—Moreley *v.* Cole, 38 S. D. 564, 162 N. W. 367; McKinney *v.* Sundback, 3 S. D. 106, 52 N. W. 322. **Tenn.**—Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712; Key *v.* Wilson, 3 Humph. 405. **Tex.**—Evans *v.* Bell, 45 Tex. 553; Holliman *v.* Rogers, 6 Tex. 91; Voorheis *v.* Fry (Tex. Civ. App.), 52 S. W. 580. **Utah.**—Dunham *v.* Travis, 25 Utah 65, 69 Pac. 468. **Vt.**—Ewing *v.* Griswold, 43 Vt. 400; Brooks, Jr. & Co. *v.* Jewell, 14 Vt. 470. **Wis.** Computing Scale Co. *v.* Churchill, 109 Wis. 303, 85 N. W. 337; McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173; Taylor *v.* Matteson, 86 Wis. 113, 56 N. W. 829; Muth *v.* Frost, 68 Wis. 425, 32 N. W. 231; Greve *v.* Schweitzer, 36 Wis. 554; Resch *v.* Senn, 31 Wis. 138; Jarvis *v.* Peck, 19 Wis. 74.

Performance of conditions precedent, see *infra,* VII, C, 6, d, (IV).

[a] **A note due on demand** can be set off at any time. Com. *v.* Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574.

[b] **Damages for Failure To Complete Grading.**—In consideration of

matured and ripened into a cause of action which he could enforce directly, and be still existing when sought to be asserted.[29]

c. *Existing at Beginning of Action.* — (I.) **In General.** — Certain cross-demands must be existing causes of action at the commencement of the suit,[30] and where that is true, a demand cannot be set up which defendant acquired after the commencement of the action.[31] A demand for damages growing out of the institution or conduct of the suit itself cannot generally be used as a cross-demand.[32]

(II.) **Set-off.** — A set-off should be an existing and enforceable claim or debt at the commencement of the action in which it is pleaded.[33]

the execution of a lease of a portion of a tract of land, the lessee agreed to build a crib dock upon the premises within three months, and further agreed to grade a portion of the land, no time for the completion of the grading being mentioned. Where the lessee sued during the term for the price of the dock, the lessor cannot counterclaim for damages for failure to complete the grading, as under the contract the lessee was entitled to complete the grading at any time before the lease expired. Pennsylvania Steel Co. *v.* Susswein, 132 App. Div. 659, 117 N. Y. Supp. 436.

[c] **An immature debt against a devisee** cannot be set off against his demand for his distributive share. Hayes *v.* Hayes, 2 Del. Ch. 191, 73 Am. Dec. 709.

[d] **The right of a bank to set off indebtedness of a depositor** against a claim for the deposit, (1) cannot be exercised unless depositor's debt to the bank is due. State *v.* Beach, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; Heidelbach *v.* Nat. Park Bank, 87 Hun 117, 33 N. Y. Supp. 794, 67 N. Y. St. 438. (2) Not against the holder of a check drawn by such depositor. Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655; Van Allen *v.* American Nat. Bank, 3 Lans. (N. Y.) 517.

29. Francis *v.* Dodsworth, 4 C. B. 202, 17 L. J. C. P. 185, 56 E. C. L. 202, 136 Eng. Reprint 482.

[a] **Discharged in Bankruptcy.** Francis *v.* Dodsworth, 4 C. B. 202, 17 L. J. C. P. 185, 56 E. C. L. 202, 136 Eng. Reprint 482.

30. See *infra*, VII, C, 6, c.

31. See *infra*, VII, C, 8.

32. See *infra*, VII, C, 6, c, (VII).

33. **Ala.**—Middleton *v.* Foshee, 192 Ala. 265, 68 So. 890; Goldthwaite *v.* National Bank, 67 Ala. 549; Wood *v.* Steele, 65 Ala. 436; Jones *v.* Blair, 57 Ala. 457; Johnson *v.* King, 20 Ala. 270; McDade *v.* Mead, 18 Ala. 214; Tuscumbia C. & D. R. Co. *v.* Rhodes, 8 Ala. 206; Cox *v.* Cooper, 3 Ala. 256. **Ark.** Mueller *v.* Breckenridge, 121 Ark. 633, 181 S. W. 145. **Conn.**—Parsons *v.* Root, 41 Conn. 161; Henry *v.* Butler, 32 Conn. 140; Finch *v.* Ives, 28 Conn. 115; Hinsdale *v.* Eells, 3 Conn. 377. **Del.**—Edwards *v.* Temple's Garnishee, 2 Harr. 322. **Ga.**—Whitaker *v.* Pope, 48 Ga. 13. **Ill.**—Ellis *v.* Cothran, 117 Ill. 458, 3 N. E. 411; Meyer *v.* Temme, 72 Ill. 574; Pettis *v.* Westlake, 4 Ill. 535; Media State Bank *v.* Garrett, 165 Ill. App. 69; Jones *v.* Adams, 81 Ill. App. 183; Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394. **Ind.**—Balser *v.* Wood, 69 Ind. 122; Judah *v.* Potter, 18 Ind. 224; Miller *v.* Rigney, 16 Ind. 327; Jackson *v.* Adamson, 7 Blackf. 597. **Ia.**—Rumsey & Co. *v.* Robinson, 58 Iowa 225, 12 N. W. 243. **Ky.**—Walker *v.* McKay, 2 Metc. 294; McConnell *v.* Morrison, 1 Litt. 206. **Me.**—Robinson *v.* Safford, 57 Me. 163; Houghton *v.* Houghton, 37 Me. 72. **Md.**—Clarke *v.* Magruder, 2 Har. & J. 77. **Mass.** Backus *v.* Spaulding, 129 Mass. 234; Warren *v.* Franklin Ins. Co., 104 Mass. 518. **Mich.**—Godkin *v.* Weber, 158 Mich. 515, 122 N. W. 1083. **Miss.** Desearn *v.* Babers, 62 Miss. 421; Carprew *v.* Canavan, 4 How. 370. **Mo.** Reppy *v.* Reppy, 46 Mo. 571; McDonald *v.* Harrison, 12 Mo. 447; Frazier *v.* Gibson, 7 Mo. 271; Second Baptist Church *v.* Beecham (Mo. App.), 180 S. W. 1065; Iler *v.* Midland Nat. Bank, 69 Mo. App. 64; Todd *v.* Crutsinger, 30 Mo. App. 145; Skaggs *v.* Given, 29 Mo. App. 612. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Shabata *v.* Johnston, 53 Neb. 12, 73 N. W. 278. **N. H.**—Toppan *v.* Jenness, 21 N. H. 232; Varney *v.* Brewster, 14 N. H. 49. **N. J.**—Hutch-

To this rule statutory exceptions are sometimes made as for example where the statutes withhold from the operation of the rule set-offs asserted in actions for debts.[34]

(III.) Recoupment. — Recoupment is restricted to demands existing at the commencement of the action,[35] but the right to recoup includes damages accruing to the time of the trial.[36]

(IV.) Counterclaim. — Counterclaims of the class formerly assertable

inson *v.* Hutchinson (N. J. Eq.), 58 Atl. 528. **N. Y.**—Mayo *v.* Davidge, 44 Hun 342, 8 N. Y. St. 844; Jefferson County Bank *v.* Chapman, 19 Johns. 322; Thompson *v.* Ellsworth, 1 Barb. Ch. 624; Hackett *v.* Connett, 2 Edw. 73. **N. C.**—Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256; Reynolds *v.* Smathers, 87 N. C. 24; Mizell *v.* Moore, 29 N. C. 255; Haughton *v.* Leary, 20 N. C. 14. **Pa.**—Russ *v.* Sadler, 197 Pa. 51, 46 Atl. 903; Hotchkiss *v.* Roehm, 181 Pa. 65, 37 Atl. 119; Roig *v.* Tim, 103 Pa. 115; Zuck *v.* McClure & Co., 98 Pa. 541; Speers *v.* Sterrett, 29 Pa. 192; Smith *v.* Ewer, 22 Pa. 116, 60 Am. Dec. 73; Morrison *v.* Moreland, 15 Serg. & R. 61; Huling *v.* Hugg, 1 Watts & S. 418. **R. I.**—Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531. **S. C.**—Union Bank *v.* Heyward, 15 S. C. 296; Shepherd *v.* Turner, 3 McCord L. 249, 15 Am. Dec. 631; Farr *v.* Hemmingway, 3 Brev. 549, 2 Tread. Const. 753. **Tenn.**—Brazelton *v.* Brooks, 2 Head 194. **Tex.**—Holliman *v.* Rogers, 6 Tex. 91. **Vt.**—Jackson *v.* Hunt, 76 Vt. 284, 56 Atl. 1010; Lewis *v.* Jewett, 51 Vt. 378; Houston *v.* Fellows, 27 Vt. 634; Carpenter *v.* Coit, 1 D. Chip. 88. **Va.**—Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789. **W. Va.**—Dickey *v.* Smith, 42 W. Va. 895, 26 S. E. 373. **Eng.** Rogerson *v.* Ladbroke, 1 Bing. 93, 8 E. C. L. 418, 7 Moore 412, 1 L. J. C. P. (O. S.) 6, 130 Eng. Reprint 39; Evans *v.* Prosser, 3 T. R. 186, 100 Eng. Reprint 524; Braithwaite *v.* Coleman, 4 N. & M. 654, 30 E. C. L. 602; Richards *v.* Jones, 6 D. & L. 52, 2 Exch. 471, 17 L. J. Exch. 277.

[a] **A claim for storage** of lumber accruing after beginning of an action for its price, not proper set-off. Godkin *v.* Weber, 158 Mich. 515, 122 N. W. 1083.

[b] **It is essential that a deposit which bank seeks to set off** be made prior to the institution of the action in which it is pleaded. Bank *v.* Wilson, 124 N. C. 561, 569, 32 S. E. 889.

34. Allen *v.* Hart, 18 Gratt. (59 Va.) 722; Ritchie *v.* Moore, 5 Munf. (19 Va.) 388, 7 Am. Dec. 688; Hoover-Dimeling Lumb. Co. *v.* Neill, 77 W. Va. 470, 87 S. E. 855. See also Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460.

[a] "**By our statute of discounts and set-offs** it is enacted that when any suit shall be commenced and prosecuted in any court within this commonwealth for any debt due by judgment, bond, bill or otherwise, the defendant shall have liberty upon trial thereof to make all the discount he can against such debt; and upon proof thereof the same shall be allowed in court. . . . Under this law the uniform practice is to allow discounts up to the time of trial. . . . This admission of offsets which have accrued or been acquired since the commencement of the suit, under our law, and their exclusion under the English law, constitute the main feature of difference in the respective systems in relation to this subject." Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460, 462.

[b] **Thus a claim assigned pendente lite** and before the trial to the defendant is a proper subject of set-off in an action for a debt. Hoover & Dimeling Lumber Co. *v.* Neill, 77 W. Va. 470, 87 S. E. 855.

35. Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Bartlett *v.* Holmes, 13 C. B. 630, 76 E. C. L. 630, 22 L. J. C. P. 182, 17 Jur. 858, 138 Eng. Reprint 1347.

36. Martin *v.* Hill, 42 Ala. 275; Atkinson *v.* Kirkpatrick, 90 Kan. 515, 135 Pac. 579; Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Platt *v.* Brand, 26 Mich. 173; Howard *v.* Johnston, 82 N. Y. 271.

[a] **Defendant may enlarge his claim** after action is begun by showing repairs made subsequent to that time, in making a heating system so as to make it conform to the requirements of the contract sued on. Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260.

as set-off are like set-off[37] confined to causes of action existing at the beginning of the suit in which they are asserted.[38] A like rule has, in some cases, been extended to counterclaims of the class connected with the matter sued on,[39] or rather it has been held that a counter-

37. See *supra*, VII, C, 5, c, (II).

38. Cal.—Perkins *v.* West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118; Lane *v.* Turner, 114 Cal. 396, 46 Pac. 290; Poly *v.* Williams, 101 Cal. 648, 36 Pac. 102; St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876; Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260; Gannon *v.* Dougherty, 41 Cal. 661; L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187. **Colo.** Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781; Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Fergus Printing & P. Co. *v.* Otter Tail, 60 Minn. 212, 62 N. W. 272; Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579. **Mo.**—Leabo *v.* Renshaw, 61 Mo. 292; Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27. **Mont.**—Hammond *v.* Thompson, 54 Mont. 609, 173 Pac. 229; Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; McGuire *v.* Edsall, 14 Mont. 359, 36 Pac. 453. **Neb.** Gurske *v.* Kelpin, 61 Neb. 517, 85 N. W. 557; Shabata *v.* Johnston, 53 Neb. 12, 73 N. W. 278; Tessier *v.* Englehart, 18 Neb. 167, 24 N. W. 734. **N. Y.** Parsons *v.* Sutton, 66 N. Y. 92; Martin *v.* Kunzmiller, 37 N. Y. 396; Rice *v.* O'Connor, 10 Abb. Pr. 362; Gleason *v.* Bush, 166 App. Div. 865, 152 N. Y. Supp. 54; Caspary *v.* Hatch, 157 App. Div. 679, 142 N. Y. Supp. 785; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537; Quayle & Son *v.* Brandow Printing Co., 116 App. Div. 9, 101 N. Y. Supp. 323; Bernheimer *v.* Hartmayer, 50 App. Div. 316, 63 N. Y. Supp. 978; Pierce *v.* Massman, 168 N. Y. Supp. 1029. **N. C.**—Griffin *v.* Thomas, 128 N. C. 310, 38 S. E. 903; Puffer & Sons Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682. **Ore.** Title Ins. & Trust Co. *v.* Northwestern Long-Distance Tel. Co., 88 Ore. 666, 173 Pac. 251. **S. C.**—Enter *v.* Quesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891; *Ex parte* Carolina Nat. Bank, 18 S. C. 289. **S. D.**—Kirby *v.* Jameson, 9 S. D. 8, 67 N. W. 854. **Tex.** Peters *v.* Chandler (Tex. Civ. App.), 51 S. W. 281; Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210. **Wash.** Conner *v.* Scott, 16 Wash. 371, 47 Pac. 761; Shelton *v.* Conant, 10 Wash. 193, 38 Pac. 1013. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167; Orton *v.* Noonan, 30 Wis. 611; Sprout *v.* Crowley, 30 Wis. 187; Rickard *v.* Kohl, 22 Wis. 506.

[a] **The express provision of the statute** defining counterclaims of this class requires them to exist at the commencement of the action in which they are set up. **Mo.**—Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27. **Mont.** Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167.

[b] **Counterclaim for Excess Payments on Drawing Account.**—A salesman brought action, immediately upon being unlawfully discharged, for weekly allowances on a drawing account. The employer counterclaimed for excess commissions paid him, but the counterclaim was held not a proper one since by the contract of employment the salesman was under no obligation to repay the excess until three months after being discharged. Theobold *v.* Gotham Waist Co., 169 N. Y. Supp. 498.

[c] **A conversion of a tenant's stock in trade by the landlord,** alleged to have occurred some time after the landlord sued the tenant for wrongfully attempting to retain possession of the premises is not a proper subject of counterclaim. Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128.

[d] **Where items accruing both before and after suit** is commenced are embraced in the counterclaim only the former can be allowed. Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27.

39. Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554; Orton *v.* Noonan, 29 Wis. 541.

[a] **The legislative intention to change the common law** does not clearly appear. Orton *v.* Noonan, 29 Wis. 541. But see *contra*, Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167, and *infra*, this section.

[b] **On the ground that issues are**

claim non-existent when plaintiff began his suit does not arise out of the transaction pleaded in the complaint as the foundation of plaintiff's claim,[40] nor is it connected with the subject of the action.[41] The correct view, however, undoubtedly is that a counterclaim arising from or connected with the contract, transaction, cause of action or subject of the action need not be in existence at the commencement of the action, providing it is an enforceable demand when sought to be asserted,[42] and in some states the rule has been extended to include, at least, counterclaims of the so-called first class which are based on an indebtedness existing at the time the action was begun but which could not be sued on till the performance of some condition precedent necessary to be pleaded.[43]

determined as of the date of the commencement of the action, demands not then matured for action are not proper counterclaims. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454; McQuire *v.* Edsall, 14 Mont. 359, 36 Pac. 453.

[c] **Rebates for commissions** on consignments for the year 1908 and not payable to defendant until the end of that year, could not be counterclaimed in a suit begun in August of 1908. L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187.

40. First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22; Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554.

41. Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554.

42. **Colo.**—Hyman *v.* Jockey Club Wine, L. & C. Co., 9 Colo. App. 299, 48 Pac. 671. **N. Y.**—Caspary *v.* Hatch, 157 App. Div. 679, 142 N. Y. Supp. 785; Bernheimer *v.* Hartmayer, 50 App. Div. 316, 63 N. Y. Supp. 978; Pierce *v.* Massman, 168 N. Y. Supp. 1029. **N. C.**—Slaughter Co. *v.* Standard Machine Co., 148 N. C. 471, 62 S. E. 599; Smith & Co. *v.* French, 141 N. C. 1, 53 S. E. 435.

[a] **In respect to the distinction between the two subdivisions of the Code** of Civil Procedure the court in a recent case said: "It would seem that the two subdivisions of that section of the Code of Civil Procedure are so plainly separate and distinct, and that subdivision two only, which relates to a counterclaim based on an independent cause of action, is limited to a cause of action existing at the time of the commencement of the action as not to require construction; but the contention of the plaintiff finds support in dictum in the opinion in the cases cited and in others. Since we are of opinion that the Legislature plainly indicated by these statutory provisions an intention that it is immaterial whether the cause of action which subdivision one of said section authorizes a defendant to interpose existed in his favor at the time the action was commenced or at any time thereafter when he is authorized to interpose the pleading, we have no hesitancy in refraining from following such expressions of opinion which were unnecessary to the decision of the question before the court even though in one instance (Reilly *v.* Lee, 85 Hun 315) the court of appeals affirmed on the opinion containing such intimation." Caspary *v.* Hatch, 157 App. Div. 679, 142 N. Y. Supp. 785, 787.

[b] **In upholding a broader interpretation** of the code than that of Orton *v.* Noonan, 29 Wis. 541, wherein it was held that a counterclaim even of the first class must exist at the commencement of the action, the court in Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167, said: "Perhaps the court in deciding this case paid too little heed to the spirit of the code and showed too much attachment to common-law rules of procedure, and that the rule in Orton *v.* Noonan might well be abrogated. It would seem that, where the Legislature has said that as to one class of causes of action they must exist when suit is commenced to be pleadable as counterclaims, and makes no such requirement as to another class, there was a reasonably plain intention to differentiate between the two."

43. Stinnett *v.* Noggle, 148 Wis.

(V.) Compensation and Reconvention. — Demands pleaded as compensation,[44] or reconvention,[45] must have existed at the commencement of the action.

(VI.) In Equity. — In view of the rule that equity follows the law,[46] it will not permit the interposition of a cross-demand not yet due or which arises after suit is brought, where the law courts would refuse to allow it,[47] unless special circumstances exist, justifying the relief,[48] such as insolvency,[49] or nonresidence[50] of the complainant.

(VII.) Demands Growing Out of Conduct of Suit Itself.— Before a cause of action in the nature of a counterclaim can accrue on account of an abuse of legal process in an action, that action must have terminated favorably to the one who asserts abuse,[51] or else the writ or process must have been wholly annulled.[52] A counter-demand cannot be predicated upon an alleged wrong done in bringing the action in which the demand is sought to be set up,[53] nor upon an unauthorized use of an

603, 135 N. W. 167.

[a] **Allowance of Claim by Town Board.**—A town treasurer sued in conversion may counterclaim an indebtedness which existed at the beginning of the action but which had to be presented to the town board for allowance precedent to the commencement of a suit to enforce it, and which was in fact so presented prior to the time it was pleaded as a counterclaim. Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167.

44. Sandel *v.* George, 18 La. Ann. 526. See Ainsworth *v.* Bank of California, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686.

45. Knox *v.* Thompson, 12 La. Ann. 114; Keene *v.* Relf, 11 La. 304.

46. See *supra*, I, G, 2.

47. **Conn.**—Parsons *v.* Root, 41 Conn. 161. **Ill.**—Voorhees *v.* Mason, 182 Ill. App. 569. **Mass.**—Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391. **Miss.** McIntyre *v.* E. E. Forbes Piano Co., 100 Miss. 517, 56 So. 457.

48. **Ga.**—Bibb Land-Lumber Co. *v.* Lima Machine Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401. **Mass.**—Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; Aldrich *v.* Campbell, 4 Gray 284; Bigelow *v.* Folger, 2 Metc. 255. **Miss.**—McIntyre *v.* E. E. Forbes Piano Co., 100 Miss. 517, 56 So. 457. **N. Y.**—Bradley *v.* Angel, 3 N. Y. 475; Lindsay *v.* Jackson, 2 Paige 581; Assets Realization Co. *v.* Buffalo, 118 App. Div. 571, 103 N. Y. Supp. 153.

49. **Ill.**—Voorhees *v.* Mason, 182 Ill. App. 568. **Ind.**—Eigenmann *v.* Clark, 21 Ind. App. 129, 51 N. E. 725. **Mass.** Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; Aldrich *v.* Campbell, 4 Gray 284; Bigelow *v.* Folger, 2 Metc. 255. **N. Y.**—Richards *v.* La Tourette, 119 N. Y. 54, 23 N. E. 531; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726; Bradley *v.* Angel, 3 N. Y. 475; Lindsay *v.* Jackson, 2 Paige 581.

Insolvency as ground for relief generally, see *supra*, I, G, 3, b, (I).

[a] **Mere insolvency** not sufficient to justify set-off of claim not due. Mechanics' Bank *v.* Stone, 115 Mich. 648, 74 N. W. 204.

50. Bibb Land-Lumber Co. *v.* Lima Machine Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401; McIntyre *v.* E. E. Forbes Piano Co., 100 Miss. 517, 56 So. 457.

Nonresidence a ground for relief generally, see *supra*, I, G, 3, b, (II).

51. Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210. See Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554.

52. Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554.

53. See *infra*, this note.

[a] **That the action was maliciously** brought not a good counterclaim, a judgment favorable to defendant is necessary to a right of action based on such malicious suing out of process. Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

[b] **Conspiracy To Bring Suit in Question.**—In an action upon a promissory note defendant cannot counterclaim conspiracy between plaintiff and his assignor to damage defendant by bringing the action in question. As

ancillary remedy in such action.[54] Thus defendant cannot counterclaim damages for wrongful seizure of property in the same suit under attachment[55] or claim and delivery process,[56] or for the wrongful use of a restraining order.[57]

d. *Valid and Enforceable.* — (I.) **In General.** — The cause of action sought to be set up as a cross-demand must be one which the law will recognize and enforce,[58] and should not therefore be based on a breach

such conspiracy was not complete until action filed it could not arise out of the contract or transaction pleaded by plaintiff. Arkansas City First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22.

54. Ind.—Newkirk *v.* Neild, 19 Ind. 194, 81 Am. Dec. 383. **Ia.**—Youngerman *v.* Long, 95 Iowa 185, 63 N. W. 674. **Kan.**—Arkansas City First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22. **Minn.**—Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554. **N. Y.**—Moore *v.* Trimmer, 52 Hun 612, 6 N. Y. Supp. 430, 17 Civ. Proc. 99, 23 N. Y. St. 2, 1 Silver. 171. **N. C.**—Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277. **Tex.**—Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

[a] **Where the action is in contract** such tort claim would not be available under the rule which refuses to allow cross-demands based on independent torts in actions on contract. See *supra*, VII, C, 3, c, and Schmidt *v.* Bickenbach, 29 Minn. 122, 12 N. W. 349; Leyser *v.* Rindskopf, 3 N. M. 382, 5 Pac. 540.

55. Ia.—Youngerman *v.* Long, 95 Iowa 185, 63 N. W. 674. **Ky.**—Nolle *v.* Thompson, 3 Metc. 121; Abernathy *v.* Myer-Bridges Coffee & Spice Co., 30 Ky. L. Rep. 844, 99 S. W. 942. **Minn.** Hall *v.* Parsons, 105 Minn. 96, 117 N. W. 240; Jones *v.* Swank, 54 Minn. 259, 55 N. W. 1126; Schmidt *v.* Bickenbach, 29 Minn. 1222, 12 N. W. 349. **N. M.**—Leyser *v.* Rindskopf, 3 N. M. 382, 5 Pac. 540. **N. C.**—Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277. **S. D.**—Hoeven *v.* Morley, 36 S. D. 421, 155 N. W. 191; Tuthill *v.* Sherman, 32 S. D. 103, 142 N. W. 257. **Wash.**—Tacoma Mill Co. *v.* Perry, 32 Wash. 650, 73 Pac. 801.

[a] **In Action for Work and Labor.** Jeffreys *v.* Hancock, 57 Cal. 646.

[b] **In Action for Purchase Price of Goods.**—Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008.

[c] **A claim for malicious prosecution** in suing out an attachment in the suit is not admissible as a counterclaim. Carver *v.* Shelly & Co., 17 Kan. 472.

[d] **Wrongful Attachment Against Supersedeas Bond.**—In action upon a supersedeas bond, defendant cannot counterclaim damages caused by wrongful attachment issued in the action in which such bond was given. Brisley *v.* Mahaffey (Okla.), 167 Pac. 984.

[e] **In a suit on an open account** a counterclaim based on the wrongful attachment of defendant's automobile in such suit is not proper. Hoeven *v.* Morley, 36 S. D. 421, 155 N. W. 191.

56. Hammond *v.* Thompson, 54 Mont. 609, 173 Pac. 229. But see McCarty *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 48 L. R. A. (N. S.) 65.

57. Blue Earth Val. Tel. Co. *v.* Commonwealth U. Co., 140 Minn. 198, 167 N. W. 554.

58. Ala.—Bomar *v.* Rosser, 123 Ala. 641, 26 So. 510; Morris *v.* Booth, 8 Ala. 907; Dunn *v.* White, 1 Ala. 645. **Ark.**—Shapard *v.* Lesser, 127 Ark. 590, 193 S. W. 262; Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929. **Cal.**—Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616. **Conn.**—Bunnell *v.* Butler, 23 Conn. 65; Pond *v.* Smith, 4 Conn. 297. **Ga.**—Brewer *v.* Grogan, 116 Ga. 60, 42 S. E. 525. **Ill.**—Kelly *v.* Garrett, 6 Ill. 649. **Ind.**—No. 2 Indiana Mut. Bldg. & Loan Assn. *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Sanford *v.* Wood, 49 Ind. 165; Bessire & Co. *v.* Corn Products Mfg. Co., 47 Ind. App. 298, 94 N. E. 353. **Ia.**—Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797. **Kan.**—Chicago, R. I. & Ry. Co. *v.* Theis, 96 Kan. 494, 152 Pac. 619. **Ky.**—Payne *v.* Loudon, 3 Bibb 250. **La.**—Callehan *v.* Stafford, 18 La. Ann. 556. **Mich.**—McQueen *v.* Gamble, 33 Mich. 344. **Mont.**—Ryan *v.* Dunphy, 4 Mont. 342, 1 Pac. 710. **N. Y.**—Lawrence *v.* Smith, 27 How. Pr. 327; Tryon *v.* Mooney, 9 Johns. 358; Clark

of a mere offer not amounting to a contract,[59] or upon a contract or transaction that is illegal or contrary to public policy,[60] or void or unenforceable under the statute of frauds,[61] or for want of consideration,[62] or upon breach of a contract which defendant himself has without cause failed to perform,[63] or which has been discharged,[64] or outlawed,[65] or the collection of which has been enjoined.[66]

(II.) Limitations and Laches. — Where a cross-demand constitutes a matter for recoupment or counterclaim equivalent to recoupment, the fact that the statute of limitations has run against it does not prevent the defendant from relying upon it to defeat or diminish plaintiff's recovery.[67] But other cross-demands,[68] except those which, in

v. Hale, Clarke Ch. 349; Deering *v.* Schreyer, 40 App. Div. 633, 58 N. Y. Supp. 1139. **Ohio.**—Stanbery *v.* Smythe, 13 Ohio St. 495. **Okla.**—Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. **Wash.** Batley *v.* Dewalt, 56 Wash. 431, 105 Pac. 1029. **Wash. Ter.**—Turnbull *v.* Farnsworth, 1 Wash. Ter. 444. **Eng.** Rawley *v.* Rawley, 1 Q. B. D. 460, 45 L. J. Q. B. 675, 35 L. T. N. S. 191, 24 Wkly. Rep. 995.

59. Bessire & Co. *v.* Corn Products Mfg. Co., 47 Ind. App. 298, 94 N. E. 353.

[a] **Offer To Rebate.**—In an action brought in March, 1908, for the price of goods, defendant cannot counterclaim for rebates which plaintiff promised to pay at the close of the year 1908 on condition that defendant continue to buy goods from plaintiff during the year. "We do not find in this proposition any element of mutuality, which is an indispensable part of an agreement. It could not be enforced against the appellant, and it was the privilege of appellant to abandon the proposal at any time and purchase goods elsewhere. Nor could the proposition be enforced against the appellee, until full performance is shown. It simply remains an open offer until by performance of its terms the appellee became bound to pay the rebate agreed upon." Bessire & Co. *v.* Corn Products Mfg. Co., 47 Ind. App. 298, 94 N. E. 353, 355.

60. **U. S.**—Higgins *v.* McCrea, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. ed. 764. **Ala.**—Ansley *v.* Bank of Piedmont, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122. **Ark.**—Shapard *v.* Lesser, 127 Ark. 590, 193 S. W. 262. **Conn.** Pond *v.* Smith, 4 Conn. 297. **Ind.** Sanford *v.* Wood, 49 Ind. 165; Bessire & Co. *v.* Corn Products Mfg. Co., 47 Ind. App. 298, 94 N. E. 353. **Ky.** Payne *v.* Loudon, 3 Bibb 250. **Wash. Ter.**—Turnbull *v.* Farnsworth, 1 Wash. Ter. 444.

[a] **Based on Gambling Transaction.** Higgins *v.* McCrea, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. ed. 764; Payne *v.* Loudon, 3 Bibb (Ky.) 250.

[b] **Contract in Restraint of Trade.** Shapard *v.* Lesser, 127 Ark. 590, 193 S. W. 262.

[c] **Based on ultra vires contract** of corporation. Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352.

61. Ryan *v.* Dunphy, 4 Mont. 342, 1 Pac. 710; Lawrence *v.* Smith, 27 How. Pr. (N. Y.) 327.

62. Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929; Walker *v.* Gilbert, 2 Rob. (N. Y.) 214.

63. Miller *v.* Yockey, 49 Colo. 303, 112 Pac. 772.

[a] **Recovery for Part Performance.** A party cannot rest a counterclaim upon what he may have done toward carrying out a contract, which he has, without cause abandoned and failed to perform. Miller *v.* Yockey, 49 Colo. 303, 112 Pac. 772.

64. See *infra*, VII, C, 6, d, (III).

65. See *infra*, VII, C, 6, d, (II).

66. Key *v.* Wilson, 3 Humph. (Tenn.) 405.

67. **Ark.**—State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. **Conn.** Beecher *v.* Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57. **Minn.** Aultman & Co. *v.* Torrey, 55 Minn. 492, 57 N. W. 211.

68. **Cal.**—Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616. See Lyon *v.* Petty, 65 Cal. 322, 4 Pac. 103. **Conn.**—Gorham *v.* Buckley, 49 Conn. 91. **Ga.** Brewer *v.* Grogan, 116 Ga. 60, 42 S. E.

some jurisdictions by statute or otherwise, are deemed to have compensated and extinguished each other so far as they are equal,[69] cannot be based on a debt or claim which, before the commencement of the plaintiff's action, has been outlawed. However, if at the time the plaintiff files his suit, the defendant is the owner of a subsisting cross-demand, which at that time is not barred, the fact that the bar is completed before the cross-demand is urged in a proper pleading, will not deprive the defendant of the right to use it,[70] to at least reduce or extinguish plaintiff's claim.[71]

An equitable set-off will not be allowed for a stale demand which it would under the circumstances be inequitable to enforce.[72]

(III.) Discharged Debts and Claims.— A claim or debt which has already been discharged cannot be used as a set-off, recoupment or counterclaim.[73]

525; Finney *v.* Brumley, 64 Ga. 510; Lee *v.* Lee, 31 Ga. 26, 76 Am. Dec. 681. **Ky.**—Williams *v.* Gilchrist, 3 Bibb 49. **Me.**—Nason *v.* McCulloch, 31 Me. 158. **Mass.**—Tyler *v.* Boyce, 135 Mass. 558. **N. J.**—Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206. **Okla.**—McClure *v.* Johnson, 10 Okla. 663, 668, 65 Pac. 103; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. **Pa.**—Gilmore *v.* Reed, 76 Pa. 462; Crist *v.* Garner, 2 Pen. & W. 251; Hinkley *v.* Walters, 8 Watts 260; Jacks *v.* Moore, 1 Yeates 391. **S. C.** Madden *v.* Madden, 2 Mill Const. 350; Turnbull *v.* Strohecker, 4 McCord L. 210. **Tex.**—Campbell *v.* Park, 11 Tex. Civ. App. 455, 33 S. W. 754.

[a] **Even though revived pending the action,** by a new promise. Lee *v.* Lee, 31 Ga. 26, 76 Am. Dec. 681.

[b] **Where defendant waives the tort** and makes his counterclaim one in assumpsit based upon the implied contract arising from fraud, the cause of action is deemed to have accrued and the statute begins to run, when the implied contract arose rather than when the fraud was discovered. Lenhardt *v.* French, 57 S. C. 493, 35 S. E. 761.

69. **Ia.**—Secor *v.* Siver, 165 Iowa 673, 146 N. W. 845; Folsom *v.* Winch, 63 Iowa 477, 19 N. W. 305. **Kan.** Chicago, R. I. & P. Ry. Co. *v.* Theis, 96 Kan. 494, 152 Pac. 619. **Tex.**—Holliman *v.* Rogers, 6 Tex. 91; Crook *v.* McGreal, 3 Tex. 487; Walker *v.* Fearhake, 22 Tex. Civ. App. 61, 52 S. W. 629.

[a] See also Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616, holding that the code section as to compensation does not embrace an obligation secured by mortgage because it is enforceable only by a foreclosure action and no personal liability can be enforced except for a deficiency after sale.

As to compensation, see *supra,* I, E; VII, C, 2, e.

70. **Ill.**—Neville *v.* Brock, 91 Ill. App. 140. **Ky.**—Gilchrist *v.* Williams, 3 A. K. Marsh. 235. **N. C.**—Brumble *v.* Brown, 71 N. C. 513. **Pa.**—Taylor *v.* Gould, 57 Pa. 152; Jacks *v.* Moore, 1 Yeates 391. **S. C.**—Turnbull *v.* Strohecker, 4 McCord L. 210. **Tex.**—Crook *v.* McGreal, 3 Tex. 487; Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501. **Eng.** Walker *v.* Clements, 15 Q. B. 1046, 69 E. C. L. 1046, 117 Eng. Reprint 755. *Contra,* Gilmore *v.* Reed, 76 Pa. 462.

[a] **The principle upon which the rule is based** is not that there has been any suspension of limitations, but that such mutual accounts extinguish one, the other pro tanto whenever plaintiff declares upon his demand. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501; Walker *v.* Fearhake, 22 Tex. Civ. App. 61, 52 S. W. 629; Holliman *v.* Rogers, 6 Tex. 91; Crook *v.* McGreal, 3 Tex. 487.

71. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

72. Adair *v.* Newlin (Del. Ch.), 100 Atl. 792.

73. **Ala.**—Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303. **Cal.**—McKenney *v.* Ellsworth, 165 Cal. 326, 132 Pac. 75. **N. H.**—Molineux *v.* Eastman, 14 N. H. 504. **N. Y.**—Williams *v.* Crary, 5 Cow. 368. **Utah.**—Brophy *v.* Ogden Rapid Transit Co., 46 Utah 426, 151 Pac. 49. **Eng.**—Francis *v.*

(IV.) Conditions Precedent. — (A.) GENERALLY. — Unless and until all conditions precedent to the existence of the claim or demand as a valid cause of action have been performed, it cannot be used as a cross-demand,[74] and such conditions must generally be performed

Dodsworth, 4 C. B. 202, 17 L. J. C. P. 185, 56 E. C. L. 202, 136 Eng. Reprint 482; Taylor *v.* Waters, 5 Maule & S. 103, 105 Eng. Reprint 989.

[a] **Special Damages Paid by and Credited to Defendant.**—Where in a suit against a street railway for personal injuries, plaintiff asks for general damages only and does not claim special damages for expenses incident to his treatment in a hospital, which expenses had been advanced by the railway, the latter will not be allowed to counterclaim for such expenses, since plaintiff's failure to sue for them, will be construed to mean that he credited defendant with the amount thereof, thus adjusting the claim. Brophy *v.* Ogden Rapid Transit Co., 46 Utah 426, 151 Pac. 49.

74. **Cal.**—Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616. **Kan.**—Chicago, R. I. & P. Ry. Co. *v.* Theis, 96 Kan. 494, 152 Pac. 619. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **N. C.**—State Bank *v.* Cape Fear Bank, 35 N. C. 75. **Pa.**—Leas *v.* Laird, 6 Serg. & R. 129. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167.

As to conditions precedent, see the title "**Suits and Actions,**" and also other titles dealing with particular causes of action.

[a] **Return or offer to return goods bought** is not a condition precedent to a cross-demand for breach of warranty as to the goods. Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177.

[b] **If re-entry of landlord upon leased premises** is unlawful it constitutes a conversion of the property on the premises though no demand is made for the property. Where, on the other hand, the re-entry is lawful demand and refusal are necessary before a cause of action for the conversion which defendant can use as a counterclaim arises. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454.

[c] **Until demand by a depositor** is made upon the bank for deposits it cannot be liable for conversion of the deposits, and no cross-demand can be based thereon. Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064.

[d] **Notice and Claim.**—(1) In an action to recover the undercharge on a shipment of cattle, a set-off cannot be allowed for damages on another shipment of cattle, where such other shipment was made under a contract prescribing as a condition precedent the giving of notice of loss, and such condition was disregarded. Chicago, R. I. & P. Ry. Co. *v.* Theis, 96 Kan. 494, 152 Pac. 619. See 10 STANDARD PROC. 225. (2) A claim against the state for work and materials, must first be presented to the state board of audit before it can be asserted as a counterclaim (People *v.* Dennison, 84 N. Y. 272; People *v.* Denison, 8 Abb. N. C. 128, 59 How. Pr. 157), but (3) no such prior presentation is necessary of a demand for unliquidated damages sought to be used against the state by way of recoupment. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376.

[e] **Demand for Deposit.**—(1) A set-off of a deposit cannot be made unless, prior to the institution of plaintiff's action, defendant, by check or its equivalent, demanded payment of his deposit. Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Farmers' Nat. Bank *v.* Worden, 95 Neb. 59, 144 N. W. 1067, *s. c.*, 95 Neb. 58, 144 N. W. 1066. (2) But where the bank is insolvent a demand for the deposit repose the bank, or its receiver, assignee or trustee in insolvency is not essential to depositor's right to use the deposit as a set-off. **Md.**—Colton *v.* Drovers' P. B. & L. Assn., 90 Md. 85, 45 Atl. 23, 78 Am. St. Rep. 431, 46 L. R. A. 388. **Nev.**—First Nat. Bank *v.* Nye, 38 Nev. 123, 145 Pac. 932. **N. J.**—Receivers of People's Bank *v.* Paterson G. L. Co., 23 N. J. L. 283. **N. Y.**—Kilby *v.* First Nat. Bank, 32 Misc. 370, 66 N. Y. Supp. 579; Fort *v.* McCully, 59 Barb. 87. **N. C.**—Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322. **Wash.** Puget S. S. Bank *v.* Washington Pav. Co., 94 Wash. 504, 162 Pac. 870.

before the commencement of the action,[75] but if the condition is merely precedent to the remedy to enforce the cause of action as distinguished from the cause of action itself, it is enough that it be performed before the cross-demand is sought to be used.[76]

(B.) EXHAUSTING SECURITY. — It is not necessary, before asserting a secured claim as a cross-demand, to first exhaust or surrender the security,[77] except where the statute requires the security to be exhausted before recourse may be had to the personal liability of the debtor.[78]

e. *Claims Upon Which Independent Suit Is Pending.* — Some courts hold that the fact that an action is pending on the same debt or claim does not preclude the defendant from using it defensively as a cross-demand, since in this aspect it does not constitute a second action.[79] But there are authorities to the contrary,[80] and it has been held that defendant may be compelled to elect between the prior action

75. **Cal.**—Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Neb.** Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **N. C.**—State Bank *v.* Cape Fear Bank, 35 N. C. 75. **Pa.**—Leas *v.* Laird, 6 Serg. & R. 129.

76. **N. Y.**—Taylor *v.* Mayor, 82 N. Y. 10; Seymour *v.* Dunham, 24 Hun 93; Clark *v.* Story, 29 Barb. 295; Cornell *v.* Donovan, 14 Daly 295; Wells *v.* Henshaw, 3 Bosw. 625. **Va.**—Craigen's Exrx. *v.* Lobb, 12 Leigh (39 Va.) 627. **Wis.**—Stinnett *v.* Noggle, 148 Wis. 603, 135 N. W. 167. **Eng.**—Brown *v.* Tibbits, 11 C. B. (N. S.) 855, 103 E. C. L. 855, 31 L. J. C. P. 206, 6 L. T. N. S. 385, 10 Wkly. Rep. 465, 142 Eng. Reprint 1031.

[a] **Presentation of Demand.**—The fact that by the charter of a municipal corporation no action can be maintained upon a demand against it, until after presentation and demand of payment of some officer of the corporation, does not prevent a set-off of the claim prior to such presentment, in an action by the corporation upon a demand against the owner thereof. Taylor *v.* Mayor, etc. City of New York, 82 N. Y. 10. *Compare* 20 STANDARD PROC. 92, 102.

77. **Mich.**—Wallace *v.* Finnegan, 14 Mich. 170, 90 Am. Dec. 243. **N. Y.** Mattern *v.* Sage, 16 Daly 142, 9 N. Y. Supp. 527, 30 N. Y. St. 855. **W. Va.** Hudkins *v.* Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

Necessity of exhausting security, see the titles "**Mortgages;**" "**Pledges.**"

78. McKean *v.* German-Am. Sav. Bank, 118 Cal. 334, 50 Pac. 656. See also Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616, and 19 STANDARD PROC. 891.

79. **Cal.**—Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516. **Ill.**—Clayes *v.* White, 65 Ill. 357; Gaddis *v.* Leeson, 55 Ill. 522; King *v.* Bradley, 44 Ill. 342. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811. **Mich.**—Jennison Hardware Co. *v.* Godkin, 112 Mich. 57, 70 N. W. 428; Seventh Day Adventist Pub. Assn. *v.* Fisher, 95 Mich. 274, 54 N. W. 759. **Mo.**—Gunn's Admr. *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231. **N. Y.**—Weinberg *v.* Weinberg, 60 Hun 167, 14 N. Y. Supp. 352, 38 N. Y. St. 734; Wiltsie *v.* Northam, 3 Bosw. 162; Naylor *v.* Schenck, 3 E. D. Smith 135. **Pa.**—Stroh *v.* Uhrich, 1 Watts & S. 57. **Tex.**—Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85. **Eng.**—Le Bret *v.* Papillon, 4 East 502, 102 Eng. Reprint 923; Evans *v.* Prosser, 3 T. R. 186, 100 Eng. Reprint 524; Baskerville *v.* Brown, 2 Burr. 1229, 97 Eng. Reprint 804.

Compare supra, I, A, 4; VII, C, 1.

[a] **No judgment for a balance in favor of defendant** can be rendered. Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516.

80. **Ala.**—Lock *v.* Miller, 3 Stew. & P. 13. **Ga.**—Whitaker *v.* Pope, 48 Ga. 13. **Ind.**—Nave *v.* Wilson, 33 Ind. 294; Snodgrass *v.* Smith, 13 Ind. 393; Rankin *v.* Harper, 4 Ind. 585. **La.** Pierce *v.* Millar, 3 Mart. N. S. 354. **Ohio.**—Becroft *v.* Dossman, 7 Ohio Dec. (Reprint) 322. **R. I.**—Banigan *v.* Woonsocket Rubber Co., 21 R. I. 171, 42 Atl. 518, 43 Atl. 538.

and his cross-demand.[81]

f. *Taxes.*[82] — The state or municipality cannot, when sued, base a set-off or other cross-demand upon an independent claim for taxes owing by the plaintiff,[83] for a tax does not constitute a debt, or demand due from the taxpayer within the meaning of the statutes as to cross-demands.[84] But where the liability in question, though called a tax, is in reality a payment exacted as consideration for a state franchise, the rule is otherwise and such claim may be the foundation of a set-off in an action in debt against the state.[85]

7. Liquidated and Unliquidated. — a. *Liquidated Demands.* There has never been any controversy as to the propriety of using liquidated claims as cross-demands if otherwise proper.[86]

b. *Unliquidated Demands.* — **(I.) In General.** — The right to interpose cross-demands for unliquidated damages is recognized in every case where the demand arises out of the contract or transaction sued on,[87] but whether an independent unliquidated demand may be as-

81. Tuckerman *v.* Corbin, 66 How. Pr. (N. Y.) 404; Fabbricotti *v.* Launitz, 3 Sandf. (N. Y.) 743, 1 Code Rep. (N. S.) 121; Fuller *v.* Read, 6 Duer (N. Y.) 697, 15 How. Pr. 236.

Contra, Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516.

[a] **If defendant elect to proceed upon his counter-demand** his prior action will be stayed. Tuckerman *v.* Corbin, 66 How. Pr. (N. Y.) 404; Fabbricotti *v.* Launitz, 3 Sandf. (N. Y.) 743, 1 Code Rep. (N. S.) 121.

[b] **Failure to offer to discontinue the prior action** is an election to pursue the counterclaim. Bailey *v.* Fear, 182 App. Div. 331, 169 N. Y. Supp. 581.

82. **Set-off against taxes,** see *supra,* V, D, 3.

83. **La.**—Rivers *v.* New Orleans, 42 La. Ann. 1196, 8 So. 484. **Mass.**—Home Sav. Bank *v.* Boston, 131 Mass. 277; Peirce *v.* Boston, 3 Metc. 520. **Neb.** Nebraska City *v.* Nebraska City H. G. & C. Co., 9 Neb. 339, 2 N. W. 870. **N. H.**—Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442.

84. **Fla.**—Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292. **Ia.** Bailies *v.* Des Moines, 127 Iowa 124, 102 N. W. 813. **Ky.**—Newport & C. B. Co. *v.* Douglass, 12 Bush 673, 715. **N. H.**—Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442. **N. J.**—Camden *v.* Allen, 26 N. J. L. 398. **N. C.**—Gatling *v.* Carteret, 92 N. C. 536, 53 Am. Rep. 432.

85. Com. *v.* Phoenix Bank, 11 Metc. (Mass.) 129, 135.

86. See cases throughout this section.

[a] **Against an Unliquidated Claim.** Baltimore Ins. Co. *v.* McFadon, 4 Har. & J. (Md.) 31.

As when claim is liquidated, see *infra,* VII, C, 7, c.

87. **Ala.**—Hatchett *v.* Gibson, 13 Ala. 587. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Ark.**—Bloom *v.* Lehman, N. & Co., 27 Ark. 489; Wheat *v.* Dotson, 12 Ark. 699. **Cal.** Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223; Stoddard *v.* Treadwell, 26 Cal. 294. **Conn.**—Satchwell *v.* Williams, 40 Conn. 371. **Ill.**—De Forrest *v.* Oder, 42 Ill. 500; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; J. B. Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Holslag *v.* Morse, 188 Ill. App. 607; Tartt *v.* Ramey, 158 Ill. App. 468; Cary *v.* Niblo, 155 Ill. App. 338; Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250. **Ind.**—Stockton *v.* Graves, 10 Ind. 294. **Ia.**—Campbell *v.* Fox, 11 Iowa 318. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **La.**—Lallande *v.* Ball, 20 La. Ann. 193. **Me.**—Rogers *v.* Humphrey, 39 Me. 382; Herbert *v.* Ford, 29 Me. 546. **Mich.**—Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Ward *v.* Fellers, 3 Mich. 281. **Minn.** Morrison *v.* Lovejoy, 6 Minn. 183. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Myers *v.* Estell, 47 Miss. 4. **Mo.**—Empire Transp. Co. *v.* Boggiano, 52 Mo. 294; Miller *v.* Crigler, 83 Mo. App. 395. **Neb.**—Raymond Bros. *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **N. J.**

serted depends largely upon the phraseology of the statute.[88]

In Texas where plaintiff's demand is a certain or liquidated demand, defendant cannot use a set-off or counterclaim for an uncertain or unliquidated claim,[89] but counterclaim founded on a cause of action arising out of or incident to or connected with plaintiff's cause of action are excepted from the provisions of the section.[90]

(II.) Set-off. — Some statutes permit the use as set-off of unliquidated demands arising on contract,[91] or those "not sounding in damages

MacPherson *v.* Mackay (N. J. L.), 103 Atl. 36; Parker *v.* Hartt, 32 N. J. Eq. 225. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Schubart *v.* Harteau, 34 Barb. 447; Batterman *v.* Pierce, 3 Hill 171. **Ohio.**—Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344. **Ore.**—Davis *v.* Wait, 12 Ore. 425, 8 Pac. 356. **S. C.**—Bryce *v.* Parker, 11 S. C. 337. **Tex.**—Avent *v.* Ormand (Tex. Civ. App.), 173 S. W. 239; Tyson *v.* Jackson Bros., 41 Tex. Civ. App. 128, 90 S. W. 930. **Vt.**—Keyes *v.* Western Vermont Slate Co., 34 Vt. 81. **Wash.**—Sheafe *v.* Hastie, 16 Wash. 563, 48 Pac. 246; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380. **W. Va.**—Ashland Coal & Coke Co. *v.* Hull Coal & Coke Corporation, 67 W. Va. 503, 68 S. E. 124; Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Wis.** Akerly *v.* Vilas, 21 Wis. 88. **Eng.** Manchester, S. & L. Ry. Co. *v.* Brooks, 2 Ex. D. 243, 46 L. J. Exch. 244, 36 L. T. N. S. 103, 25 Weekly Rep. 413.

See also *infra,* this section.

[a] **At least to reduce or bar recovery by plaintiff.** Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161; Ashland Coal & Coke Co. *v.* Hull Coal & Coke Corporation, 67 W. Va. 503, 68 S. E. 124.

88. See *infra,* this section as to set-off and counterclaim.

89. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501; Fuller *v.* Pruitt (Tex. Civ. App.), 157 S. W. 176; Ajax-Grieb Rubber Co. *v.* Byars (Tex. Civ. App.), 153 S. W. 921; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[a] **A suit for money converted** by one with whom it is deposited is a suit upon a certain demand. Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832.

[b] **The test** of whether a counterclaim is unliquidated or uncertain depends upon whether the same sounds in tort. Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832; Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

[c] **A claim for commissions** for selling plaintiff's property is not an unliquidated demand as it does not sound in tort. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

[d] **A demand on a fire policy** is by express terms of the statute a liquidated demand where there has been a total loss. Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[e] **Breach of Contract to Reinsure.** Though by statute a demand on fire policy in case of total loss is liquidated, a claim for breach of contract to reinsure is unliquidated within the prohibition against setting off unliquidated damages in an action on a certain demand. Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[f] **In tenant's action for conversion** against landlord, the landlord cannot set off an unliquidated claim for damages for tort which is not connected with, arising out of, or incident to plaintiff's cause of action. Sanchez *v.* Blumberg (Tex. Civ. App.), 176 S. W. 904.

90. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501; Ajax-Grieb Rubber Co. *v.* Byars (Tex. Civ. App.), 153 S. W. 921; Inman *v.* Brown (Tex. Civ. App.), 147 S. W. 652; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

91. Fla.—Robinson *v.* L'Engle, 13 Fla. 482. **Ga.** — Pickett *v.* Andrews, 135 Ga. 299, 69 S. E. 478; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015. **Kan.**—St. Louis, Ft. S. & N. R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584; Axford *v.* Hubbell, 24 Kan. 444. **Vt.**—Hudson *v.* Nute, 45 Vt. 66; Thompson *v.* Congdon, 43 Vt. 396; Keyes *v.* Western Vermont Slate Co., 34 Vt. 81; Hubbard *v.* Fisher, 25 Vt. 539.

[a] **Under some codes any cause of**

merely.''[92] And in those states where set-off also embraces demands growing out of the transaction sued on,[93] unliquidated damages can properly be used as a set-off when they grow out of the contract or transaction pleaded.[94] In general, however, unliquidated claims are not within the scope of set-off at law,[95] particularly where they sound

action arising on contract, whether for a liquidated or unliquidated demand may constitute a set-off and be pleaded as such in an action founded on contract. Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Nation *v.* Planters' & Mechanics' Bank, 29 Okla. 819, 119 Pac. 977.

92. Barnes *v.* Marshall, 193 Ala. 94, 69 So. 436; Middleton *v.* Foshee, 192 Ala. 265, 68 So. 890; Burns *v.* Reeves, 127 Ala. 127, 28 So. 554; Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Johnston *v.* Smith's Admr., 70 Ala. 108; Lang *v.* Waters' Admr., 47 Ala. 624; Steverson *v.* W. C. Agee & Co., 9 Ala. App. 389, 63 So. 794.

[a] **The restriction of the statute cannot be avoided** by showing a single specific item of damage which is exactly ascertainable and therefore liquidated in character. Barnes *v.* Marshall, 193 Ala. 94, 69 So. 436; Nelms *v.* Hill, 85 Ala. 583, 5 So. 344; Walker *v.* McCoy, 34 Ala. 659.

[b] **An action for malicious prosecution** sounds in damages merely, and is not available as a set-off. Barnes *v.* Marshall, 193 Ala. 94, 69 So. 436.

[c] **Damages for conversion of or trespass to** lumber owned or possessed by defendant may be set off in an action on an account. Steverson *v.* W. C. Agee & Co., 9 Ala. App. 389, 63 So. 794.

[d] **When a certain cause of action gives ground for both special and vindictive damages,** it ''sounds in damages merely'' to an extent that will prevent its being set off in an action for money had and received. Rosser *v.* Bunn, 66 Ala. 89; Walker *v.* McCoy, 34 Ala. 659.

93. See *supra,* VII, C, 2, c.

94. Clause *v.* Bullock Printing Press Co., 118 Ill. 612, 9 N. E. 201; Robison *v.* Hibbs, 48 Ill. 408; Turnbull Joice Lumber Co. *v.* Chicago L. & Coal Co., 152 Ill. App. 347; Horn *v.* Noble, 95 Ill. App. 99; Congress Const. Co. *v.* Interior Bldg. Co., 86 Ill. App. 199.

[a] **In a suit for services in making plans and specifications** for defendant, the defendant cannot interpose a set-off based on a claim for damages, resulting from unauthorized changes made by plaintiff in the plans as a result of which the contractor erected the building farther back on the premises than the defendant desired or directed, since it was an unliquidated demand not growing out of the transaction sued. Carnegie *v.* Dawney, 178 Ill. App. 413.

[b] **For Breach of Warranty.**—In an action on a note for the purchase price of a chattel, unliquidated damages for breach of warranty in the sale of the chattel cannot be set off, because they do not arise out of the transaction or cause of action sued on. Hartshorn *v.* Kinsman, 16 Ill. App. 555.

95. **U. S.**—Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524; Charnley *v.* Sibley, 73 Fed. 980, 20 C. C. A. 157; Gentry *v.* Grand View Min. & S. Co., 13 Fed. 843; United States *v.* Wells, 2 Wash. C. C. 161, 28 Fed. Cas. No. 16,663. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Ark.**—Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271; Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131; B. A. Stevens Co. *v.* Whalen, 95 Ark. 488, 129 S. W. 1081; Stewart *v.* Scott, 54 Ark. 187, 15 S. W. 463; Gerson *v.* Slemons, 30 Ark. 50; Robinson *v.* Mace, 16 Ark. 97; Woodruff *v.* Laflin, 4 Ark. 527; Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727. **Cal.** Ricketson *v.* Richardson, 19 Cal. 330. **Conn.**—New Haven Pipe Co. *v.* Work, 44 Conn. 230. **Del.**—Voigtmann *v.* Wilmington Trust Bldg. Corp., 7 Penne. 265, 78 Atl. 920. **D. C.**—Dale *v.* Richards, 21 App. Cas. 312. **Ill.**—Higbie *v.* Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204; Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575; Robison *v.* Hibbs, 48 Ill. 408; J. B. Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Holslag *v.* Morse, 188 Ill. App. 607; The quality Car Co. *v.* Corkill, 187 Ill. App. 2; Bevier *v.* Horn, 180 Ill. App. 547; Car-

negie *v.* Dawney, 178 Ill. App. 413; The American Laundry Mach. Co. *v.* Barr, 176 Ill. App. 519; Marrone *v.* Ehrat, 175 Ill. App. 649; Turgrinson *v.* Meyer, 155 Ill. App. 553; Cary *v.* Niblo, 155 Ill. App. 338; Robidoux *v.* Baltz, 153 Ill. App. 100; Turnbull Joice Lumber Co. *v.* Chicago Lumber & Coal Co., 152 Ill. App. 347; Leischke *v.* Miller, 100 Ill. App. 137; Horn *v.* Noble, 95 Ill. App. 99; Kelley Maus & Co. *v.* Caffrey, 79 Ill. App. 278; Smith *v.* Billings, 62 Ill. App. 77; Weaver *v.* Penny, 17 Ill. App. 628; Hartshorn *v.* Kinsman, 16 Ill. App. 555; Hawks *v.* Lands, 8 Ill. 227. **Ind.**—West *v.* Hayes, 104 Ind. 251, 3 N. E. 932; Miles *v.* Elkin, 10 Ind. 329; McKinney *v.* Bellows, 3 Blackf. 31; Smith *v.* Smith, 1 Smith 337. **Ia.**—Sample *v.* Griffith, 5 Iowa 376. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Shropshire *v.* Conrad, 2 Metc. 143; Farquhar *v.* Collins, 3 A. K. Marsh. 31; Williams *v.* Gilchrist, 3 Bibb 49; Doysher *v.* Adams, 16 Ky. L. Rep. 582, 29 S. W. 348; Marks Bros. *v.* Squair & Co., 10 Ky. L. Rep. 589; Brannin *v.* Crouch, G. & Co., 10 Ky. L. Rep. 773. **La.**—Franz *v.* Schiro, 136 La. 841, 67 So. 925; Monroe Grocer Co. *v.* J. A. Perdue & Co., 123 La. 375, 48 So. 1002; Agaisse *v.* Guedron, 2 Mart. N. S. 73. **Me.** Hall *v.* Glidden, 39 Me. 445; Rogers *v.* Humphrey, 39 Me. 382. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1; Westminster M. & F. Co. *v.* Coffman, 123 Md. 619, 91 Atl. 716; Hearn *v.* Cullin, 54 Md. 533; Cumberland & P. R. Co. *v.* Slack, 45 Md. 161, 180; Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49. **Mass.** Taylor-Stites Glass Co. *v.* Manufacturers' Bottle Co., 201 Mass. 123, 87 N. E. 558; Barry *v.* Cavanagh, 127 Mass. 394; Taft *v.* Larkin, 123 Mass. 598; Montague *v.* Boston & F. Iron Wks., 97 Mass. 502; Pitts *v.* Holmes, 10 Cush. 92; Corey *v.* Janes, 15 Gray 543; Loring *v.* Otis, 7 Gray 563; Cardell *v.* Bridge, 9 Allen 355. **Mich.**—Shipman *v.* Coryell, 105 Mich. 395, 63 N. W. 410; Wood Mowing & R. Co. *v.* Seaver, 90 Mich. 546, 51 N. W. 637; Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203; Mitchell *v.* Shuert, 16 Mich. 444. **Miss.** W. T. Adams Machine Co. *v.* Thomas, 87 Miss. 391, 39 So. 810; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Casper *v.* Thigpen, 48 Miss. 635; Myers *v.* Estell, 47 Miss. 4; Whitaker *v.* Robinson, 2 Smed. & M. 349. **Mo.**—State *v.* Eldridge, 65 Mo. 584; Gunn's Admr. *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231; Brake *v.* Corning, 19 Mo. 125; Mahan *v.* Ross, 18 Mo. 121; Johnson *v.* Jones, 16 Mo. 494; Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220; Volker *v.* Stone, 181 Mo. App. 311, 168 S. W. 902; Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545; Scarritt Estate Co. *v.* J. F. Schmelzer & Sons Arms Co., 110 Mo. App. 406, 86 S. W. 489; State *v.* McHale, 16 Mo. App. 478. **Mont.**—Wells *v.* Clarkson, 2 Mont. 379. **Neb.**—Boyer *v.* Clark, 3 Neb. 161. **N. H.**—Barker *v.* Barker, 62 N. H. 366; Eastman *v.* Thayer, 60 N. H. 575; Robinson *v.* Gilman, 43 N. H. 485; Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380. **N. J.**—MacPherson *v.* Mackay (N. J. L.), 103 Atl. 36; Links *v.* Mariowe, 83 N. J. L. 389, 84 Atl. 1056; Reim *v.* Bissinger, 75 N. J. L. 289, 68 Atl. 88; Godkin *v.* Bailey, 74 N. J. L. 655, 65 Atl. 1032, 9 L. R. A. (N. S.) 1134; Slayton-Jennings Co. *v.* Specialty Paper Box Co., 69 N. J. L. 214, 54 Atl. 247; Cooper *v.* Crane, 9 N. J. L. 173; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83. **N. Y.**—Buttes *v.* Collins, 13 Wend. 139; Sherman *v.* Ballou, 8 Cow. 304; Cumings *v.* Morris, 3 Bosw. 560; Gordon *v.* Bowne, 2 Johns. 150; Batteman *v.* Pierce, 3 Hill 171. **N. C.** Terrell *v.* Walker, 66 N. C. 244; Wheeler *v.* Dunn, 27 N. C. 380; Hogg *v.* Ashe, 1 N. C. 233. **Ohio.**—Cleveland Rubber Co. *v.* Bradford, 6 Ohio Dec. (Reprint) 1160. **Okla.**—Colcord *v.* Conger, 10 Okla. 458, 62 Pac. 276. **Ore.**—Burrage *v.* Bonanza Gold, etc. Min. Co., 12 Ore. 169, 6 Pac. 766. **Pa.**—Roth *v.* Reiter, 213 Pa. 400, 62 Atl. 1063; McCracken *v.* Elder, 34 Pa. 239. **R. I.**—Cole *v.* Shanahan, 24 R. I. 427, 53 Atl. 273; Clyde & Co. *v.* Knight, 12 R. I. 194; Bell *v.* Ward, 10 R. I. 503. **Tenn.** Bolinger *v.* Gordon, 11 Humph. 61; Nashville & C. R. Co. *v.* Chumley, 6 Heisk. 325; Brady *v.* Wasson, 6 Heisk. 131; Whitaker *v.* Robinson, 8 Smed. & M. 349. **Tex.**—Carothers *v.* Thorp, 21 Tex. 358; Thomas *v.* Hill, 3 Tex. 270; McKinney *v.* Southwestern Liquor Co. (Tex. Civ. App.), 201 S. W. 1162; Binder *v.* Millikin (Tex. Civ. App.), 201 S. W. 239; Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927; Avent *v.* Ormand (Tex. Civ. App.), 173 S. W. 239; Brooks Tire Machine Co. *v.* Shields, 48 Tex. Civ. App. 531, 108 S. W. 1005. **Va.**—Kinzie *v.* Riely's

in tort,[96] and can be set up in equity only when equitable grounds appear.[97]

(III.) Recoupment. — Damages sought to be recovered by way of recoupment need not be certain and liquidated,[98] unless, in some juris-

Exr., 100 Va. 709, 42 S. E. 872; American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466; Webster *v.* Couch, 6 Rand. (26 Va.) 519. **W. Va.**—Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161; Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E. 702; Case Mfg. Co. *v.* Sweeny, 47 W. Va. 638, 35 S. E. 853; Clark's Cove Guano Co. *v.* Appling, 33 W. Va. 470, 10 S. E. 809; Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775. **Wis.**—Norton *v.* Rooker, 1 Pinn. 195. **Eng.**—Nedriffe *v.* Hogan, 2 Burr. 1024, 97 Eng. Reprint 687.

[a] **The term "debt"** as used in the statutes confining set-off to claims in the nature of a debt does not include unliquidated claims. Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545.

[b] **The term "demands"** used in the statutes of set-off does not include unliquidated claims. Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380. But see Hartshorn *v.* Kinsman, 16 Ill. App. 555.

[c] **Damages for breach of a contract** of sale of land are not (1) proper items of set-off in a suit upon a note given after such breach for the rent of the land. Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927. (2) Damages for breach of contract to purchase ties, where unliquidated, cannot be set off in an action on a note. Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451.

[d] **In an action on an account** unliquidated damages arising from a separate and distinct transaction cannot be set off. The Quality Car Co. *v.* Corkill, 187 Ill. App. 2.

[e] **In assumpsit for goods sold and** delivered a set-off for unliquidated damages is not proper. Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1.

[f] **In a foreclosure suit,** unliquidated claims are not proper subjects of set-off. Com. Title & Trust Co. *v.* New Jersey L. Co., 86 N. J. Eq. 540, 100 Atl. 52.

[g] **Set-off of Penalty.**—A claim for the penalty authorized by sec. 2, chap. 95, R. S. for failure to give notices of sale under chattel mortgage, is one for unliquidated damages and not available as a set-off. Turgrinson *v.* Meyer, 155 Ill. App. 553.

[h] **Under the Act of 8 George II, chapt. 24 the word "debt"** was used in the technical sense of a liquidated demand. It followed that the statutes applied only to suits in which the claims were liquidated on both sides. Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

96. **Ark.**—Woodruff *v.* Laflin, 4 Ark. 527. **Fla.**—Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687; Hall *v.* Penny, 13 Fla. 621. **Ga.**—Mell *v.* Moony, 30 Ga. 413; Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846. **Ill.** Robison *v.* Hibbs, 48 Ill. 408. **Ky.** Brannin *v.* Crouch, G. & Co., 10 Ky. L. Rep. 773. **Mass.**—Pitts *v.* Holmes, 10 Cush. 92. **Mont.**—Wells *v.* Clarkson, 2 Mont. 379. **Pa.**—Glennon *v.* Lebanon Mfg. Co., 140 Pa. 594, 21 Atl. 429, 12 L. R. A. 321; Hunt *v.* Gilmore, 59 Pa. 450; McIlvaine *v.* A. W. Rand Co., 6 W. N. C. 176. **Tenn.** Brady *v.* Wasson, 6 Heisk. 131. **Tex.** Thomas *v.* Hill, 3 Tex. 270.

[a] **Unliquidated damages for misrepresentations** of the agent who sold land cannot be set off in a suit on notes given for the purchase price of the land. Binder *v.* Millikin (Tex. Civ. App.), 201 S. W. 239.

97. See *infra*, VII, C, 7, b, (VI).

98. **U. S.**—Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487. **Ark.**—Bloom *v.* Lehman, N. & Co., 27 Ark. 489; Desha's Exrs. *v.* Robinson, 17 Ark. 228. **Conn.**—Satchwell *v.* Williams, 40 Conn. 371; Avery *v.* Brown, 31 Conn. 398. **Ill.**—Sanger *v.* Fincher, 27 Ill. 346; J. B. Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Holslag *v.* Morse, 188 Ill. App. 607; Tartt *v.* Ramey, 158 Ill. App. 468; Cary *v.* Niblo, 155 Ill. App. 338; Weaver *v.* Penny, 17 Ill. App. 628; Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250. **Me.**—Rogers *v.* Humphrey, 39 Me. 382; Herbert *v.* Ford,

dictions, plaintiff's demand be on a sealed instrument.[99] A claim for unliquidated damages for a tort in no sense arising out of the contract or transaction sued on is, of course, not a proper subject matter of recoupment.[1]

(IV.) Counterclaim. — Nothing in the language of the codes describing counterclaim restricts its use to liquidated demands. It was designed as a broad remedy, wider in its scope than either set-off or recoupment,[2] and with the exception of a few earlier cases,[3] the courts have consistently admitted as counterclaims, unliquidated claims[4] aris-

29 Me. 546. **Mich.**—Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Ward *v.* Fellers, 3 Mich. 281. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Myers *v.* Estell, 47 Miss. 4. **N. J.**—MacPherson *v.* Mackay (N. J. L.), 103 Atl. 36; Kuhnen *v.* Parker, 56 N. J. Eq. 286, 38 Atl. 641; Parker *v.* Hartt, 32 N. J. Eq. 225; Bouker *v.* Randles, H. & Co., 31 N. J. L. 335. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Batterman *v.* Pierce, 3 Hill 171; Ives *v.* Van Epps, 22 Wend. 155; Van Epps *v.* Harrison, 5 Hill 63, 40 Am. Dec. 314. **Ore.** Davis *v.* Wait, 12 Ore. 425, 8 Pac. 356. **Pa.**—Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700. **Tenn.**—Nashville & C. R. Co. *v.* Chumley, 6 Heisk. 325. **Vt.**—Keyes *v.* Western Vermont Slate Co., 34 Vt. 81. **W. Va.**—Ashland Coal & Coke Co. *v.* Hull Coal & Coke Corp., 67 W. Va. 503, 68 S. E. 124; Baltimore & O. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

99. Kinzie *v.* Rieley's Exr., 100 Va. 709, 42 S. E. 872.

1. Fink *v.* United States Coal & Coke Co., 72 W. Va. 507, 78 S. E. 702. See *supra*, VII, C, 3, a, (III).

2. See *supra*, I, D, 2.

[a] **Unliquidated Demands Within Purpose of Code.**—"In some jurisdictions it is probably the rule that unliquidated claims cannot be the subject of counterclaim. What the rule should be must depend upon the construction of the provision of the civil code, allowing counterclaims to be set up as a defense. The object of this provision in our code is to enable parties to settle and adjust their cross-claims in a single action and thus avoid circuity and multiplicity of suits. . . . A claim based upon a cause of action arising upon contract is often unliquidated, in the sense that the amount of the claim is not settled or adjusted. To hold that such a claim must be liquidated to render it available as a counterclaim would not only result in preventing counterclaims from being pleaded in many instances, but would rob the code of its beneficent purpose by reading into it a qualification or limitation which is not found there, and does not impliedly belong there." Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340.

3. **In Pomeroy's Code Remedies** (4th ed.), §674, referring to unliquidated damages as a counterclaim, it is said: "A few early cases lay down a different doctrine and require the damages to be liquidated so that they would constitute a good set-off under the ancient rules; but these decisions are palpably erroneous and are completely overruled."

4. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Cal.**—Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Stoddard *v.* Treadwell, 26 Cal. 294. **Colo.**—Michigan Stove Co. *v.* Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340. **Ia.**—Campbell *v.* Fox, 11 Iowa 318. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537; Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584; Stevens *v.* Able, 15 Kan. 584. **La.**—Lallande *v.* Ball, 20 La. Ann. 193. **Minn.** Morrison *v.* Lovejoy, 6 Minn. 183. **Mo.** McAdow *v.* Ross, 53 Mo. 199; Empire Transp. Co. *v.* Boggiano, 52 Mo. 294; Bowman & Co. *v.* Lickey, 86 Mo. App. 47. **Neb.**—Raymond Bros. *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **N. Y.**—Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599; Schubart *v.* Harteau, 34 Barb. 447; Boston Mills *v.* Eull, 6 Abb. Pr. (N. S.) 319, 37 How. Pr. 299, 1 Sweeny 359. **Ohio.**—Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344. **Tex.**—Hansen *v.* Yturria, 48 S. W. 795; Avent *v.* Ormand (Tex. Civ. App.), 173 S. W. 239; Pittman *v.* Keith (Tex. Civ. App.), 24 S. W. 88. **Wash.**—Sheafe *v.* Hastie, 16 Wash.

ing out of the matter set forth by plaintiff, and also those based on independent contracts.[5]

(V.) Compensation. — A claim that is not liquidated cannot be asserted by way of compensation,[6] since compensation takes place between debts that are equally liquidated and demandable.[7]

(VI.) In Equity. — Since equity follows the law in respect to cross-demands,[8] it will not permit the use of an unliquidated demand as a set-off where the same would be unavailable at law,[9] unless peculiar equities intervene between the parties. There must be present some equitable reason for allowing the unliquidated demand to be interposed.[10] It must appear that the defendant is prevented from col-

563, 48 Pac. 246; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380. **Wis.**—Akerly *v.* Vilas, 21 Wis. 88; Walker *v.* Wilson, 13 Wis. 522.

5. Michigan Stove Co. *v.* Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340; Garnett & Allen Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736.

6. Franz *v.* Schiro, 136 La. 841, 67 So. 925.

7. Monroe Grocer Co. *v.* J. A. Perdue & Co., 123 La. 375, 48 So. 1002. See *supra*, VII, C, 2, e.

8. See *supra*, I, G, 2.

9. **Ala.**—Cotton *v.* Scott, 97 Ala. 447, 12 So. 65; Gafford *v.* Proskauer & Co., 59 Ala. 264; Betts *v.* Gunn, 31 Ala. 219; Wray's Admr. *v.* Furniss, 27 Ala. 471. **Ark.**—Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271; Matthews *v.* Weiler, 57 Ark. 606, 22 S. W. 569. **Cal.**—Ricketson *v.* Richardson, 19 Cal. 330. **Ga.**—Bonaud *v.* Sorrel, 21 Ga. 108. **Ill.**—Derby *v.* Gage, 38 Ill. 27; Wade *v.* Wade, 12 Ill. 89. **Ky.**—Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24; Jones *v.* Murray, 3 T. B. Mon. 83; Taylor *v.* Stowell, 4 Metc. 175; Talbot *v.* Banks, 2 J. J. Marsh. 548. **Mich.**—Hendricks *v.* Toole, 29 Mich. 340. **Miss.**—Gridley *v.* Tucker, Freem. Ch. 209. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260; Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220. **N. J.**—McCracken *v.* Harned, 59 N. J. Eq. 190, 44 Atl. 959; Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83. **N. Y.**—Bradley *v.* Angel, 3 N. Y. 475; Davis *v.* American L. Ins. & T. Co., 4 Edw. Ch. 308; Livingston *v.* Livingston, 4 Johns. Ch. 287, 8 Am. Dec. 562. **Ore.**—Burrage *v.* Bonanza Gold, etc. Min. Co., 12 Ore. 169, 6 Pac. 766. **R. I.**—American Bldg. Loan & Inv. Co. *v.* Booth, 17 R. I. 736, 24 Atl. 779. **Vt.**—Smith's Admrs. *v.* Wainwright's Admrs., 24 Vt. 97; Nims *v.* Rood, 11 Vt. 96, 34 Am. Dec. 669. **Va.**—Robertson *v.* Hogshead, 3 Leigh (30 Va.) 667; Webster *v.* Couch, 6 Rand. (26 Va.) 519.

[a] "**The civil law requirement** that the claim should be certain and determined quite naturally in the English chancery took the form of the rule that it should be liquidated. The underlying idea and purpose of the requirement and the rule were the same. The practical difference was that the line between what were and what were not liquidated claims was far more arbitrary and technical at the common law than was the civil-law distinction between the claims which were certain and determined and those which were not." Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 457, 107 C. C. A. 524.

10. **Ark.**—Ewing-Merkel Electric Co. *v.* Lewisville Light & Water Co., 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21. **Ga.**—Bibb Land-Lumber Co. *v.* Lima Machine Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401. **Ill.** Quick *v.* Lemon, 105 Ill. 578. **Ky.** Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641; Combs *v.* Frick Co., 162 Ky. 42, 171 S. W. 999; Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24.

See Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

[a] "**Our code of practice does not forbid** one, when sued by an insolvent or a nonresident, from using defensively an unliquidated claim, although founded upon a transaction independent of the subject of the action; and in our opinion the ends of justice dic-

lecting his demand in the usual way and has no adequate remedy at law for the purpose,[11] as where the plaintiff is insolvent,[12] or is a nonresident.[13] But in some states non-residence is not of itself sufficient to justify such relief equity,[14] but defendant must go further and show that there is some accompanying circumstance, the effect of which is to deprive him of an adequate remedy at law for the enforcement of his claim.[15]

tate that he should be allowed to do so. We perceive no principle of reason, justice or policy, superior to the considerations in favor of his being permitted to do so, when the equitable circumstances exist to which we have alluded.'', Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24.

11. Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641.

12. **U. S.**—North Chicago Rolling Mill Co. *v.* St. Louis Ore & S. Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565; Central Appalachian Co. *v.* Buchanan, 90 Fed. 454, 33 C. C. A. 598. **Ala.**—Wray's Admr. *v.* Furniss, 27 Ala. 471. **Ga.**—Butler *v.* Scandrett, 128 Ga. 432, 57 S. E. 764; Bonaud *v.* Sorrel, 21 Ga. 108. **Ill.**—Ehrat *v.* Marrone, 191 Ill. App. 121. **Ky.**—Patterson *v.* Woolridge, 170 Ky. 748, 186 S. W. 639; Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641; Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24; Chamberlin *v.* Stewart, 6 Dana 32. **Mass.**—McDonald *v.* Webster, 2 Mass. 498; Phelps *v.* Rice, 10 Metc. 128. **Miss.**—Gridley *v.* Tucker, Freem. Ch. 209. **Mo.** Barnes *v.* McMullins, 78 Mo. 260; Reppy *v.* Reppy, 46 Mo. 571. **Neb.** Thrall *v.* Omaha Hotel Co., 5 Neb. 295, 25 Am. Rep. 488. **N. Y.**—Littlefield *v.* Albany County Bank, 97 N. Y. 581; Davidson *v.* Alfaro, 16 Hun 353, 54 How. Pr. 481.

Insolvency as ground for relief generally, see *supra,* I, G, 3, b, (I).

[a] **An unliquidated claim on a purchase money note** may be set off in a suit by an insolvent shareholder of a corporation to recover profits illegally obtained. **Patterson** *v.* **Woolridge,** 170 Ky. 748, 186 S. W. 639.

13. **Ark.**—Benton *v.* Southern Engine & Boiler Works, 101 Ark. 493, 142 S. W. 1138; Ewing-Merkel Elec. Co. *v.* Lewisville Light & W. Co., 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21. **Ga.**—Bibb Land-Lumber Co. *v.* Lima Machine Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401; Bonaud *v.* Sorrel, 21 Ga. 108. **Ky.**—Combs *v.* Frick Co., 162 Ky. 42, 171 S. W. 999; Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451; Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24; Taylor *v.* Stowell, 4 Metc. 175; Abernathy *v.* Myer-Bridges C. & S. Co., 30 Ky. L. Rep. 1236, 100 S. W. 862. **Md.**—But see Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49. **Mo.**—Barnes *v.* McMullins, 78 Mo. 260.

Nonresidence as ground for relief generally, see *supra,* I, G, 3, b, (II).

[a] **Nonresidence of plaintiff** (1) may be ground in equity for permitting a resident defendant to plead in set-off of plaintiff's demand his claim for unliquidated damages. Where the plaintiff is a nonresident, service of process in an independent action cannot be had within the jurisdiction in which he is attempting to enforce his demand against a resident, and it would be inequitable to allow him to enforce his demand and deny relief to a resident defendant on his set-off in the same action. Ewing-Merkel Electric Co. *v.* Lewisville Light & Water Co., 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21. (2) The equity does not exist where all parties are nonresidents. Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271.

14. Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451.

15. Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451.

[a] **Limits of Rule.**—By the rule stated in the text it is not intended that, before the defendant will be permitted to collect his claim by way of set-off, he must show that it would be impossible to collect it in any other way; but he should be required to show that there is some substantial obstacle in the way that would probably prevent his collecting it by an independent action in the usual way. Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451.

[b] **Agent of Plaintiff Within the State.**—The fact that plaintiff is a nonresident does not authorize a set-

c. *What Are Liquidated and Unliquidated Demands.* — Claims are liquidated, within the foregoing rules, when the amount thereof is exactly ascertainable[16] by the judgment or contract itself, or by mathematical calculation on the same.[17] Or conversely, they are unliquidated when there is no criterion provided by the law or by the parties themselves for their ascertainment[18] where they rest in opinion

off of unliquidated damages where he owns property within the state sufficient to cover any claim of defendant, and has an agent within the state upon whom service of process can be had. Bates *v.* Reitz, 157 Ky. 514, 163 S. W. 451.

16. Ala.—Barnes *v.* Marshall, 193 Ala. 94, 69 So. 436. **Ill.**—Ideal Coated Paper Co. *v.* Cupples Envelope Co., 169 Ill. App. 484. **Pa.**—Barclay *v.* Edlis Barber Supply Co., 39 Pa. Super. 482.

[a] **Unliquidated damages have been defined as follows:** "They are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case; they are damages which cannot be ascertained by computation or calculation—as, for instance, damages for not using a farm in a workmanlike manner . . . for carelessly upsetting a stage by which a bone is broken; . . . and other cases of like character where the amount to be settled rests in the discretion, judgment or opinion of the jury." Butts *v.* Collins, 13 Wend. (N. Y.) 139, 156.

[b] **If indebitatus assumpsit will lie** on the claim, it is liquidated. Godkin *v.* Bailey, 74 N. J. L. 655, 65 Atl. 1032, 9 L. R. A. (N. S.) 1134; Slayton-Jennings Co. *v.* Specialty Paper Box Co., 69 N. J. L. 214, 54 Atl. 247.

[c] **A claim for the amount paid on goods purchased** and which are not up to sample, is a liquidated demand. Ideal Coated Paper Co. *v.* Cupples Envelcpe Co., 169 Ill. App. 484.

[d] **A claim for commissions** is liquidated (1) when it is based on a certain per cent of the price of goods. Walker *v.* Marshall Field & Co., 179 Ill. App. 3. (2) Thus secret commissions paid an agent amounting to a certain percentage of the goods he would purchase for his principal may be set off in an action by the seller against the principal for the purchase price. Walker *v.* Marshall Field & Co., 179 Ill. App. 3.

17. Del.—Voigtmann *v.* Wilmington Trust Bldg. Corp., 7 Penne. 265, 78 Atl. 920. **Ill.**—Higbie *v.* Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204; Trower *v.* Elder, 77 Ill. 452; Walker *v.* Marshall Field & Co., 179 Ill. App. 3; The American Laundry Mach. Co. *v.* Barr, 176 Ill. App. 519; Horn *v.* Noble, 95 Ill. App. 99; Kelley, Maus & Co. *v.* Caffrey, 79 Ill. App. 278. **Me.** Hall *v.* Glidden, 39 Me. 445. **Miss.** Weil Bros. *v.* Wittjen, 116 Miss. 514, 77 So. 308. **N. J.**—MacPherson *v.* Mackay (N. J. L.), 103 Atl. 36; Parker *v.* Hartt, 32 N. J. Eq. 225.

See also **Mass.**—Union Mut. Marine Ins. Co. *v.* Howes, 124 Mass. 470; Taft *v.* Larkin, 123 Mass. 598. **N. H.**—Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380. **R. I.**—Bell *v.* Ward, 10 R. I. 503. **Tex.**—Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832.

[a] **Items for work and labor** performed, not unliquidated. East *v.* Crow, 70 Ill. 91; Tartt *v.* Ramey, 158 Ill. App. 468.

18. Middleton *v.* Foshee, 192 Ala. 265, 68 So. 890; M'Cord *v.* Williams, 2 Ala. 71.

[a] **"A debt or demand, 'not sounding on damages merely'** (within the statutory provision as to set-offs) is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard." Middleton *v.* Foshee, 192 Ala. 265, 68 So. 890.

[b] **Nondelivery of Goods.** — "The classic illustration of what is an unliquidated claim under the statutes of set-off is a claim for not delivering goods according to contract." Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 461, 107 C. C. A. 524. See also North Chicago Rolling Mill Co. *v.* St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565; Charnley *v.* Sibley, 73 Fed. 980, 20 C. C. A. 157.

[c] **Difference Between Contract Price and Market Value.**—Damages which can be determined by computing the difference between the contract price and the market value are un-

only and must be ascertained by a jury, their verdict being required by the peculiar circumstances of each case.[19]

8. Claims Acquired After Commencement of the Action. — The requirement that demands to be available as a set-off or counterclaim must be in existence and owned by the party asserting them at the beginning of the action, prevents defendant from using as a cross-demand any claim transferred or assigned to him thereafter.[20]

D. Between What Persons Available. — **1. Mutuality in General.** — a. *Necessity That Demands Be Mutual.* — (I.) **Rule Stated.** Mutuality of debts and claims is the essential circumstance[21] of cross-

liquidated within the rule. **Turnbull Joice Lumber Co.** *v.* **Chicago L. & Coal Co., 152 Ill. App. 347.**

19. Carnegie *v.* Dawney, 178 Ill. App. 413; **The American Laundry Mach. Co.** *v.* **Barr, 176 Ill. App. 519.**

[a] **Breach of Warranty.**—Damages for breach of express and implied warranties are unliquidated. **The American Laundry Mach. Co.** *v.* **Barr, 176 Ill. App. 519.**

20. Ark.—Mueller *v.* Breckenridge, 121 Ark. 633, 181 S. W. 145. **Cal.**—See Ainsworth *v.* Bank of California, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686. **Colo.**—Gibs *v.* Gibs, 6 Colo. App. 368, 40 Pac. 781. **Ill.**—Ellis *v.* Cothran, 117 Ill. 458, 3 N. E. 411; Brown *v.* Cleveland, C. C. & St. L. R. Co., 155 Ill. App. 187; Ewen *v.* Wilbor, 99 Ill. App. 132. **Ind.** Balser *v.* Wood, 69 Ind. 122; Shannon *v.* Wilson, 19 Ind. 112. **Ia.**—Morrison Mfg. Co. *v.* Rimerman, 127 Iowa 719, 104 N. W. 279. **Kan.**—Arkansas City First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22; Reynolds *v.* Thomas, 28 Kan. 810. **Mass.**—Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265. **Mo.**—Goza *v.* Sanford, 79 Mo. App. 95; Skaggs *v.* Given, 29 Mo. App. 612. **N. H.**—Hardy *v.* Corlis, 21 N. H. 356. **N. J.**—Whitaker *v.* Turnbull, 18 N. J. L. 172. **N. Y.**—Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; John Church Co. *v.* Clarke, 77 Hun 467, 28 N. Y. Supp. 870, 60 N. Y. St. 405; Mayo *v.* Davidge, 44 Hun 342, 8 N. Y. St. 844; Moody *v.* Steele, 11 N. Y. Civ. Proc. 205, 3 N. Y. St. 269; Knapp *v.* Burnham, 11 Paige 330. **N. C.** Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256; Riddick *v.* Moore, 65 N. C. 382. **Ohio.**—Straus *v.* Eagle Ins. Co., 5 Ohio St. 59. **Pa.**—Speers *v.* Sterrett, 29 Pa. 192; Pennell *v.* Grubb, 13 Pa. 552. **S. C.**—Enter *v.* Quesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891; Godley *v.* Barnes, 13 Rich. 161; Shepherd *v.* Turner, 3 McCord 249, 15 Am. Dec. 631. **S. D.**—Kirby *v.* Jameson, 9 S. D. 8, 67 N. W. 854. **Vt.**—Bragg *v.* Fletcher, 20 Vt. 351. **Wis.**—Rickard *v.* Kohl, 22 Wis. 506.

Assigned claims generally, see *infra*, **VII, D, 2.**

[a] **A claim assigned to a carrier after suit,** is not available as a set-off in a suit against it for wrongful delivery of a car of hay. **Brown** *v.* **Cleveland, etc. R. Co., 155 Ill. App. 187.**

21. U. S.—Cramond *v.* Bank of United States, 1 Bin. 64, 4 Dall. 291, 1 L. ed. 838; Louisville & N. R. Co. *v.* Empire State Chemical Co., 189 Fed. 174. **Ala.**—McRight *v.* Farned, 76 So. 975; McLendon *v.* Rubenstein, 180 Ala. 615, 61 So. 902; St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Mauldin, M. & Co. *v.* Armistead, 14 Ala. 702. **Ark.**—Western Coal & M. Co. *v.* Hollenbeck, 72 Ark. 44, 80 S. W. 145; Houston *v.* Brown, 23 Ark. 333; Trammell *v.* Harrell, 4 Ark. 602. **Cal.** Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Collins *v.* Butler, 14 Cal. 223; Naglee *v.* Palmer, 7 Cal. 543. **Colo.**—Thatcher *v.* Rockwell, 4 Colo. 375. **Conn.**—Nichols *v.* Dayton, 34 Conn. 65; Kinne *v.* New Haven, 32 Conn. 210; Francis *v.* Rand, 7 Conn. 221. **D. C.**—Carver *v.* Hall, 3 App. Cas. 170; Baltimore United Oil Co. *v.* Barber, 2 Mackay 4. **Fla.**—Lucas *v.* Wade, 43 Fla. 419, 31 So. 231. **Ga.** Wilson *v.* Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97; Bibb Land-Lumber Co. *v.* Lima Mach. Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401; Kinard *v.* Sanford, 64 Ga. 630; Vason *v.* Beall, 58 Ga. 500. **Ill.** Howe Mach. Co. *v.* Hickox, 106 Ill. 461; Phelps *v.* Reeder, 39 Ill. 172; Ryan

demands. They must be mutual both as to the quality of the right,[22] and the identity of the parties.[23]

(II.) Cross-Demands at Law. — That cross-demands be mutual is a requirement demanded by the statutes in respect to legal set-offs,[24] and

v. Barger, 16 Ill. 28; Engs *v.* Matson, 11 Ill. App. 639. **Ind.**—Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Proctor *v.* Cole, 120 Ind. 102, 22 N. E. 101; Sefton *v.* Hargett, 113 Ind. 592, 15 N. E. 513; Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Talmage *v.* Bierhause, 103 Ind. 270, 2 N. E. 716; Gordon *v.* Swift, 46 Ind. 208; Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Berthoff *v.* Fisk, 166 N. W. 713; Swan *v.* Ewing, Morris 344. **Ky.** Bauer Cooperage Co. *v.* Ewell, 149 Ky. 838, 149 S. W. 1137; Hill *v.* Golden, 16 B. Mon. 551; Cummins' Admrs. *v.* Williams' Heirs, 5 J. J. Marsh. 384; Louisville First Nat. Bank *v.* Krieger's Assignee, 'S Ky. L. Rep. 612, 89 S. W. 733. **La.**—New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569; Vincent & Co. *v.* Gandolfo, 12 La. Ann. 526; Guibert *v.* Herpin, 3 Mart. (N. S.) 395. **Me.**—Moulton *v.* Perkins, 116 Me. 218, 100 Atl. 1020; Rich *v.* Hayes, 101 Me. 324, 64 Atl. 656, 115 Am. St. Rep. 321; Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458; Adams *v.* Ware, 33 Me. 228. **Md.**—Wilson & Co. *v.* Keedy, 8 Gill 195; Watkins *v.* Zane, 4 Md. Ch. 13. **Mass.** McGuinness *v.* Kyle, 208 Mass. 443, 94 N. E. 700; Clare *v.* Hatch, 180 Mass. 194, 62 N. E. 250; Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087; Barnstable Sav. Bank *v.* Snow, 128 Mass. 512; Holland *v.* Makepeace, 8 Mass. 418. **Mich.**—Hapke *v.* Davidson, 180 Mich. 138, 146 N. W. 624; Kinney *v.* Tabor, 62 Mich. 517, 29 N. W. 86; Fifield, 39 Mich. 264; Hendricks *v.* Toole, 29 Mich. 340. **Minn.**—Cooper *v.* Brewster, 1 Minn. 94. **Miss.**—Bullard *v.* Dorsey, 7 Smed. & M. 9. **Mo.**—Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Finney *v.* Turner, 10 Mo. 207; Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220; Graham Paper Co. *v.* National Newspaper Assn. (Mo. App.), 193 S. W. 1003. **Mont.** Stadler *v.* First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582. **N. H.**—McCaffrey *v.* Kennett, 73 N. H. 189, 60 Atl. 96; Winnipiseogee P. Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171; Woods *v.* Carlisle, 6 N. H. 27; Woodman *v.* Barker, 2 N. H. 479. **N. Y.** Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Taylor *v.* New York, 82 N. Y. 10; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Lyman *v.* Newman, 29 Barb. 162; Wood *v.* Munson, 70 Hun 468, 24 N. Y. Supp. 287, 53 N. Y. St. 621; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266. **N. C.**—Utley *v.* Foy, 70 N. C. 303; Walton *v.* McKesson, 64 N. C. 154; Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699. **N. D.**—Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046. **Ohio.** Miller & Co. *v.* Florer, 19 Ohio St. 356; McGee *v.* Cleveland Organ Co., 4 Ohio Dec. (Reprint) 481. **Okla.**—Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208. **Ore.** Barnes *v.* Esch, 87 Ore. 1, 169 Pac. 512; Richmond *v.* Block, 36 Ore. 590, 60 Pac. 385. **Pa.**—Mintz *v.* Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285; Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; First Nat. Bank *v.* Tustin, 246 Pa. 151, 92 Atl. 119; Sieger *v.* Sieger, 209 Pa. 65, 58 Atl. 140; Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004. **S. C.**—Shepherd *v.* Turner, 3 McCord 249, 15 Am. Dec. 631. **S. D.** Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784. **Tenn.**—Ewing *v.* Coffman, 12 Lea 79. **Tex.**—Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019; Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816. **Vt.**—Clough *v.* Clough, 55 Vt. 360. **Va.**—Edmondson *v.* Thomasson, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301; James *v.* Johnston, 22 Gratt. (63 Va.) 461. **W. Va.**—Little Kanawaha Nav. Co. *v.* Rice, 9 W. Va. 636.

22. Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61.

[a] **By mutuality in quality of right is meant** mutuality of right with respect to the legal remedy provided for the enforcement of the several demands. Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61.

23. See *infra*, VII, D, 1, b, (I).

24. **U. S.**—Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769; Hurlbert *v.*

by the provisions of the code defining counterclaim.[25] It is likewise a

Pacific Ins. Co., 2 Sumn. 471, 12 Fed. Cas. No. 6,919; Wright *v.* Rogers, 3 McLean 229, 30 Fed. Cas. No. 18,090; Louisville & N. R. Co. *v.* Empire State Chemical Co., 189 Fed. 174. **Ala.**—McRight *v.* Farned, 76 So. 975; Hamilton *v.* Griffin, 123 Ala. 600, 26 So. 243; McKinley *v.* Winston, 19 Ala. 301; Scott *v.* Rivers, 1 Stew. & P. 19. **Ark.** Menifee's Admrs. *v.* Ball, 7 Ark. 520; Trammell *v.* Harrell, 4 Ark. 602. **Conn.** Snyder *v.* Spurr, 33 Conn. 407. **Ga.** Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Davis *v.* Hadden, 115 Ga. 466, 41 S. E. 608. **Ill.**—Priest *v.* Dodsworth, 235 Ill. 613, 85 N. E. 940; Walker *v.* Chovin, 16 Ill. 489; Peoria & O. R. Co. *v.* Neill, 16 Ill. 269; Ryan *v.* Barger, 16 Ill. 28; Burgwin *v.* Babcock, 11 Ill. 28; Rector *v.* Duntley Mfg. Co., 189 Ill. App. 562; Ripley *v.* Cross S. Farming Co., 189 Ill. App. 291. **Ind.**—Proctor *v.* Cole, 120 Ind. 102, 22 N. E. 101; Sefton *v.* Hargett, 113 Ind. 592, 15 N. E. 513; Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Durbon *v.* Kelley's Admr., 22 Ind. 183; Blankenship *v.* Rogers, 10 Ind. 333; McKinney *v.* Bellows, 3 Blackf. 31; Cleveland, C. C. & St. L. Ry. Co. *v.* Van Laningham, 52 Ind. App. 156, 97 N. E. 573. **Ky.**—Cummins' Admr. *v.* Williams' Heirs, 5 J. J. Marsh. 384; Morrison *v.* Furnham, 1 A. K. Marsh. 41; Banton *v.* Hoomes' Exrs., 1 A. K. Marsh. 19. **Me.**—Rich *v.* Hayes, 101 Me. 324, 64 Atl. 656, 115 Am. St. Rep. 321; Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458. **Md.** Gibbs *v.* Cunningham, 4 Md. Ch. 322; Watkins *v.* Zane, 4 Md. Ch. 13. **Mass.** Clare *v.* Hatch, 180 Mass. 194, 62 N. E. 250; Holland *v.* Makepeace, 8 Mass. 418; Grew *v.* Burditt, 9 Pick. 265. **Mich.**—Kinney *v.* Tabor, 62 Mich. 517, 29 N. W. 86; Hendricks *v.* Toole, 29 Mich. 340; Adams *v.* Bradley, 12 Mich. 346. **Miss.**—Green *v.* Bounds, 112 Miss. 252, 72 So. 1001. **Mo.**—Weiss *v.* Wahl, 5 Mo. App. 408. **Neb.**—Craig *v.* Chicago, St. P. M. & O. Ry. Co., 97 Neb. 586, 150 N. W. 648. **N. H.**—Goodwin *v.* Richardson, 44 N. H. 125; Brown *v.* Warren, 43 N. H. 430. **N. J.**—Reveruzzi *v.* Caruso, 86 N. J. L. 556, 91 Atl. 1022. **N. Y.**—Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Warner *v.* Barker, 3 Wend. 400. **Pa.**—Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; Stuart *v.* Com., 8 Watts 74; Waln *v.* Wilkins, 4 Yeates 461; Darroch's Exrs. *v.* Hay, 2 Yeates 208. **S. C.**—Shepherd *v.* Turner, 3 McCord L. 249, 15 Am. Dec. 631; *Ex parte* Doyley, 2 McCord L. 185. **Tenn.**—Turbeville *v.* Broach, 5 Coldw. 270. **Tex.**—Allbright *v.* Aldrich, 2 Tex. 166; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816. **Vt.** Snow *v.* Conant, 8 Vt. 301.

[a] **"Mutuality is implied in the word 'set-off,'** which has been adopted as a legal term by the legislatures and courts, and is essential in every case dependent upon the discretion of the court, but it need not be a nominal mutuality indicated by the record, but real mutuality shown by the evidence." Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458.

[b] **The terms "mutual debts" and "mutual credits"** used in statutes as to set-off are correlative, what is a debt on one side is a credit on the other. Libby *v.* Hopkins, 104 U. S. 303, 26 L. ed. 769.

25. **Ga.**—Douglass Planing Mill & N. Co. *v.* Anderson, 127 Ga. 571, 56 S. E. 635. **Ky.**—Hill *v.* Golden, 16 B. Mon. 551. **Mo.**—Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220; Graham Paper Co. *v.* National Newspaper Assn. (Mo. App.), 193 S. W. 1003; Volker *v.* Stone, 181 Mo. App. 311, 168 S. W. 902; Thayer-Moore Brokerage Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545. **Neb.**—Craig *v.* Chicago, St. P., M. & O. Ry. Co., 97 Neb. 586, 150 N. W. 648. **N. Y.** Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Hood *v.* Hayward, 124 N. Y. 1, 26 N. E. 331; Sperb *v.* McCoun, 110 N. Y. 605, 18 N. E. 441, 1 L. R. A. 490; Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183; Lyman *v.* Newman, 29 Barb. 162; Davidson *v.* Remington, 12 How. Pr. 310; Johnson *v.* Johnson, 157 App. Div. 289, 142 N. Y. Supp. 416; Weeks *v.* O'Brien, 25 App. Div. 206, 49 N. Y. Supp. 344; City of New York *v.* Montague, 74 Misc. 521, 134 N. Y. Supp. 520; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650; Wood *v.* Munson, 70 Hun 468, 24 N. Y. Supp. 287, 53 N. Y. St. 621; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266. **N. C.** Devries & Co. *v.* Warren, 82 N. C. 356. **Ore.**—Hammer *v.* Campbell Automatic

necessary condition to cross-demands in recoupment,[26] compensation[27] and reconvention.[28]

(III.) **In Equity.** — Equity, following the rule at law in respect to cross-demands,[29] requires them to be mutual,[30] unless it clearly appears that it is necessary, notwithstanding the want of mutuality, to allow the offset in order to do complete equity or to prevent irremediable injustice,[31] as in the case of non-residence[32] or insolvency[33] of the plaintiff. Thus equity will permit joint and separate debts to be set-off against

Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. D.**—Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784.

[a] **The code in respect to counterclaim provides** that the counterclaim must be a cause of action in favor of the defendant or of one or more defendants between whom and the plaintiff a separate judgment may be had in the action. **Cal.**—Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369. **Colo.**—Canfield *v.* Arnett, 17 Colo. App. 426, 68 Pac. 784. **Mo.**—Miller *v.* Crigler, 83 Mo. App. 395. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447. **Ore.**—Hammer *v.* Campbell Automatic Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. D.** Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784. **Wis.**—Computing Scale Co. *v.* Churchill, 109 Wis. 303, 85 N. W. 337; Resch *v.* Senn, 31 Wis. 138; Matteson *v.* Ellsworth, 28 Wis. 254.

26. **Ala.**—Gibboney *v.* R. W. Wayne & Co., 141 Ala. 300, 37 So. 436. **Conn.** Kinne *v.* New Haven, 32 Conn. 210. **Ga.**—Kinard *v.* Sanford, 64 Ga. 630. **Mass.**—Thresher *v.* Simpson, 223 Mass. 349, 111 N. E. 1035.

27. Ballard *v.* Thompson, 139 **La.** 267, 71 So. 505; New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569.

28. Findley *v.* Breedlove, 4 Mart. N. S. (La.) 105.

29. See *supra*, I, G, 2.

30. **Cal.**—Collins *v.* Butler, 14 **Cal.** 223. **Ill.**—Morris *v.* Calumet & C. Canal & Dock Co., 195 Ill. 101, 62 N. E. 813. **Ind.**—Sefton *v.* Hargett, 113 Ind. 592, 15 N. E. 513; Wasson *v.* Gould, 3 Blackf. 18. **Md.**—Schlens *v.* Poe, 128 Md. 352, 97 Atl. 649. **Mo.**—Fulkerson *v.* Davenport, 70 Mo. 541. **N. J.**—Hanneman *v.* Richter, 63 N. J. Eq. 753, 53 Atl. 177; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Robbins *v.* McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406. **N. Y.**—Cummings *v.* Morris, 25 N. Y. 625.

31. **U. S.**—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059. **Conn.**—Hubley Mfg. & Sup. Co. *v.* Ives, 81 Conn. 244, 70 Atl. 615, 129 Am. St. Rep. 209. **Ill.**—Morris *v.* Calumet & C. Canal & Dock Co., 195 Ill. 101, 62 N. E. 813. **Ind.**—Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222; Sefton *v.* Hargett, 113 Ind. 592, 15 N. E. 513; Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571. **Mass.**—Merrill *v.* Cape Ann Granite Co., 161 Mass. 212, 36 N. E. 797, 23 L. R. A. 313. **Minn.**—Noyes *v.* Ostrom, 113 Minn. 111, 129 N. W. 142. **Mo.**—Fulkerson *v.* Davenport, 70 Mo. 541. **N. J.**—Hanneman *v.* Richter, 63 N. J. Eq. 753, 53 Atl. 177; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423. **N. D.**—Clark *v.* Sullivan, 2 N. D. 103, 49 N. W. 416, 13 L. R. A. 233. **S. C.**—Enter *v.* Quesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891. **Vt.**—Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678.

32. Porter *v.* Roseman, 165 **Ind.** 255, 74 N. E. 1105, 112 Am. St. Rep. 222; Wallenstein *v.* Selizman & Co., 7 Bush (Ky.) 175.

Non-residence as ground for equitable relief, generally see *supra*, I, G, 3, b, (II).

33. **Cal.**—People *v.* California Safe Deposit & Trust Co., 168 Cal. 241, 141 Pac. 1181. **Ill.**—Hall *v.* Kimball, 77 Ill. 161. **Ind.**—Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571. **Ky.**—Chamberlin *v.* Stewart, 6 Dana 32. **Md.** Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965. **Mo.**—Fulkerson *v.* Davenport, 70 Mo. 541. **N. Y.**—Shipman *v.* Lansing, 25 Hun 290. **Tex.**—Hahn *v.* Cook, 1 White & W. Civ. Cas. §689. **Wis.** Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

Insolvency as ground for equitable set-off generally, see *supra*, I, G, 3, b, (I).

[a] **That the party is in receiver's**

each other where justice and right require it.[34]

b. *In What Mutuality Consists.* — (I.) **Demands Must Be Between the Parties.** — (A.) IN GENERAL — The doctrine of mutality as applied to set-off, counterclaim and recoupment, requires that the respective debts, claims and demands exist between the same parties,[35] and in the same

hands does not necessarily compel the inference of insolvency. Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571.

34. Fulkerson *v.* Davenport, 70 Mo. 541.

Joint and several claims generally, see *infra*, VII, D, 1, b, (V).

35. U. S.—McGill *v.* Sorenson, 209 Fed. 876; Wright *v.* Rogers, 3 McLean 229, 30 Fed. Cas. No. 18,090. **Ala.** McLendon *v.* Rubenstein, 180 Ala. 615, 61 So. 902; Drennen *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902; St. Louis & T. R. Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Scott *v.* Rivers, 1 Stew. & P. 19. **Ark.** Western Coal & M. Co. *v.* Hollenbeck, 72 Ark. 44, 80 S. W. 145; Bizzell *v.* Stone, 12 Ark. 378; Menifee's Admrs. *v.* Ball, 7 Ark. 520. **Cal.**—Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Hobbs *v.* Duff, 23 Cal. 596; Howard *v.* Shores, 20 Cal. 277; Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340; Thatcher *v.* Rockwell, 4 Colo. 375; Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235. **Conn.**—Nichols *v.* Dayton, 34 Conn. 65; Snyder *v.* Spurr, 33 Conn. 407; Kinne *v.* New Haven, 32 Conn. 210; Pitkin *v.* Pitkin, 8 Conn. 325. **D. C.**—Carver *v.* Hall, 3 App. Cas. 170; Kendall *v.* Vanderslip, 2 Mackey 105. **Ga.**—Douglas Planing Mill & N. Co. *v.* Anderson, 127 Ga. 571, 56 S. E. 635; Bibb Land-Lumber Co. *v.* Lima Mach. Works, 104 Ga. 116, 30 S. E. 673, 31 S. E. 401; Kinard *v.* Sanford, 64 Ga. 630; Vason *v.* Beall, 58 Ga. 500. **Ill.**—Priest *v.* Dodsworth, 235 Ill. 613, 85 N. E. 940; Howe Machine Co. *v.* Hickox, 106 Ill. 461; Peoria & O. R. Co. *v.* Neill, 16 Ill. 269; Ryan *v.* Barger, 16 Ill. 28; Burgwin *v.* Babcock, 11 Ill. 28; Peretes *v.* Tompary, 182 Ill. App. 495; Pegram *v.* Miser, 176 Ill. App. 352; Lucas *v.* Johnson, 176 Ill. App. 143; Carey *v.* Niblo, 155 Ill. App. 338. **Ind.**—Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Proctor *v.* Cole, 104 Ind. 376, 3 N. E. 106, 4 N. E. 303; First Nat. Bank *v.* Hill, 58 Ind. 52; Durbon *v.* Kelley's Admr., 22 Ind. 183. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Swan *v.* Ewing, Morris 344. **Ky.**—Hill *v.* Golden, 16 B. Mon. 551; Cummins' Admrs. *v.* Williams' Heirs, 5 J. J. Marsh. 384; Prior *v.* Richards' Admr., 4 Bibb 356; Hancock *v.* Hancock, 24 Ky. L. Rep. 664, 69 S. W. 757. **La.**—Lougarre *v.* W. D. Haas & Co., 131 La. 871, 60 So. 376; New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569; Vincent & Co. *v.* Gandolfo, 12 La. Ann. 526; Guibert *v.* Herpin, 3 Mart. N. S. 395. **Me.** Adams *v.* Ware, 33 Me. 228; Banks *v.* Pike, 15 Me. 268. **Md.**—Belbin *v.* Mullan, 131 Md. 425, 102 Atl. 548; Wilson & Co. *v.* Keedy, 8 Gill 195; Howard *v.* Warfield's Admr., 4 Harr. & M. 21; Watkins *v.* Zane, 4 Md. Ch. 13. **Mass.** Cromwell *v.* Parsons, 219 Mass. 299, 106 N. E. 1020; Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087; Stickney *v.* Clement, 7 Gray 170; Bridgham *v.* Tileston, 5 Allen 371. **Mich.**—Stewart *v.* Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas. 1915C, 808; Fifield *v.* Edwards, 39 Mich. 264; Hendricks *v.* Toole, 29 Mich. 340. **Minn.**—Cronan *v.* Wolfe, 138 Minn. 308, 164 N. W. 1018; Cooper *v.* Brewster, 1 Minn. 94. **Miss.** Wadlington *v.* Gary, 7 Smed. & M. 522; Bullard *v.* Dorsey, 7 Smed. & M. 9. **Mo.**—Finney *v.* Turner, 10 Mo. 207; Gemmell *v.* Hueben, 71 Mo. App. 291. **N. H.**—McCaffrey *v.* Kennett, 73 N. H. 189, 60 Atl. 96; Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171; Woodward *v.* Tupper, 58 N. H. 577; Brown *v.* Warren, 43 N. H. 430; Woodman *v.* Barker, 2 N. H. 479. **N. Y.** Taylor *v.* New York, 82 N. Y. 10; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Beckwith *v.* Union Bank, 9 N. Y. 211, Seld. Notes 176; Coursen *v.* Hamlin, 2 Duer 513; Compton *v.* Green, 9 How. Pr. 228; Hofferberth *v.* Duckett, 175 App. Div. 498, 162 N. Y. Supp. 167; Wood *v.* Munson, 70 Hun 468, 24 N. Y. Supp. 287, 53 N. Y. St. 621; City of New York *v.* Montague, 74 Misc. 521, 134 N. Y. Supp. 520; Samuels *v.* Twin State Realty Co., 145 N. Y. Supp. 44; Pophan *v.* Rubin, 134 N. Y. Supp. 1067. **N. C.**—Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230;

right or capacity,[36] so that actions may be maintained thereon each against the other.[37] In other words, the rights of the parties in respect to presenting their contentions in the same action must be reciprocal.[38] The debtor on one side must be the creditor on the other, nominally or really,[39] and the cause of action to which the cross-demand is pleaded must be one which might be used as a counter-demand if defendant had brought the action on his claim.[40] But the debts need not have grown out of mutual dealings nor have arisen between the same parties.[41]

(B.) DEMANDS MUST BE AGAINST PLAINTIFF.— The cause of action which defendant seeks to assert as a cross-demand must be an obligation of the plaintiff,[42] though it need not necessarily be a demand against the

Devries & Co. *v.* Warren, 82 N. C. 356; Utley *v.* Foy, 70 N. C. 303; Walton *v.* McKesson, 64 N. C. 154; Jones *v.* Gilreath, 28 N. C. 338; Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699; State Bank *v.* Armstrong, 15 N. C. 519. **N. D.** Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046. **Ohio.**—Miller & Co. *v.* Florer, 19 Ohio St. 356; Holmes *v.* Robinson, 4 Ohio 90; McGee *v.* Cleveland Organ Co., 4 Ohio Dec. (Reprint) 481. **Okla.** Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208. **Ore.**—Hammer *v.* Campbell Automatic Gas Burner Co., 74 Ore. 126, 144 Pac. 396; Richmond *v.* Bloch, 36 Ore. 590, 60 Pac. 385. **Pa.**—Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004; Bache *v.* Philips, 155 Pa. 103, 25 Atl. 891; Tenant *v.* Tenant, 110 Pa. 478, 1 Atl. 532; Winter *v.* Newell, 49 Pa. 507. **S. C.** Farmers' Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422; Shepherd *v.* Turner, 3 McCord 249, 15 Am. Dec. 631; Kerr *v.* Webb, 9 Rich Eq. 369. **S. D.**—Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784; Callan *v.* Sether, 31 S. D. 80, 139 N. W. 786. **Tenn.** Ewing *v.* Coffman, 12 Lea 79; Flint *v.* Tillman, 2 Heisk. 202; Turbeville *v.* Broach, 5 Coldw. 270. **Tex.**—Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Allbright *v.* Aldrich, 2 Tex. 166; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816. **Vt.**—Clough *v.* Clough, 55 Vt. 360. **Va.**—James *v.* Johnston, 22 Gratt. (63 Va.) 461; Pulliam *v.* Winston, 5 Leigh (32 Va.) 324. **Wash.** Williams *v.* Miller, 1 Wash. Ter. 88. **W. Va.**—Little Kanawaha Nov. Co. *v.* Rice, 9 W. Va. 636. **Wis.**—Carpenter *v.* Fulmer, 118 Wis. 454, 95 N. W. 403; Computing Scale Co. *v.* Churchill, 109 Wis. 303, 85 N. W. 337; McConihe *v.* Hollister, 19 Wis. 269.

Demands By and Against Strangers, see *infra*, VII, D, 1, b, (I), (D).

36. See *infra*, VII, D, 1, b, (III).

37. **Conn.**—Kinne *v.* New Haven, 32 Conn. 210. **Ill.**—Tully *v.* Excelsior Iron Works, 115 Ill. 544, 5 N. E. 83; Cary *v.* Niblo, 155 Ill. App. 338. **Ky.**—Thompson *v.* Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89. **Me.**—Thayer *v.* Jewett, 22 Me. 19. **Mass.**—Graham *v.* Middleby, 213 Mass. 437, 100 N. E. 750, Ann. Cas. 1914A, 384, 43 L. R. A. (N. S.) 977; McCarthy *v.* Henderson, 138 Mass. 310; Sawyer *v.* Wiswell, 9 Allen 39. **Mich.**—Hendricks *v.* Toole, 29 Mich. 340; McGraw *v.* Pettibone, 10 Mich. 530. **Mo.**—Weiss *v.* Wahl, 5 Mo. App. 408. **N. Y.**—Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600. **Pa.** Mintz *v.* Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285; Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004. **Va.**—Kinzie *v.* Riely's Exr., 100 Va. 709, 42 S. E. 872.

38. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

39. Hapke *v.* Davidson, 180 Mich. 138, 146 N. W. 624; Hendricks *v.* Toole, 29 Mich. 340.

40. Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494; Fulton County G. & E. Co. *v.* Hudson River T. Co., 200 N. Y. 287, 93 N. E. 1052; Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41; Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

41. See *infra*, VII, D, 2.

42. **U. S.**—Manhattan L. Ins. Co. *v.* McKown, 90 Fed. 646, 33 C. C. A. 212; Jackson *v.* Robinson, 3 Mason 138, 13

plaintiff of record,[43] nor against the plaintiff alone.[44]

(C.) DEMANDS MUST BE IN FAVOR OF DEFENDANT. — It is essential to mutuality, as that term is employed in relation to cross-demands, that the claim or debt pleaded as such be one in favor of the defendant who seeks to use it.[45] He must own and control it, so that his suing creditor

Fed. Cas. No. 7,144. **Ariz.**—Rouse *v.* Bolen, 17 Ariz. 14, 147 Pac. 736. **Cal.** Howard *v.* Shores, 20 Cal. 277. **Colo.** Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155. **Conn.**—Atkins *v.* Churchill, 19 Conn. 394. **Del.**—Greer *v.* Arlington Mills Mfg. Co., 1 Penne. 581, 43 Atl. 609. **Ga.**—West *v.* Kendrick, 46 Ga. 526. **Ill.**—International Bank *v.* Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807; Ryan *v.* Barger, 16 Ill. 28; Hilliard *v.* Walker, 11 Ill. 644; Rector *v.* Duntley Mfg. Co., 189 Ill. App. 562; Cragin Mfg. Co. *v.* Geuder, & P. Mfg. Co., 85 Ill. App. 379. **Ind.**—Shearman *v.* Fellows, 5 Blackf. 459; McKinney *v.* Bellows, 3 Blackf. 31. **Ia.**—Nagel *v.* Meier, 155 N. W. 813. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **Ky.** Bright *v.* Wilson's Admr., 7 B. Mon. 122; Bibb *v.* Saunders, 2 Bibb 86. **La.** Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590. **Me.**—Moulton *v.* Perkins, 116 Me. 218, 100 Atl. 1020; Cutler *v.* Gilbreth, 53 Me. 176. **Md.**—Mitchell *v.* Sellman, 5 Md. 376; Wilson & Co. *v.* Keedy, 8 Gill 195; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133. **Mass.**—Reed *v.* Whitney, 7 Gray 533; Bridgham *v.* Tileston, 5 Allen 371; Cutler *v.* Middlesex Factory Co., 14 Pick. 483. **Mich.**—Rumney *v.* Detroit, etc. Cattle Co., 129 Mich. 644, 89 N. W. 573; Dunlap *v.* J. P. Donaldson Co., 74 Mich. 290, 41 N. W. 927. **Mo.**—Miller *v.* Crigler, 83 Mo. App. 395. **N. H.** Weaver *v.* Rogers, 44 N. H. 112; Varney *v.* Brewster, 14 N. H. 49. **N. Y.** Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350; Stephens *v.* Beard, 4 Wend. 604; Wolfe *v.* Washburn, 6 Cow. 262; McCulloch *v.* Vibbard, 51 Hun 227, 4 N. Y. Supp. 202, 21 N. Y. St. 51; Straschitz *v.* Ungar, 153 N. Y. Supp. 118. **Ohio.**—Beesley *v.* Crawford, 19 Ohio 126. **Pa.**—Jarecki Mfg. Co. *v.* Haymaker, 138 Pa. 541, 21 Atl. 99; McDowell *v.* Tyson. 14 Serg. & R. 300. **R. I.**—Trafford *v.* Hall, 7 R. I. 104, 82 Am. Dec. 589. **S. C.**—Byrd *v.* Charles, 3 S. C. 352. **Tenn.**—Flint *v.* Tillman, 2 Heisk. 202. **Tex.**—Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Hamilton *v.* Van Hook, 26 Tex. 302; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816. **Vt.**—Brooks, Jr. & Co. *v.* Jewell, 14 Vt. 470. **Va.**—Porter *v.* Nekervis, 4 Rand. (25 Va.) 359. **Eng.**—Rawley *v.* Rawley, 1 Q. B. D. 460, 45 L. J. Q. B. 675, 24 Wkly. Rep. 995, 35 L. T. N. S. 191.

[a] **Demand Against Plaintiff's Predecessor.**—A set-off available against the firm of attorneys to which plaintiff firm succeeded cannot be interposed in plaintiff's action for legal services rendered. Rector *v.* Duntley Mfg. Co., 189 Ill. App. 562.

43. See *infra,* VII, D, 1, b, (IV).

44. **Demands against plaintiff and others,** see *infra,* VII, D, 1, b, (V), (B).

45. **U. S.**—Gray *v.* Rollo, 18 Wall. 629, 21 L. ed. 927. **Ala.**—Drennan *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902; French *v.* Garner, 7 Port. 549. **Cal.**—Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456; Howard *v.* Shores, 20 Cal. 277. **Colo.**—Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155. **Ga.**—Tinsley *v.* Beall, 2 Ga. 134. **Idaho.** McGuire *v.* Lamb, 2 Idaho 378, 17 Pac. 749. **Ill.**—Dameier *v.* Bayor, 167 Ill. 547, 47 N. E. 770. **Ind.**—Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Reilly *v.* Rucker, 16 Ind. 303. **Md.**—Penniman *v.* Loney, 40 Md. 471; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **Mass.**—St. Louis Perpetual Ins. Co. *v.* Homer, 9 Metc. 39. **Mich.** McGraw *v.* Pettibone, 10 Mich. 530. **Minn.**—Culbertson *v.* Lennon, 4 Minn. 51. **Mo.**—Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Farmers' & Merchants Nat. Bank *v.* Worden, 95 Neb. 58, 59, 144 N. W. 1066, 1067 (two cases). **N. Y.**—Merritt *v.* Millard, 5 Bosw. 645, 653; Collins *v.* Butts, 10 Wend. 399; Pease Oil Co. *v.* Monroe Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; Springfield Iron Co. *v.* Kelley, 1 N. Y. Supp. 351, 15 N. Y. St. 930. **Ohio.**—Stanbery *v.* Smythe, 13 Ohio St. 495. **Ore.**—Sanford *v.* Pike, 87 Ore. 614, 170 Pac. 729, 171 Pac. 394. **Pa.**—Hunter *v.* Henning, 259

is to that claim his debtor,[46] and he could himself maintain an independent action upon it.[47] The defendant cannot set up as a valid cross-demand a right of action in favor of another person,[48] even though there may be close legal relations between himself and such other person.[49] If by assignment or transfer to another,[50] even for a purpose which is contingent and temporary,[51] he has lost the right to sue on the claim, he cannot use it as a cross-demand.

(D.) Claims by and Against Third Persons. — In view of the requirement that the cross-demands must be mutual, and exist between the parties to the suit,[52] a claim against plaintiff in favor of a third person, is not available as a set-off or counterclaim,[53] nor can defendant success-

Pa. 347, 103 Atl. 61; Scott *v.* Fritz, 51 Pa. 418; Craig *v.* Henderson, 2 Pa. 261, 44 Am. Dec. 193. **S. C.**—Copeland *v.* Young, 21 S. C. 275; Kimbrel *v.* Glover, 13 Rich. 191. **S. D.**—Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784. **Tex.** San Antonio & G. S. Constr. Co. *v.* Davis (Tex. Civ. App.), 48 S. W. 754. **Vt.**—Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078; Kendall *v.* Aldrich, 68 Vt. 478, 35 Atl. 429; Strong *v.* Mitchell, 19 Vt. 644; McIntyre *v.* Corss, 18 Vt. 451. **Wis.**—Briggs *v.* Seymour, 17 Wis. 255.

Claims owned by defendant and others, see *infra,* VII, D, 1, b, (V), (C).

As to real and nominal parties, see *infra,* VII, D, 1, b, (IV).

[a] "**A set-off, to be available,** must be owned by defendant in absolute right at the time suit is brought. It is not enough that, together with another partner, the defendant owns the claim. It must be such demand as that he, in his own name, or in the names of the defendants sued, without bringing in the name of a stranger to the suit may maintain an action of debt or indebitatus assumpsit upon it, against the party, or all the parties suing, as the case may be. Less than this is not mutuality. Ownership at the time of suit brought is of the very essence of the right." Jones *v.* Blair, 57 Ala. 457.

[b] **In action to foreclose chattel mortgage** defendant cannot set-off debt due from plaintiff to one of defendant's predecessors who had assumed the mortgage sued upon. Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396, 413.

46. **Ga.**—Tinsley *v.* Beall, 2 Ga. 134. **Me.**—Moulton *v.* Perkins, 116 Me. 218, 100 Atl. 1020. **Mich.**—McGraw *v.* Pettibone, 10 Mich. 530. **S. C.**—Kimbrel *v.* Glover, 13 Rich. 191. **Tenn.**—Smith *v.* Mosby, 9 Heisk. 501.

47. **Ala.**—Carew *v.* Northrup, 5 Ala. 367; Bell *v.* Horton, 1 Ala. 413. **Mass.** Leighton *v.* Ricker, 173 Mass. 564, 54 N. E. 254; Mixer *v.* Coburn, 11 Metc. 559, 45 Am. Dec. 230. **Minn.**—Culbertson *v.* Lennon, 4 Minn. 51. **Mo.**—Emery *v.* St. Louis K. & N. W. R. Co., 77 Mo. 339, 347. **N. Y.**—Cumings *v.* Morris, 25 N. Y. 625 (*affirming* 3 Bosw. 560); Coursen *v.* Hamlin, 2 Duer 513, 520; Dart *v.* McAdam, 27 Barb. 187; Merritt *v.* Millard, 5 Bosw. 645, 653. **Ohio.**—Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Hill *v.* Butler, 6 Ohio St. 207, 216. **Wis.**—McConihe *v.* Hollister, 19 Wis. 269.

See *supra,* VII, C, 1.

As to assigned demands, see *infra,* VII, D, 2, a, (II).

[a] **Right To Maintain Action.**—If, by reason of the insolvency of the person liable upon the obligation attempted to be set-off, defendant could not maintain an action upon such obligation and against the person originally liable, but is required to present his claim to an assignee, executor or other person or tribunal, and receive only his pro rata of his debt, such claim cannot be the subject of a offset. Irons *v.* Irons, 5 R. I. 264.

48. See *infra,* VII, D, 1, b, (I), (D).

49. See *infra,* VII, D, 3.

50. See *infra,* VII, D, 2, a, (II), and the titles "**Assignments;**" "**Parties;**" "**Pledges.**"

51. Moulton *v.* Perkins, 116 Me. 218, 100 Atl. 1020.

[a] **Where the claim is transfered as collateral security** of an indebtedness by defendant to the transferee, it cannot while so held be used as a set-off by the transferor, since he could not sue on it independently. Moulton *v.* Perkins, 116 Me. 218, 100 Atl. 1020.

52. See *supra,* VII, D, 1, b, (I), (A).

53. **U. S.**—Gormley *v.* Bunyan, 138

fully plead as a cross-demand an obligation of a third person to him.[54]

(II.) Between All the Parties. — Under some statutes as to set-off, it seems to be necessary that the claims be due between all the parties,[55]

U. S. 623, 11 Sup. Ct. 453, 34 L. ed. 1086; Earle *v.* Miller, 102 Fed. 600. **Ala.** Turner *v.* Lawson, 144 Ala. 432, 39 So. 755; Gibboney *v.* R. W. Wayne, 141 Ala. 300, 37 So. 436; Thompson *v.* Merriman, 15 Ala. 166. **Cal.**—Blood *v.* La Serena Land & W. Co., 150 Cal. 764, 89 Pac. 1090. **Conn.**—Foster *v.* Balch, 79 Conn. 449, 65 Atl. 574; Kinne *v.* New Haven, 32 Conn. 210. **Ill.**—Zuckerman *v.* Solomon, 73 Ill. 130; Weisenborn *v.* People, 53 Ill. App. 32. **Ind.** Carter *v.* Berkshire, 8 Blackf. 193; Jennings *v.* Shriver, 5 Blackf. 37. **Ia.** Reed *v.* Darlington, 19 Iowa 349. **Ky.** Morse *v.* Wilcoxson, 17 Ky. L. Rep. 29, 30 S. W. 612. **La.**—Bridges *v.* Simonton, 28 La. Ann. 830; Smith *v.* Adams, 14 La. Ann. 409. **Md.**—Fishwick's Admr. *v.* Sewell, 4 Harr. & J. 393. **Mich.**—McGraw *v.* Pettibone, 10 Mich. 530. **Minn.**—Carpenter *v.* Leonard, 5 Minn. 155. **Mo.**—State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44; Miller *v.* Crigler, 83 Mo. App. 395. **N. Y.**—Bates *v.* Rosekrans, 37 N. Y. 409, 4 Abb. Pr. (N. S.) 276; Chambers *v.* Lewis, 11 Abb. Pr. 210; Babbett *v.* Young, 51 Barb. 466. **N. C.**—Forney *v.* Shipp, 49 N. C. 527. **Ohio.**—Ernst *v.* Kunkle, 5 Ohio St. 520. **Pa.**—Sieger *v.* Sieger, 209 Pa. 65, 58 Atl. 140; Shaw *v.* Fleming, 143 Pa. 104, 22 Atl. 816; Scott *v.* Fritz, 51 Pa. 418; Carman *v.* Garrison, 13 Pa. 158; Henderson *v.* Lewis, 9 Serg. & R. 379, 11 Am. Dec. 733; Union Nat. Bank *v.* Canonsburg Iron Co., 3 Sad. 58, 6 Atl. 577. **S. C.** Kimbrel *v.* Glover, 13 Rich. 191. **S. D.** Callan *v.* Sether, 31 S. D. 80, 139 N. W. 786. **Vt.**—First Nat. Bank *v.* Post, 66 Vt. 237, 28 Atl. 989; McIntyre *v.* Corss, 18 Vt. 451. **Wis.**—Dolph *v.* Rice, 21 Wis. 590.

Demands owned by defendants and others, see *infra,* VII, D, 1, b, (V), (C).

[a] **Damages from trespassing cattle,** sustained by one not a party to a suit in replevin for the cattle, cannot be set up as a cross-demand in such suit. Callan *v.* Sether, 31 S. D. 80, 139 N. W. 786.

54. **U. S.**—McGill *v.* Sorensen, 209 Fed. 876. **Ala.**—McLendon *v.* Rubenstein, 180 Ala. 615, 61 So. 902. **Ill.** Tully *v.* Excelsior Iron Works, 115 Ill. 544, 5 N. E. 83; Peoria & O. R. Co. *v.* Neill, 16 Ill. 269; Gregg *v.* James, 1 Ill. 143, 12 Am. Dec. 151. **Ind.**—Kent *v.* Cantrall, 44 Ind. 452. **Ia.**—Enix *v.* Hays, 48 Iowa 86. **Ky.**—Thatcher *v.* Cannon, 6 Bush 541; Caldwell *v.* Caldwell, 2 Bush 446; Witt *v.* Thomas, 19 Ky. L. Rep. 847, 42 S. W. 338. **La.**—Lougarre *v.* W. D. Haas & Co., 131 La. 871, 60 So. 376. **Me.**—Newcastle *v.* Bellard, 3 Greenl. 369. **Mass.**—Sanger *v.* Cleveland, 10 Mass. 415. **Mich.**—Detroit, H. & S. W. R. Co. *v.* Smith, 50 Mich. 112, 15 N. W. 39. **Mo.**—Field *v.* Hahn, 65 Mo. 417. **N. H.**—Northy *v.* Northy, 45 N. H. 141. **N. Y.**—Spencer *v.* Babcock, 22 Barb. 326; Howe *v.* Woolsey, 7 Misc. 33, 27 N. Y. Supp. 377, 57 N. Y. St. 507. **N. C.**—Thomson-Houston Electric Light Co. *v.* Henderson Electric, & G. Light Co., 116 N. C. 112, 21 S. E. 951; Benzein *v.* Robinett, 17 N. C. 67. **Ohio.**—Pennsylvania Orphan's Ct. *v.* Ogle, Wright 281. **Okla.** Peck-Williamson Heating & Ventilating Co. *v.* Board of Education, 6 Okla. 279, 50 Pac. 236. **Pa.**—Carr & Co. *v.* Beck, 51 Pa. 269; Jamison *v.* Brady, 6 Serg. & R. 466, 9 Am. Dec. 460. **Tenn.** Hamilton *v.* Gilbert, 2 Heisk. 680. **Tex.** Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816. **Vt.**—Phelps *v.* Bulkeley, 20 Vt. 17; Leavenworth *v.* Lapham, 5 Vt. 204. **Wis.**—Kipp *v.* Gates, 126 Wis. 566, 105 N. W. 947; Computing Scale Co. *v.* Churchill, 109 Wis. 303, 85 N. W. 337.

Claims against plaintiff and others, see *infra,* VII, D, 1, b, (V), (B).

[a] **Debts of Father.**—Where a son deals directly with a commission merchant, shipping cotton on bills of lading held by him, the commission merchant will not be allowed to offset the amount to the credit of the son by the debts of the father previously contracted. Lougarre *v.* W. D. Haas & Co., 131 La. 871, 60 So. 376.

55. See the following: **Ala.**—Drennen *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902. **Colo.** Thatcher *v.* Rockwell, 4 Colo. 375. **Ga.** Wilson *v.* Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97; Harlow *v.* Rosser, 28 Ga. 219. **Ind.**—Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391. **Mich.**—Stewart *v.* Terwilliger, 177

but in general claims pleaded as set-off or counterclaim need not exist between all the parties,[56] and as above stated[57] a counterclaim may consist in a demand in favor of one of several defendants as to which a separate judgment against plaintiff could be had.

(III.) Same Right and Capacity. — (A.) IN GENERAL. — The claims or demands must exist between the parties in the same right and capacity in which they appear in the suit,[58] for the law forbids the set-off of

Mich. 313, 143 N. W. 17, Ann. Cas. 1915C, 808; Fifield *v.* Edwards, 39 Mich. 264. **Miss.**—Walker *v.* Hall, 66 Miss. 390, 6 So. 318.

56. **Ark.**—Leach *v.* Lambeth, 14 Ark. 668. **Cal.**—Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369. **Ill.**—Graff *v.* Kahn, 18 Ill. App. 485. **Mo.**—Miller *v.* Crigler, 83 Mo. App. 395. **Okla.**—Cooper *v.* Gibson, 170 Pac. 220; Robertson *v.* Howerton, 56 Okla. 555, 156 Pac. 329; McKay *v.* H. A. Hall & Co., 30 Okla. 773, 120 Pac. 1108; Stauffer *v.* Campbell, 30 Okla. 76, 118 Pac. 391; Loeb *v.* Loeb, 24 Okla. 384, 103 Pac. 570.

Joint and several demands, see *infra,* VII, D, 1, b, (V).

Claims between the real parties in interest, see *infra,* VII, D, 1, b, (IV).

Partnership debts and obligations, see *infra,* VII, D, 3, c.

57. See *supra,* VII, D, 1, (II), note.

58. **Ala.**—White *v.* Word, 22 Ala. 442; Harbin *v.* Levi, 6 Ala. 399; Thomas *v.* Hopper, 5 Ala. 442. **Ark.** Menifee's Admrs. *v.* Ball, 7 Ark. 520. **Colo.**—Miller *v.* Mickel, 9 Colo. 331, 12 Pac. 240. **Conn.**—Wallingford *v.* Hall, 45 Conn. 350; Pitkin *v.* Pitkin, 8 Conn. 325; Francis *v.* Rand, 7 Conn. 221. **Del.**—Jones *v.* Wells, 2 Houst. 223. **Fla.** Lucas *v.* Wade, 43 Fla. 419, 31 So. 231. **Ga.**—Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Davis *v.* Hadden, 115 Ga. 466, 41 S. E. 608; Carter *v.* Tippins, 113 Ga. 636, 38 S. E. 946; Houston *v.* Ladies' Union Branch Assn., 87 Ga. 203, 13 S. E. 634; McQueen *v.* Fisher (Ga. App.), 95 S. E. 1004. **Ill.** Wisdom *v.* Becker, 52 Ill. 342; McCully *v.* Silverburgh, 18 Ill. 306; Peretes *v.* Tompary, 182 Ill. App. 495. **Ind.** Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303. **Ia.** Headington *v.* Smith, 113 Iowa 107, 84 N. W. 982; Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354. **Ky.**—Thompson *v.* Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89; Breashers *v.* Frazier, 102 Ky. 237, 43 S. W. 427; Oregon Gold Min. Co. *v.* Schmidt, 22 Ky. L. Rep. 1330, 60 S. W. 530; Avritt *v.* Russell, 22 Ky. L. Rep. 752, 58 S. W. 811; Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874. **La.**—Wood *v.* Hardy, 11 La. Ann. 760; Blanchard *v.* Cole, 8 La. 160. **Me.**—Rich *v.* Hayes, 101 Me. 324, 64 Atl. 656, 115 Am. St. Rep. 321. **Md.** Owens *v.* Barroll, 88 Md. 204, 40 Atl. 880; Scott *v.* Scott, 17 Md. 78; Hall *v.* Creswell, 12 Gill & J. 36; Turner *v.* Plowden, 2 Gill & J. 455; Gibbs *v.* Cunningham, 4 Md. Ch. 322. **Mass.**—Grew *v.* Burditt, 9 Pick. 265. **Mich.**—Watson *v.* Andrews & Co., 201 Mich. 484, 167 N. W. 1013; First Nat. Bank *v.* E. T. Barnum Wire & Iron Works, 58 Mich. 124, 24 N. W. 543, 55 Am. Rep. 660. **Miss.**—Hall *v.* Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831. **Mo.**—Smith *v.* Perry, 197 Mo. 438, 95 S. W. 337; Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68. **Neb.**—Lewis *v.* Pickering, 58 Neb. 63, 78 N. W. 368. **N. J.**—Jeffray *v.* Towar, 63 N. J. Eq. 530, 53 Atl. 182; McChesney *v.* Rogers, 8 N. J. L. 272. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Hood *v.* Hayward, 124 N. Y. 1, 26 N. E. 331; Sperb *v.* McCoun, 110 N. Y. 605, 18 N. E. 441, 1 L. R. A. 490; Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183; Miller *v.* Franklin Bank, 1 Paige 444; Weeks *v.* O'Brien, 25 App. Div. 206, 49 N. Y. Supp. 344, 27 Civ. Proc. 86; Blood *v.* Kane, 52 Hun 225, 6 N. Y. Supp. 353, 23 N. Y. St. 298; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650; Samuels *v.* Twin State Realty Co., 145 N. Y. Supp. 44. **N. C.**—Cooper *v.* Landis, 75 N. C. 526. **Ohio.**—Westfall *v.* Dungan, 14 Ohio St. 276. **Ore.**—Sanford *v.* Pike, 87 Ore. 614, 170 Pac. 729, 171 Pac. 394. **Pa.**—Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; First Nat. Bank *v.* Tustin, 246 Pa. 151, 92 Atl. 119; Sieger *v.* Sieger, 209 Pa. 65, 58 Atl. 140; Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004; Tagg *v.* Bowman, 108 Pa. 273, 56 Am. Rep. 204; Coffman *v.* Hampton, 2 Watts & S. 377, 37 Am.

claims and liabilities held in inconsistent relations,[59] and debts are not mutual unless held in the same right.[60]

(B.) In Suits by Representative in His Individual Capacity. — In an action brought by a man in his own right, the defendant cannot interpose a cross-demand due from such plaintiff in some representative capacity,[61] such as administrator or executor,[62] or guardian[63] or trustee,[64] or receiver.[65]

(C.) In Suits by Representative as Such. — Demands against plaintiff in his individual capacity cannot be set-off or counterclaimed where he sues in a representative capacity,[66] such as executor or administrator,[67] or trustee.[68] But if the plaintiff, suing in a representative capacity has become the real owner of the debt sued on, and that fact is alleged in the answer and proved, a defendant may set-off against him a debt due to him from the plaintiff individually.[69]

(D.) In Suits Against Representative Upon Individual Liability. — Where one acting in a representative capacity is sued upon an individual debt or demand, he may interpose proper set-offs or counterclaims due from the plaintiff to him individually,[70] but cannot[71] avail

Dec. 511. **S. C.**—Ex parte Doyley, 2 McCord L. 185; Columbia Corp. *v.* Harrison, 2 Mill 213. **Tenn.**—McClung *v.* Embreeville Freehold, Land, Iron & Railway Co., 42 S. W. 53; Beal *v.* Smithpeter, 6 Baxt. 356. **Tex.**—Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927. **W. Va.**—Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237.

59. Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972.

60. Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972.

61. Watson *v.* Andrews & Co., 201 Mich. 484, 167 N. W. 1013; Wolfersberger *v.* Bucher, 10 Serg. & R. 10.

62. See *infra*, VII, D, 3, i, (II).

63. See *infra*, this note.

[a] **A debt for the loan of his ward's money** to a partnership is an individual demand of the guardian against the partnership and he has the legal right to collect it in his individual capacity. Consequently in a suit to liquidate the partnership, the latter can set-off as against such claim debts due the partnership by the guardian individually. Leach *v.* Gray (Ala.), 77 So. 341.

64. See *infra*, VII, D, 3, f.

65. See *infra*, VII, D, 3, e.

66. **Ala.**—Harbin *v.* Levi, 6 Ala. 399. **Ark.**—Menifee's Admrs. *v.* Ball, 7 Ark. 520. **Conn.**—Miller *v.* Bellamore Armored Car & Equip. Co., 86 Conn. 548, 86 Atl. 13. **Ga.**—Carter *v.* Tippins, 113 Ga. 636, 38 S. E. 946. **Ill.**—Wisdom *v.* Becker, 52 Ill. 342; McCully *v.* Silverburgh, 18 Ill. 306. **Ky.** Thompson *v.* Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89; Oregon Gold Min. Co. *v.* Schmidt, 22 Ky. L. Rep. 1330, 60 S. W. 530; Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874. **Mich.**—First Nat. Bank *v.* E. T. Barnum Wire & Iron Works, 58 Mich. 124, 24 N. W. 543, 55 Am. Rep. 660. **N. Y.** Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Hood *v.* Hayward, 124 N. Y. 1, 26 N. E. 331; Sperb *v.* McCoun, 110 N. Y. 605, 18 N. E. 441, 1 L. R. A. 490; Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273; Weeks *v.* O'Brien, 25 App. Div. 206, 49 N. Y. Supp. 344; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650. **N. J.**—McChesney *v.* Rogers, 8 N. J. L. 272. **W. Va.**—Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237.

67. See *infra*, VII, D, 3, i, (II).

68. See *infra*, VII, D, 3, f.

69. Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874.

70. Vaughn *v.* Walsh, 122 Wis. 486, 100 N. W. 840.

71. **Ala.**—White *v.* Word, 22 Ala. 442; Thomas *v.* Hopper, 5 Ala. 442. **Fla.** Lucas *v.* Wade, 43 Fla. 419, 31 So. 231. **Ga.**—Davis *v.* Hadden, 115 Ga. 466, 41 S. E. 608. **Ky.**—Johnson *v.* Gunter, 6 Bush. 534; Avritt *v.* Russell, 22 Ky. L. Rep. 752, 58 S. W. 811. **La.**—Wood *v.* Hardy, 11 La. Ann. 760. **Mo.**—Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68. **N. Y.**—Blood *v.* Kane, 52 Hun 225, 6

himself of demands due him in his representative capacity, such as executor or administrator,[72] or trustee.[73]

(E.) In Suits Against Representative as Such. — In a suit against one in his representative capacity, a cross-demand held by him in his individual capacity is not available,[74] but claims due from plaintiff to him as representative may be set off.[75]

(IV.) Real and Nominal Parties. — In applying the rule that the claims and demands must exist between the parties to the action,[76] the court does not look merely to the nominal parties to the record, but inquires rather as to who are the real parties in interest, and adjusts the claims accordingly.[77] And even though the record may not

N. Y. Supp. 353, 23 N. Y. St. 298. **Pa.** Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; First Nat. Bank *v.* Tustin, 246 Pa. 151, 92 Atl. 119. **S. C.**—Ex parte Doyley, 2 McCord L. 185.

[a] **Bank deposits made in a fiduciary capacity** by defendant cannot be set-off by him in an action against him on his individual note. Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61.

72. See *infra*, VII, D, 3, i, (II).

73. See *infra*, VII, D, 3, f.

74. **Ga.**—McQueen *v.* Fisher (Ga. App.), 95 S. E. 1004. **Mass.**—Stickney *v.* Clement, 7 Gray 170. **S. C.**—Richbourg *v.* Richbourg, Harp. Eq. 168.

[a] **Suit Against Defendant as Guardian.**—McQueen *v.* Fisher (Ga. App.), 95 S. E. 1004.

75. Pearson *v.* Darrington, 32 Ala. 227; Harris *v.* White, 5 N. J. L. 485.

76. See *supra*, VII, D, 1, b, (I).

77. **U. S.**—Winchester *v.* Hackley, 2 Cranch 342, 2 L. ed. 299; McGill *v.* Sorensen, 209 Fed. 876. **Cal.**—Hobbs *v.* Duff, 23 Cal. 596; Davis *v.* Bakersfield Oil, & S. Exch., 2 Cal. App. 195, 83 Pac. 260. **Colo.**—Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013. **Del.**—Burton *v.* Willin, 6 Houst. 522, 22 Am. St. Rep. 363. **Ga.**—Summers *v.* Lee, 10 Ga. App. 441, 73 S. E. 602. **Ill.**—Himrod *v.* Baugh, 85 Ill. 435; Cary *v.* Niblo, 155 Ill. App. 338; Third Swedish Meth. E. Church *v.* Wetherell, 43 Ill. App. 414; Graff *v.* Kahn, 18 Ill. App. 485. **Ind.** Marsh *v.* Low, 55 Ind. 271; Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Henry *v.* Scott, 3 Ind. 412. **Kan.** Citizens' Bank *v.* Bowen, 21 Kan. 354. **Ky.**—Ward *v.* Martin, 3 T. B. Mon. 18. **La.**—Smith *v.* Adams & Co., 14 La. Ann. 409. **Me.**—Rich *v.* Hayes, 101 Me. 324, 64 Atl. 656, 115 Am. St. Rep. 321; Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458. **Mass.**—Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; Sheldon *v.* Kendall, 7 Cush. 217; Com. *v.* Phoenix Bank, 11 Metc. 129. **Mo.**—Nickerson *v.* Gilliam, 29 Mo. 456, 77 Am. Dec. 583; Frazier *v.* Gibson, 7 Mo. 271. **N. H.** Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Andrews *v.* Varrell, 46 N. H. 17; Bellows *v.* Smith, 9 N. H. 285. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905; Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; Clegg *v.* Cramer, 32 Hun 162; Cowles *v.* Cowles, 9 How. Pr. 361. **N. C.**—Moore *v.* Greenville Bank & Tel. Co., 173 N. C. 180, 91 S. E. 793. **Ohio.** Miller & Co. *v.* Florer, 15 Ohio St. 148. **Okla.**—Rankin *v.* Blaine County Bank, 20 Okla. 68, 93 Pac. 536. **Pa.**—Russ *v.* Sadler, 197 Pa. 51, 46 Atl. 903; Henderson *v.* Lewis, 9 Serg. & R. 379, 11 Am. Dec. 733. **Tenn.**—Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712. **Tex.**—Masterson *v.* Goodlett, 46 Tex. 402. **W. Va.**—Baltimore & O. R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820. **Wis.**—Briggs *v.* Seymour, 17 Wis. 255.

Real party in interest, see 20 Standard Proc. 897, et seq.

Husband the real party in interest, see *infra*, VII, D, 3, g.

[a] **Where the plaintiff sues for the benefit of another** a cross-demand against the beneficiary is always allowable. Summers *v.* Lee, 10 Ga. App. 441, 73 S. E. 602.

[b] **Where the personnel of two firms is identical** and they conduct a business in different places under different names, there is in law but one partnership and a claim belonging to one, belongs as well to the other and may be set-up by such other as a set-off as counterclaim without first having been assigned to it. Michigan

show who the real party in interest is, that fact may be established by evidence.[78]

(V.) Several and Joint Demands. — (A.) IN GENERAL. — Since the rule in respect to cross-demands requires mutuality,[79] and does not permit defendant to set up against plaintiff any cause of action upon which he would be unable to maintain a suit against plaintiff alone,[80] it follows that joint debts and demands cannot be set-off or counterclaimed against separate ones,[81] nor separate demands against joint ones,[82] un-

Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340.

[c] **Change in Firm Name.**—Where persons under a certain firm name enter into a contract, their right to avail themselves of a cross-demand for breach thereof is not lost by a subsequent change in the firm name. Cary *v.* Niblo, 155 Ill. App. 338.

[d] **Where a bank is the real and its director the nominal party** in a suit brought by the director on notes, the defendant may set up a demand which it has against the bank. Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013.

[e] **Beneficiary's money deposited in trustee's name** may be set-off in an action by the bank against the beneficiary. Third Swedish Meth. E. Church *v.* Wetherell, 43 Ill. App. 414.

78. Rich *v.* Hayes, 101 Me. 324, 64 Atl. 656, 115 Am. St. Rep. 321; Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265.

79. See *supra*, VII, D, 1, a.

80. See *supra*, VII, D, 1, b, (I), (B) and (C).

81. **Ariz.**—Ives *v.* Sanguinetti, 10 Ariz. 83, 85 Pac. 480. **Cal.**—Corwin *v.* Ward, 35 Cal. 195, 95 Am. Dec. 93; Howard *v.* Shores, 20 Cal. 277; Duff *v.* Hobbs, 19 Cal. 646. **Colo.**—Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235. **Conn.**—Palmer *v.* Green, 6 Conn. 14. **Del.**—Wingate *v.* Parsons, 4 Del. Ch. 117. **Ga.**—Wilson *v.* Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97. **Ill.**—Priest *v.* Dodsworth, 235 Ill. 613, 85 N. E. 940; Morris *v.* Calumet & C. Canal, etc. Co., 195 Ill. 101, 62 N. E. 813; Ryan *v.* Barger, 16 Ill. 28; Ripley *v.* Cross S. Farming Co., 189 Ill. App. 291. **Ind.**—Proctor *v.* Colt, 120 Ind. 102, 22 N. E. 101; Parks *v.* Zeek, 53 Ind. 221; Blankenship *v.* Rogers, 10 Ind. 333. **Ky.**—Bibb *v.* Saunders, 2 Bibb 86; Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874; Bailey *v.* Penick, 10 Ky. L. Rep. 239. **Md.**—Tyrrell *v.* Tyrrell, 54 Md. 167. **Mass.**—Dehon *v.* Stetson, 9 Metc. 341. **Mich.**—Stewart *v.* Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas 1915C, 808; Detroit, H. & S. W. R. Co. *v.* Smith, 50 Mich. 112, 15 N. W. 39. **Mo.**—Finney *v.* Turner, 10 Mo. 207. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. H.**—Brown *v.* Warren, 43 N. H. 430. **N. J.**—Reveruzzi *v.* Caruso, 86 N. J. L. 556, 91 Atl. 1022. **N. Y.**—Coursen *v.* Hamlin, 2 Duer 513; In re Miller, 23 Misc. 511, 52 N. Y. Supp. 1023. **Ohio.**—Miller & Co. *v.* Florer, 19 Ohio St. 356. **Pa.** Mintz *v.* Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285. **S. C.**—Copeland *v.* Young, 21 S. C. 275; Kenedy *v.* Cunningham, Sheves 50. **Tenn.**—Robertson *v.* Talbot, 2 Yerg. 258; Turbeville *v.* Broach, 5 Coldw. 270. **Tex.** Allbright *v.* Aldrich, 2 Tex. 166; Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816. **Va.**—Porter *v.* Nekervis, 4 Rand. (25 Va.) 359.

Partnership debts, see *infra*, VII, D, 3, c.

[a] **A claim for damages for breach of joint covenants** in a deed cannot be set-off against an individual claim of one of the grantors. Stewart *v.* Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas. 1915C, 808.

82. **Ala.**—McRight *v.* Farned, 76 So. 975. **Ark.**—Trammell *v.* Harrell, 4 Ark. 602. **Colo.**—Thatcher *v.* Rockwell, 4 Colo. 375. **Ga.**—Ingram *v.* Jordan, 55 Ga. 356. **Ill.**—Heckenkemper *v.* Dingwehrs, 32 Ill. 538; Walker *v.* Chovin, 16 Ill. 489; Peretes *v.* Tompary, 182 Ill. App. 495; Lucas *v.* Johnson, 176 Ill. App. 143. **Ind.**—Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Johnson *v.* Kent, 9 Ind. 252. **Ia.**—Kauffman *v.* Phillips, 154 Iowa 542, 134 N. W. 575. **Ky.**—Bauer Cooperage Co. *v.* Ewell & Smith, 149 Ky. 838, 149 S. W. 1137; Bibb *v.* Saunders, 2 Bibb 86; Lebanon Steam Laundry Co. *v.* Dyckman, 22 Ky. L. Rep. 348, 57 S. W. 227. **La.**—Thomas *v.* Elkins, 4 Mart.

less in either case the parties agree to allow the cross-demand,[83] or it is authorized by the terms of the statute.[84]

(B.) CROSS-DEMAND OF CLAIMS DUE FROM PLAINTIFF AND OTHERS. — A debt or claim existing against plaintiff and others jointly cannot be set-off or counterclaimed against plaintiff alone.[85] The rule is otherwise where the debt or claim is a joint and several one,[86] or where the stat-

O. S. 376; Smith *v.* Duncan, 1 Mart. O. S. 24. **Md.**—Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389; Wilson & Co. *v.* Keedy, 8 Gill 195. **Mass.**—Brooks *v.* Stackpole, 168 Mass. 537, 47 N. E. 419. **Mich.**—Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260; Keystone Mfg. Co. *v.* Forsyth, 115 Mich. 51, 72 N. W. 1109; Fifield *v.* Edwards, 39 Mich. 264. **Minn.** Birdsall *v.* Fischer, 17 Minn. 100. **Miss.** Moody *v.* Willis, 41 Miss. 347. **N. H.** Brown *v.* Warren, 43 N. H. 430; Woods *v.* Carlisle, 6 N. H. 27. **N. J.**—Williamson *v.* Fox, 30 N. J. Eq. 488. **N. Y.** Mortimer *v.* Chambers, 63 Hun 335, 17 N. Y. Supp. 874, 43 N. Y. St. 365; Perry *v.* Chester, 12 Abb. Pr. N. S. 131; National State Bank *v.* Boylan, 2 Abb. N. C. 216; Pophan *v.* Rubin, 134 N. Y. Supp. 1067. **Pa.**—Archer *v.* Dunn, 2 Watts & S. 327. **S. C.**—Kenedy *v.* Cunningham, Cheves 50. **Tenn.**—Turbeville *v.* Broach, 5 Coldw. 270; Blanks *v.* Smith, Peck 186. **Tex.**—Senter *v.* Whittaker, 66 Tex. 624, 2 S. W. 89; Henderson *v.* Gilliam & Co., 12 Tex. 71. **Vt.**—Clough *v.* Clough, 55 Vt. 360. **Va.**—Christian *v.* Miller, 3 Leigh (30 Va.) 78, 23 Am. Dec. 251. **W. Va.** Elliott *v.* Bell, 37 W. Va. 834, 17 S. E. 399. **Wis.**—Carpenter *v.* Fulmer, 118 Wis. 454, 95 N. W. 403. **Eng.**—Jones *v.* Fleeming, 7 B. & C. 217, 14 E. C. L. 103, 6 L. J. K. B. O. S. 113, 108 Eng. Reprint 704.

[a] **Joint Liability of Husband and Wife.**—Lucas *v.* Johnson, 176 Ill. App. 143.

83. Perkins' Admr. *v.* Hawkins' Admx., 9 Gratt. (50 Va.) 649.

Agreement to allow cross-demands, generally see *supra,* VI.

84. Curlee *v.* Ruland, 56 Okla. 329, 155 Pac. 1182.

85. Ariz.—Rouse *v.* Bolen, 17 Ariz. 14, 147 Pac. 736. **Cal.**—Howard *v.* Shores, 20 Cal. 277; Duff *v.* Hobbs, 19 Cal. 646. **Colo.**—Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155. **Conn.**—Snyder *v.* Spurr, 33 Conn. 407; Atkins *v.* Churchill, 19 Conn. 394. **Del.**—Sussex Trust Co. *v.* Bacon (Del. Ch.), 102 Atl. 785; Greer *v.* Arlington Mills Mfg. Co., 1 Penne. 581, 43 Atl. 609. **Ga.**—West *v.* Kendrick, 46 Ga. 526. **Ill.**—International Bank *v.* Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807; Phelps *v.* Reeder, 39 Ill. 172; Ryan *v.* Barger, 16 Ill. 28; Hilliard *v.* Walker, 11 Ill. 644. **Ind.**—Blankenship *v.* Rogers, 10 Ind. 333; Reed *v.* Coale, 4 Ind. 283; McKinney *v.* Bellows, 3 Blackf. 31. **Ky.** Bright *v.* Wilson's Admr., 7 B. Mon. 122; Bibb *v.* Saunders, 2 Bibb 86. **La.** Smith *v.* Duncan, 1 Mart. O. S. 24. **Md.** Mitchell *v.* Sellman, 5 Md. 376; Robertson *v.* Parks, 3 Md. Ch. 65; Wilson & Co. *v.* Keedy, 8 Gill 195. **Mass.** Reed *v.* Whitney, 7 Gray 533; Bridgham *v.* Tileston, 5 Allen 371. **N. Y.** Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350; Schubart *v.* Harteau, 34 Barb. 447; Belknap *v.* McIntyre, 2 Abb. Pr. 366; Johnson *v.* Johnson, 157 App. Div. 289, 142 N. Y. Supp. 416; McCulloch *v.* Vibbard, 51 Hun 227, 4 N. Y. Supp. 202, 21 N. Y. St. 51; Walsh *v.* Ostrander, 22 Wend. 178; Wolfe *v.* Washburn, 6 Cow. 262. **Ohio.**—Dougherty *v.* Cummings, 7 Ohio Dec. (Reprint) 184. **Pa.**—Mintz *v.* Tri-Country Natural Gas Co., 259 Pa. 477, 103 Atl. 285; Jarecki Mfg. Co. *v.* Haymaker, 138 Pa. 541, 21 Atl. 99; McDowell *v.* Tyson, 14 Serg. & R. 300. **S. C.**—Byrd *v.* Charles, 3 S. C. 352. **Tenn.**—Flint *v.* Tillman, 2 Heisk. 202. **Tex.**—Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Hamilton *v.* Van Hook, 26 Tex. 302. **Eng.** Fletcher *v.* Dyche, 2 T. R. 32, 100 Eng. Reprint 18; Vulliamy *v.* Noble, 3 Merw. 593, 17 Rev. Rep. 143, 36 Eng. Reprint 228; Arnold *v.* Bainbrigge, 9 Exch. 153.

[a] **A demand for services rendered plaintiff and others** cannot be counterclaimed in an action by plaintiff to cancel a note and mortgage. Rouse *v.* Bolen, 17 Ariz. 14, 147 Pac. 736.

Demands against partnership of which plaintiff is a member, see *infra,* VII, D, 3, c.

86. U. S.—Pate *v.* Gray, Hempst. 155, 18 Fed. Cas. No. 10,794a. **Ala.** Carson *v.* Barnes, 1 Ala. 93; Clarke *v.* McElroy, 1 Stew. 147. **Ill.**—Hayden *v.*

ute[87] or circumstances[88] permit a several suit on a joint obligation.

(C.) Cross-Demand of Claims Owing to Defendant and Others. — A debt or demand owing to several persons jointly cannot be used as a set-off or counterclaim by one or some of them,[89] but one or more of defendants may properly use as a counter-demand a claim due to defendants

Alton Nat. Bank, 29 Ill. App. 458. **Ind.** White *v.* Rogers, 6 Blackf. 436. **Ia.** Branch of State Bank *v.* Morris, 13 Iowa 136. **Ky.**—Grimes *v.* Grimes, 88 Ky. 20, 9 S. W. 840; Dunn *v.* West, 5 B. Mon. 376; Dunwidie *v.* Kerley, 6 J. J. Marsh. 501; Otwell *v.* Cook, 9 B. Mon. 357. **Me.**—Fox *v.* Cutts, 6 Me. 240. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811. **Mass.**—Donelson *v.* Colerain, 4 Metc. 430. **Mich.**—Ferguson *v.* Millikin, 42 Mich. 441, 4 N. W. 185. **Mo.**—Ruddle *v.* Horine, 34 Mo. App. 616; Weiss *v.* Wahl, 5 Mo. App. 408. **Neb.**—Burge *v.* Gandy, 41 Neb. 149, 59 N. W. 359. **N. Y.**—Standish *v.* Chandler, 23 Wend. 511. **Pa.**—Com. *v.* Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574. **Tex.**—Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504. **W. Va.**—Elliott *v.* Bell, 37 W. Va. 834, 17 S. E. 399. **Eng.**—Owen *v.* Wilkinson, 5 C. B. N. S. 526, 94 E. C. L. 526, 28 L. J. C. P. 3, 5 Jur. N. S. 102, 141 Eng. Reprint 213; Fletcher *v.* Dyche, 2 T. R. 32, 100 Eng. Reprint 18.

[a] **That a note is signed by a party jointly** with others does not prevent the note from being available as a set-off against such party where the liability is joint and several. Com. *v.* Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574. See also Ferguson *v.* Millikin, 42 Mich. 441, 4 N. W. 185.

87. See 11 Standard Proc. 976.

88. See 11 Standard Proc. 977, et seq.

[a] **Where the Other Joint Obligor Is Dead.**—McCarthy *v.* Sleight, 114 Mich. 182, 72 N. W. 165. See 11 Standard Proc. 977. Where one joint maker of a note is dead the note may be used as a set-off in an action by the other joint maker on a demand due him alone. McCarthy *v.* Sleight, 114 Mich. 182, 72 N. W. 165.

Surviving partners, see *infra,* VII, D, 3, c, (V).

89. U. S.—Gray *v.* Rollo, 18 Wall. 629, 21 L. ed. 927. **Ala.**—Drennen *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902; Jasper Mercantile Co. *v.* O'Rear, 112 Ala. 247, 20 So. 583; Evans *v.* Sims, 37 Ala. 710; Taylor *v.* Bass, 5 Ala. 110. **Cal.**—Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456; Hook *v.* White, 36 Cal. 299; Howard *v.* Shores, 20 Cal. 277. **Colo.** Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155. **Ga.**—Bishop *v.* Mathews, 109 Ga. 790, 35 S. E. 161. **Idaho.** McGuire *v.* Lamb, 2 Idaho 378, 17 Pac. 749. **Ill.**—Dameier *v.* Bayor, 167 Ill. 547, 47 N. E. 770. **Ind.**—Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Parks *v.* Zeek, 53 Ind. 221; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460. **Ky.** Bibb *v.* Saunders, 2 Bibb 86; Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874; Bailey *v.* Penick, 10 Ky. L. Rep. 239. **Md.**—Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **Mass.**—Howe *v.* Snow, 3 Allen 111; Reed *v.* Whitney, 7 Gray 533; Dehon *v.* Stetson, 9 Metc. 341. **Mo.**—Lamb *v.* Brolaski, 38 Mo. 51. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **N. Y.**—Hopkins *v.* Lane, 87 N. Y. 501; Baldwin *v.* Briggs, 51 How. Pr. 477, 53 How. Pr. 80; Secor *v.* Law, 9 Bosw. 163, 188, *affirmed,* 4 Abb. Dec. 188; Campbell *v.* Genet, 2 Hilt. 290; Springfield Iron Co. *v.* Kelley, 1 N. Y. Supp. 351, 15 N. Y. St. 930. **Ore.**—Sanford *v.* Pike, 87 Ore. 614, 170 Pac. 729, 171 Pac. 394; Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **Pa.**—Gerber *v.* Meredith, 160 Pa. 102, 28 Atl. 638. **S. C.**—Copeland *v.* Young, 21 S. C. 275. **S. D.**—Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784. **Tex.**—Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849; Allbright *v.* Aldrich, 2 Tex. 166. **Vt.** Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078; Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701. **Eng.**—Bowyear *v.* Pawson, 6 Q. B. D. 540, 50 L. J. Q. B. 495, 29 Wkly. Rep. 664; Middleton *v.* Pollock, L. R. 20 Eq. 29, 44 L. J. Ch. 584, 23 Wkly. Rep. 766, 33 L. T. N. S. 240.

Debts and demands owned by a partnership of which defendant is a member, see *infra,* VII, D, 3, c.

or to defendants and others jointly and severally.[90]

(D.) WHERE SEVERAL PARTIES PLAINTIFF. — When two or more persons have a joint right of action and proceed jointly to enforce it, a set-off or counterclaim cannot be interposed against one or some of them in favor of any or all of the defendants.[91]

(E.) WHERE SEVERAL PARTIES DEFENDANT. — Where defendants are sued jointly upon a joint obligation, they may assert a cross-demand existing in them jointly,[92] but no set-off or counterclaim can be made available which consists of a demand in favor of one or some of them and not the others,[93] though a contrary rule prevails in some jurisdic-

90. See *infra*, VII, D, 1, b, (V), (E).

91. **U. S.** — Young *v.* Black, 7 Cranch 565, 3 L. ed. 440; Howe *v.* Sheppard, 2 Sumn. 409, 12 Fed. Cas. No. 6,773; Boehm *v.* United States, 20 Ct. Cl. 142. **Ala.**—Tillis *v.* McKinna, 114 Ala. 311, 21 So. 465; Boykin *v.* Persons, 95 Ala. 626, 11 So. 67; Watts *v.* Sayre, 76 Ala. 397; Clark *v.* Taylor & Co., 68 Ala. 453; Taylor *v.* Bass, 5 Ala. 110. **Ark.**—Collier *v.* Dyer, 27 Ark. 478; Trammell *v.* Harrell, 4 Ark. 602. **Colo.**—Thatcher *v.* Rockwell, 4 Colo. 375. **Conn.**—Meeker *v.* Thompson, 43 Conn. 77; Palmer *v.* Green, 6 Conn. 14. **Ga.**—Ingraham *v.* Jordan, 55 Ga. 356; Harlow *v.* Rosser, 28 Ga. 219. **Ill.**—Burgwin *v.* Babcock, 11 Ill. 28; Gregg *v.* James, 1 Ill. 143, 12 Am. Dec. 151. **Ind.**—Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Shotts *v.* Boyd, 77 Ind. 223; Johnson *v.* Kent, 9 Ind. 252. **Kan.** Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279. **Ky.**—Bourne *v.* Wooldridge, 10 B. Mon. 492; Smith *v.* Brannon, 21 Ky. L. Rep. 267, 51 S. W. 178. **La.** Thomas *v.* Elkins, 4 Mart. (O. S.) 376. **Me.**—Jones *v.* Vinal Haven Steamboat Co., 90 Me. 120, 37 Atl. 879. **Md.** Tyrrell *v.* Tyrrell, 54 Md. 167; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681; Howard *v.* Warfield's Admr., 4 Har. & M. 21. **Mass.**—Williams *v.* Brimhall, 13 Gray 462; Williams *v.* Ocean Ins. Co., 2 Metc. 303. **Mich.** Fifield *v.* Edwards, 39 Mich. 264. **Minn.** Birdsall *v.* Fischer, 17 Minn. 100. **Miss.**—Walker *v.* Hall, 66 Miss. 390, 6 So. 318; Jones *v.* Howard, 53 Miss. 707. **Neb.**—Folsom *v.* Pailing, 58 Neb. 478, 78 N. W. 926. **Nev.**—Davis *v.* Notware, 13 Nev. 421. **N. H.**—Woods *v.* Carlisle, 6 N. H. 27. **N. Y.**—Ladue *v.* Hart, 4 Wend. 583; Pinckney *v.* Keyler, 4 E. D. Smith 469. **N. C.**—Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699. **Okla.**—Gotthauer *v.* Cunningham, 4 Okla. 551, 47 Pac. 479. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **R. I.**—Hopkins *v.* Drowne, 21 R. I. 80, 41 Atl. 1010; Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913. **S. C.**—Lovel *v.* Whitridge, 1 McCord L. 7; Powrie *v.* Fletcher, 2 Bay 146. **Tex.**—Ward *v.* Newell, 37 Tex. 261. **Vt.**—Clough *v.* Clough, 55 Vt. 360; Gleason *v.* Vermont Cent. R. Co., 25 Vt. 37; Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701; Wells *v.* Mace, 17 Vt. 503. **Eng.** Grant *v.* Royal Exch. Assur. Co., 5 Maule & S. 439, 442, 105 Eng. Reprint 1111. **Can.**—McDougall *v.* Cameron, 21 Can. Sup. Ct. 379.

Actions by partnership, see *infra*, VII, D, 3, c.

[a] **If three joint owners of a cargo** employ the master of the ship to sell it for them and he afterwards becomes interested in the share of one of the joint owners, he cannot in an action brought against him by the three joint owners to recover the amount of sales, set off his share of that amount. Young *v.* Black, 7 Cranch (U. S.) 565, 3 L. ed. 440.

92. Progress Blue Ribbon Farms *v.* George, 167 Wis. 228, 167 N. W. 253.

93. **U. S.**—Coleman *v.* Elmore, 31 Fed. 391, 12 Sawy. 463; Waters *v.* Bussard, 2 Cranch C. C. 226, 29 Fed. Cas. No. 17,262; Langley *v.* Brent, 3 Cranch C. C. 365, 14 Fed. Cas. No. 8,066. **Cal.**—McDonald *v.* Poole, 113 Cal. 437, 45 Pac. 702; Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. **Colo.**—Rogers *v.* McMillen, 6 Colo. App. 14, 39 Pac. 891; Thatcher *v.* Rockwell, 4 Colo. 375. **Conn.**—Atkins *v.* Churchill, 19 Conn. 394; Palmer *v.* Green, 6 Conn. 14. **Ga.**—Wilson *v.*

tions.[94] When defendants, though sued jointly, are jointly and severally liable, a counterdemand may be interposed in favor of one or

Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97; Ingram *v.* Jordan, 55 Ga. 356. **Ill.**—Priest *v.* Dodsworth, 235 Ill. 613, 85 N. E. 940; Dameier *v.* Bayor, 167 Ill. 547, 47 N. E. 770; Lemon *v.* Stevenson, 36 Ill. 49; McCully *v.* Silverburgh, 18 Ill. 306; Ryan *v.* Barger, 16 Ill. 28; Hinckley *v.* West, 9 Ill. 136; Ripley *v.* Cross S. Farming Co., 189 Ill. App. 291; Peretes *v.* Tompary, 182 Ill. App. 495; Bevier *v.* Horn, 180 Ill. App. 547. **Ind.**—New Castle First Nat. Bank *v.* Nugen, 99 Ind. 160; Lynn *v.* Crim, 96 Ind. 89; Gregory *v.* Gregory, 89 Ind. 345; Gordon *v.* Swift, 46 Ind. 208; Slayback *v.* Jones, 9 Ind. 470; Woods *v.* Harris, 3 Blackf. 585. **Ia.**—Kauffman *v.* Phillips, 154 Iowa 542, 134 N. W. 575; Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510. **Ky.**—Stone *v.* McConnell, 1 Duv. 54. **Me.**—Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458; Banks *v.* Pike, 15 Me. 268. **Md.**—Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389; Tyrrell *v.* Tyrrell, 54 Md. 167; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **Mass.**—McGuinness *v.* Kyle, 208 Mass. 443, 94 N. E. 700; Brooks *v.* Stackpole, 168 Mass. 537, 47 N. E. 419; Emerson *v.* Baylies, 19 Pick. 55; Fuller *v.* Wright, 18 Pick. 403; Walker *v.* Leighton, 11 Mass. 140; Warren *v.* Wells, 1 Metc. 80. **Mich.** Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260; Keystone Mfg. Co. *v.* Forsyth, 115 Mich. 51, 72 N. W. 1109; Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256; Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183. **Minn.** Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467. **Miss.**—Paine *v.* Lewis, 64 Miss. 96, 8 So. 207; Bullard *v.* Dorsey, 7 Smed. & M. 9. **Mo.**—Finney *v.* Turner, 10 Mo. 207. **Mont.**—Collier *v.* Ervin, 3 Mont. 142; Kemp *v.* McCormick, 1 Mont. 420. **Nev.**—Davis *v.* Notware, 13 Nev. 421. **N. H.**—Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171; Concord *v.* Pillsbury, 33 N. H. 310; Woods *v.* Carlisle, 6 N. H. 27; Ross *v.* Knight, 4 N. H. 236. **N. Y.** Coffin *v.* McLean, 80 N. Y. 560; Sherman *v.* Crosby, 11 Johns. 70; Peabody *v.* Bloomer, 5 Duer 678, 3 Abb. Pr. 353; Murray *v.* Toland, 3 Johns. Ch. 569; Pinckney *v.* Keyler, 4 E. D. Smith 469; Rosenzweig *v.* McCaffrey, 27 Misc. 808, 57 N. Y. Supp. 219; Carey *v.* Baldwin, 61 N. Y. Supp. 581. **N. C.**—Utley *v.* Foy, 70 N. C. 303; Walton *v.* McKesson, 64 N. C. 154; Jones *v.* Gilreath, 28 N. C. 338; State Bank *v.* Armstrong, 15 N. C. 519. **Ohio.**—McGee *v.* Cleveland Organ Co., 4 Ohio Dec. (Reprint) 481. **Okla.**—Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584; Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. C.**—Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787; Kenedy *v.* Cunningham, Cheves L. 50. **Tenn.**—Henry *v.* Walker, 11 Heisk. 194. **Tex.**—Allbright *v.* Aldrich, 2 Tex. 166; Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927. **Vt.**—Johnson *v.* Kelley, 67 Vt. 386, 31 Atl. 849; Bragg *v.* Fletcher, 20 Vt. 351. **Va.**—Gilliat *v.* Lynch, 2 Leigh (29 Va.) 493; Arnolds *v.* Jacksons, 6 Munf. (20 Va.) 106; Ritchie *v.* Moore, 5 Munf. (19 Va.) 388, 7 Am. Dec. 688; Scott *v.* Trent, 1 Wash. (1 Va.) 77. **W. Va.**—Choen *v.* Guthrie, 15 W. Va. 100. **Wis.**—Wilson *v.* Runkel, 38 Wis. 526.

Actions against partnership, see *infra,* VII, D, 3, c.

[a] **Though one of joint defendants is not served** the set-off is not available where a joint liability is established since the party not served can be brought in on scire facias and made a party to the judgment. Lucas *v.* Johnson, 176 Ill. App. 143.

[b] **The reason is** that a separate judgment against less than all is impossible. Wilson *v.* Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97.

94. Curlee *v.* Ruland, 56 Okla. 329, 155 Pac. 1182; McKay *v.* H. A. Hall & Co., 30 Okla. 773, 120 Pac. 1108; Loeb *v.* Loeb, 24 Okla. 384, 103 Pac. 570.

[a] **The contrary rule is, in Pennsylvania, based upon the theory** that when an individual debt is allowed to be set off in a suit against defendants jointly, the defendants have the right to agree among themselves as to the adjustment of the proceeds of the set-off. Mintz *v.* Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285; Miller *v.* Kreiter, 76 Pa. 78; Cochran

some of them,[95] for since a judgment might be recovered against either, either is at liberty to plead a counterclaim which inures to his benefit.[96] Where thus pleaded by one or more of the defendants the cross-demand inures to the benefit of all, so far as there being any recovery in the cause,[97] for if it extinguishes the debt of the plaintiff there can be

v. Cutter, 18 Pa. Super. 282; Stewart *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Childerston *v.* Hammon, 9 Serg. & R. 68; Robinson *v.* Beall, 3 Yeates 267; Pasek *v.* Vockroth, 13 Pa. Co. Ct. 593; Warren Wood-Working Co. *v.* Cooke Mercantile Trust Co., 5 Pa. Dist. 359.

[b] **One joint maker of a note** may set off against it an indebtedness due him individually from the payee. Curlee *v.* Ruland, 56 Okla. 329, 155 Pac. 1182. See also Leach *v.* Lambeth, 14 Ark. 668; Ballinger *v.* Tarbell, 16 Iowa 491, 85 Am. Dec. 527.

95. **Ala.**—Locke *v.* Locke, 57 Ala. 473; Sledge *v.* Swift, 53 Ala. 110; Pitcher *v.* Patrick's Admrs., Minor 321, 12 Am. Dec. 54. **Ark.**—Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131; Burke's Admr. *v.* Stillwell's Exr., 23 Ark. 294; Leach *v.* Lambeth, 14 Ark. 668. **Cal.**—McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. **Colo.**—Canfield *v.* Arnett, 17 Colo. App. 426, 68 Pac. 784. **Ga.**—Wilson *v.* Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97; Harrison *v.* Henderson, 4 Ga. 198. **Ind.**—Gordon *v.* Swift, 46 Ind. 208; Knour *v.* Dick, 14 Ind. 20; Blankenship *v.* Rogers, 10 Ind. 333; Johnson *v.* Kent, 9 Ind. 252. **Ky.**—Powell *v.* Hogue, 8 B. Mon. 443; Dunn *v.* West, 5 B. Mon. 376. **Minn.**—Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456. **Mo.**—Mortland *v.* Holton, 44 Mo. 58; Kent *v.* Rogers, 24 Mo. 306; Austin *v.* Feland, 8 Mo. 309. **Mont.**—Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454. **Neb.**—Raymond Bros. *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **N. Y.**—Clegg *v.* Cramer, 32 Hun 162; Briggs *v.* Briggs, 20 Barb. 477; Perry *v.* Chester, 12 Abb. Pr. (N. S.) 131; A. D. Kneuper Specialty Co. *v.* Kneuper, 171 App. Div. 555, 157 N. Y. Supp. 395; Wolf *v.* Michael, 21 Misc. 86, 46 N. Y. Supp. 991; Straschitz *v.* Ungar, 153 N. Y. Supp. 118. **N. C.**—Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230; Utley *v.* Foy, 70 N. C. 303. **N. D.**—Bradley *v.* Earle, 22 N. D. 139, 132 N. W. 660, Ann. Cas. 1914A, 1181, 42 L. R. A. (N. S.) 575; Clark *v.* Sullivan, 2 N. D. 103, 49 N. W. 416, 13 L. R. A. 233. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **Pa.**—Com. *v.* Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574; Purviance *v.* Sutherland, Add. 291. **S. C.**—Mitchell *v.* Gibbes, 2 Bay 475.

[a] **Even though plaintiff alleges facts tending to show joint liability,** where in fact the liability is joint and several. A. D. Kneuper Specialty Co. *v.* Kneuper, 171 App. Div. 555, 157 N. Y. Supp. 395.

[b] **In a suit on a lease** against defendants who are jointly and severally liable, a defendant may counterclaim for conversion of certain personal property placed by him on the premises. Scott *v.* Waggoner, 48 Mont. 536, 139 Pac. 454.

[c] **In a suit upon a joint and several note** against the makers, one of them may plead in offset a several demand. **Colo.**—Canfield *v.* Arnett, 17 Colo. App. 426, 68 Pac. 784. **Ky.** Powell *v.* Hogue, 8 B. Mon. 443. **N. C.** Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230.

[d] **Where the maker and indorser of a note are sued** the indorser (1) may plead by way of set-off a personal claim. Wilson *v.* Exchange Bank, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97. (2) And the maker may set up by way of counterclaim a cause of action existing in him. Wolf *v.* Michael, 21 Misc. 86, 46 N. Y. Supp. 991.

96. A. D. Kneuper Specialty Co. *v.* Kneuper, 171 App. Div. 555, 157 N. Y. Supp. 395.

[a] "**The plaintiff cannot be injured** by discharging his own liability. There is no other person jointly interested with him in the debt to be prejudiced by it; and as it is a voluntary assumption of the payment of the whole demand by one defendant, the other defendants, jointly bound with him, have no cause to complain." Powell *v.* Hogue, 8 B. Mon. (Ky.) 443.

97. **Burton *v.* Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131.**

no recovery against any of the defendants.

2. Assigned Claims and Demands. — a. *As Basis of Cross-Demand.* — (I.) **In General.** — Within certain limitations[98] a claim or demand available as a cross-demand in the hands of an assignor may be asserted by his assignee whether the same constitute a set-off[99] or counterclaim,[1] or other counter-demand.

(II.) Conditions Essential to.— The debt or claim which an assignee may thus assert as a cross-demand, must be one which the assignor himself could have interposed,[2] and consequently should possess all the requisites of a valid counter-demand. It must be a subsisting cause of action at the commencement of the suit,[3] and be then owned by the defendant, for a debt or claim assigned to him after the action is commenced is not available as a set-off or counterclaim.[4] The assigned claim must be one upon which the defendant himself could sue in his own right.[5] It has been held that the claim must be owned by him as a bona fide purchaser or owner,[6] and not be held by him conditionally

[a] "**A payment by one defendant is, in effect,** a payment by all. The defendants may plead separately, and any defense to the merits of the action inures to the benefit of all: and if the plaintiff is indebted to one of several defendants, and such defendant should choose to pay and discharge the debt of himself and his codefendant out of it, it is, in effect, the payment and satisfaction of both, and no good reason seems to exist why he should not be permitted to do so." Leach *v.* Lambeth, 14 Ark. 668.

98. See *infra,* VII, D, 2, a, (II).

99. **Ala.**—Conner *v.* Smith, 88 Ala. 300, 7 So. 150. **Cal.**—Naglee *v.* Minturn, 8 Cal. 540. **Conn.**—Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519; Francis *v.* Rand, 7 Conn. 221. **Ga.** Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Whitaker *v.* Pope, 48 Ga. 13. **Ill.**—Young *v.* Young, 32 Ill. App. 109; Graff *v.* Kahn, 18 Ill. App. 485. **Ind.**—Weader *v.* First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Hurd *v.* Earl, 4 Blackf. 184. **Kan.** Reynolds *v.* Thomas, 28 Kan. 810. **Ky.** Otwell *v.* Cook, 9 B. Mon. 357; Brackett's Admr. *v.* Boreing's Admr., 33 Ky. L. Rep. 292, 110 S. W. 276. **Me.**—Soule *v.* Kennebec Maine Ice Co., 85 Me. 166, 27 Atl. 92. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Hennighausen *v.* Tischer, 50 Md. 583. **Mich.**—Hanselman *v.* Doyle, 90 Mich. 142, 51 N. W. 195; Smith *v.* Warner, 16 Mich. 390. **Miss.**—Ashby *v.* Carr, 40 Miss. 64; Ainsworth *v.* Ainsworth, 24 Miss. 145; Glass *v.* Moss, 1 How. 519. **Mo.**—Hall *v.* Allen, 80 Mo. 286; Reppy *v.* Reppy, 46 Mo. 571; Frazier *v.* Gibson, 7 Mo. 271. **Neb.**—Salladin *v.* Mitchell, 42 Neb. 859, 61 N. W. 127. **N. H.**—Rowe *v.* Langley, 48 N. H. 391. **N. Y.** Martin *v.* Williams, 17 Johns. 330; Tuttle *v.* Bebee, 8 Johns. 152. **Ohio.** Beesley *v.* Crawford, 19 Ohio 126. **Ore.** Rayburn *v.* Hurd, 20 Ore. 229, 25 Pac. 635. **Pa.**—Murray *v.* Williamson, 3 Binn. 135; Welliver *v.* Fox, 4 Pa. Dist. 197; Primer *v.* Kuhn, 1 Dall. 452, 1 L. ed. 219. **S. C.**—Hemmingway *v.* Farr, 2 Treadway 753, 3 Brev. 549; Compty's Admrs. *v.* Alken, 2 Bay 481. **Tenn.** Wilson *v.* Reaves, 4 Sneed 173; Hickerson *v.* McFaddin, 1 Swan 258; Allen *v.* McNew, 8 Humph. 46. **Vt.**—First Nat. Bank *v.* Post, 65 Vt. 222, 25 Atl. 1093. **Va.**—Clopton's Admr. *v.* Morris, 6 Leigh (33 Va.) 278.

1. Moody *v.* Steele, 10 N. Y. Civ. Proc. 67; Baldel *v.* Berko, 144 N. Y. Supp. 10; Lynn *v.* Stanley Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877.

2. **Ill.**—Messmore *v.* Larson, 86 Ill. 268. **Mo.**—Savage *v.* Allen, 34 Mo. 224. **S. C.**—Compty's Admrs. *v.* Alken, 2 Bay 481.

3. See *supra,* VII, C, 6, c.

4. See *supra,* VII, C, 8.

5. **Ark.** — Hamilton *v.* Myrick, 3 Ark. 541. **Colo.**—Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340. **Md.**—Dilley *v.* Roman, 17 Md. 337. **S. D.**—Johnson *v.* Peterson, 36 S. D. 218, 154 N. W. 443.

See generally *supra,* VII, D, 1, b, (I), (C).

6. **Ark.**—Hamilton *v.* Myrick, 3 Ark.

merely,[7] as, for example, where it is assigned to him to be used merely as a set-off and to be returned to the assignor if not so available.[8] But these cases must be considered with reference to the change and development in the law upon the right of an assignee to sue in his own name and the local statutes and practice governing this matter, which vary somewhat,[9] some requiring a transfer of the beneficial ownership,[10] others merely the legal title.[11]

b. *Against Assigned Claims.* — **(I.) In General.** — The assignee of an assigned claim occupies in respect thereto the place and position of the assignor and in suing the claim is, within certain limitations,[12] subject to any counter-demands[13] that could have been used against the

541. **Colo.**—Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340. **Conn.**—Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519, equitable owner. **Ill.**—Ayres *v.* McConnel, 15 Ill. 230; Sprigg *v.* Granneman, 36 Ill. App. 102. **Ind.**—Claflin *v.* Dawson, 58 Ind. 408. **Ky.**—Winebrinner *v.* Weisiger, 3 T. B. Mon. 32. **Md.**—Fusting *v.* Sullivan, 51 Md. 489; Foley *v.* Mason & Son, 6 Md. 37. **Mich.**—Smith *v.* Warner, 16 Mich. 390. **Miss.**—Stone *v.* Buckner, 12 Smed. & M. 73. **Mo.** McDonald *v.* Harrison, 12 Mo. 447. **N. Y.** Arnold *v.* Johnston, 28 How. Pr. 249. **Ohio.**—Straus *v.* Eagle Ins. Co., 5 Ohio St. 59. **Pa.**—Gump *v.* Goodwin, 172 Pa. 276, 33 Atl. 686; Russell *v.* Spear, 12 Phila. 230, 4 W. N. C. 476. **S. D.** Johnson *v.* Peterson, 36 S. D. 218, 154 N. W. 443.

[a] **Defendant need not have actually paid** for the claim provided he has agreed to do so. Everit *v.* Strong, 7 Hill (N. Y.) 585.

7. **Ala.**—McDade *v.* Mead, 18 Ala. 214; Adams *v.* McGrew, 2 Ala. 675. **Conn.**—Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519. **Ind.**—Claflin *v.* Dawson, 58 Ind. 408. **Ky.**—Tinly *v.* Martin, 80 Ky. 463. **Mo.**—McDonald *v.* Harrison, 12 Mo. 447. **N. Y.**—Gilman *v.* Van Slyck, 7 Cow. 469. **Ohio.**—Straus *v.* Eagle Ins. Co., 5 Ohio St. 59. **Pa.** Shryock *v.* Basehore, 82 Pa. 159; McGowan *v.* Budlong, 79 Pa. 470. **S. D.** Johnson *v.* Peterson, 36 S. D. 218, 154 N. W. 443.

8. **Conn.**—Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519. **Ill.**—Sprigg *v.* Granneman, 36 Ill. App. 102. **Pa.** Gump *v.* Goodwin, 172 Pa. 276, 33 Atl. 686. **S. D.**—Johnson *v.* Peterson, 36 S. D. 218, 154 N. W. 443.

See also **Ala.**—Adams *v.* McGrew, 2 Ala. 675. **Ind.**—Claflin *v.* Dawson, 58 Ind. 408. **Ky.**—Tinly *v.* Martin, 80 Ky. 463. **N. Y.**—Arnold *v.* Johnson, 28 How. Pr. 249. **Ohio.**—Straus *v.* Eagle Ins. Co., 5 Ohio St. 59. **Pa.**—McGowan *v.* Budlong, 79 Pa. 470.

9. See 3 STANDARD PROC. 111, et seq. See also 20 STANDARD PROC. 896, 899, 901.

10. See Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519, and 3 STANDARD PROC. 111, et seq.; 20 STANDARD PROC. 896, 897, et seq.

11. See 3 STANDARD PROC. 111, et seq.; 20 STANDARD PROC. 899.

[a] **Assignment for collection,** see Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340, and 3 STANDARD PROC. 111, note 87; 4 STANDARD PROC. 235.

12. See *infra*, VII, D, 2, b, (II).

13. **U. S.**—Horne *v.* Hoyle, 28 Fed. 743. **Ariz.**—Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753. **Cal.**—Richmond Dredging Co. *v.* Industrial Accident Commission, 33 Cal. App. 97, 164 Pac. 407. **Colo.**—Hottel *v.* Poudre Valley Reservoir Co., 41 Colo. 370, 92 Pac. 918. **Conn.**—Simpson *v.* Hall, 47 Conn. 417. **Ill.**—First Nat. Bank *v.* Hogg-Harris Lumber Co., 181 Ill. App. 220; Salt Fork Coal Co. *v.* Eldridge Coal Co., 170 Ill. App. 268. **Ind.**—Weader *v.* First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Hoffman *v.* Zollinger, 39 Ind. 461; Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981. **Ia.**—Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310; Miller *v.* Centerville, 57 Iowa 640, 11 N. W. 631; Reynolds *v.* Martin, 51 Iowa 324, 1 N. W. 620. **Kan.**—Davies *v.* Stevenson, 59 Kan. 648, 54 Pac. 679. **Ky.**—Frankfort *v.* Brislan, 126 Ky. 477, 104 S. W. 311, 1199; Ward *v.* Martin, 3 Mon. 18. **La.**—Adams *v.* Webster, 25 La. Ann. 117; Plunkett's Succession, 12 La. Ann. 558. **Md.**—Levy *v.* Steinbach, 43 Md. 212. **Mass.**—Bemis

assignor. Thus cross-demands by way of set-off,[14] recoupment,[15]

v. Smith, 10 Metc. 194; Demmon *v.* Boylston Bank, 5 Cush. 194. **Mich.** Smith *v.* Warner, 16 Mich. 390. **Miss.** Illinois Cent. R. Co. *v.* First Nat. Bank, 110 Miss. 676, 70 So. 831. **Mo.**—Archer *v.* Merchants', etc. Ins. Co., 43 Mo. 434; Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220. **N. H.**—Sanborn *v.* Little, 3 N. H. 539. **N. Y.**—Thalmann *v.* Giles, 116 App. Div. 437, 101 N. Y. Supp. 980; Rindskopf *v.* Zimmer, 84 Misc. 32, 145 N. Y. Supp. 984; Lathrop *v.* Godfrey, 3 Hun 739, 6 Thomp. & C. 96, assignee of mortgage, particularly where the assignment is merely colorable. **Ohio.** Miller & Co. *v.* Florer, 15 Ohio St. 148. **Ore.**—Louie Chung *v.* Stephenson, 50 Ore. 244, 89 Pac. 386, 805; Rayburn *v.* Hurd, 19 Ore. 59, 23 Pac. 669. **Pa.** Jordan *v.* Sharlock, 84 Pa. 366, 24 Am. Rep. 198; Keagy *v.* Com., 43 Pa. 70. **Tex.**—Townsend *v.* Quinan, 47 Tex. 1. **Va.**—Gordon *v.* Rixey's Admr., 86 Va. 853, 11 S. E. 562; Fry & Co. *v.* Boyd, 3 Gratt. (44 Va.) 73. **Wash.**—King *v.* West Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081; Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421. **Eng.**—Young *v.* Kitchin, 3 Ex. D. 127, 47 L. J. Exch. 579, 26 Wkly. Rep. 403.

[a] **A typical statute provides that** "in all actions on such assigned promissory note, bill of exchange, or other writing for the payment of money or other thing, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-off made, had, or possessed against the same previous to notice of assignment in the same manner as though the suit had been brought by the payee." Illinois Cent. R. Co. *v.* First Nat. Bank, 110 Miss. 676, 70 So. 831.

[b] "**The common-law rule** rested upon the principle that the assignee was notified by the assignment that the assigned right sprang from a contract entered into by and obligating the assignor, that the obligation of the debtor to pay was based upon the obligation of the assignor, a violation of which would entitle the debtor to the right of recoupment; and the assignee occupied, as to the assigned claim, the place and position of the assignor—at least as to rights accruing prior to a notice to the debtor of the assignment." Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447.

[c] **Especially where the assignee purchases with knowledge** of the facts upon which the cross-demand is based. Morbrose Inv. Co. *v.* Flick, 187 Mo. App. 528, 174 S. W. 189.

[d] **Though the assignees have paid consideration and had no knowledge** that they were buying a claim as to which the consideration had failed. Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310.

14. **Conn.**—Simpson *v.* Hall, 47 Conn. 417. **Ind.**—Herod *v.* Snyder, 48 Ind. 480; Hoffman *v.* Zollinger, 39 Ind. 461; Wells *v.* Teall, 5 Blackf. 306. **Ia.** Miller *v.* Centerville, 57 Iowa 640, 11 N. W. 631. **Kan.**—Davies *v.* Stevenson, 59 Kan. 648, 54 Pac. 679. **Ky.** Ward *v.* Martin, 3 Mon. 18. **Md.** Levy *v.* Steinbach, 43 Md. 212. **Mo.** Smith *v.* Spengler, 83 Mo. 408; Archer *v.* Merchants', etc. Ins. Co., 43 Mo. 434. **N. H.**—Sanborn *v.* Little, 3 N. H. 539. **N. J.**—Fisher *v.* Bull, 52 N. J. Eq. 298, 29 Atl. 440. **N. Y.**—Matter of Van Allen, 37 Barb. 225; Marsh *v.* Oneida Cent. Bank, 34 Barb. 298. **Ohio.** Miller & Co. *v.* Florer, 15 Ohio St. 148; Farrin *v.* De Golia, 6 Ohio Cir. Dec. 157, 12 Ohio C. C. 661. **Ore.**—Rayburn *v.* Hurd, 19 Ore. 59, 23 Pac. 669. **Pa.**—Jordan *v.* Sharlock, 84 Pa. 366, 24 Am. Rep. 198; Keagy *v.* Com., 43 Pa. 70; Thompson *v.* McClelland, 29 Pa. 475; Northampton Bank *v.* Balliet, 8 Watts & S. 311, 42 Am. Dec. 297. **S. C.**—Neal *v.* Sullivan, 10 Rich. Eq. 276; Jervey *v.* Strauss, 11 Rich. L. 376; Hodges *v.* Connor, 1 Spears 120. **Va.** Gordon *v.* Rixey's Admr., 86 Va. 853, 11 S. E. 562; Clopton's Admr. *v.* Morris, 6 Leigh (33 Va.) 278; Fry & Co. *v.* Boyd, 3 Gratt. (44 Va.) 73.

[a] **In actions on assigned accounts** the defendant is allowed every set-off existing in his favor at the time of his being notified of such assignment. Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220.

15. **Colo.**—Smith *v.* Wall, 12 Colo. 363, 21 Pac. 42. **Ind.**—Stilwell *v.* Chappell, 30 Ind. 72. **Mo.**—Morbrose Inv. Co. *v.* Flick, 187 Mo. App. 528, 174 S. W. 189. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447. **Wis.**—Rockwell *v.* Daniels, 4 Wis. 432.

counterclaim[16] and compensation,[17] have been asserted against the assignee.

Assignment for Benefit of Creditors. — The right to plead as against an assignee, off-sets which could have been interposed against his assignor applies to actions brought by an assignee for the benefit of creditors.[18]

(II.) Limitations of Rule. — The off-set thus interposed against an assigned claim must be one which could have been set up against the original owner,[19] and hence at that time,[20] or at least before notice of

16. **Ariz.**—Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753. **Cal.**—Richmond Dredging Co. *v.* Industrial Accident Commission, 33 Cal. App. 97, 164 Pac. 407. **Colo.**—Hottel *v.* Poudre Valley Reservoir Co., 41 Colo. 370, 92 Pac. 918. **Ind.**—Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981. **Ia.**—Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310; Miller *v.* Centerville, 57 Iowa 640, 11 N. W. 631. **Ky.**—Frankfort *v.* Brislan, 126 Ky. 477, 104 S. W. 311, 1199. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N E. 447; Thalmann *v.* Giles, 116 App. Div. 437, 101 N. Y. Supp. 980. **Ore.**—Louie Chung *v.* Stephenson, 50 Ore. 244, 89 Pac. 386, 805. **Wash.**—Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421.

[a] **The assignee "represents"** the assignor within the code provision providing that the counterclaim must be a cause of action against the plaintiff or in a proper case against the person whom he "represents." Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447.

[b] **Payment of Building Contract.** "Thing in action," within the statute as to set-off against an assignee, includes the assignment before the payment was due, of the last payment due under a building contract. Richmond Dredging Co. *v.* Industrial Accident Commission, 33 Cal. App. 97, 164 Pac. 407.

[c] **A claim for breach of warranty** may be asserted as counterclaim against an assignee suing for the price of the goods sold by his assignor. Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310.

[d] **An assignee of a judgment** even for a valuable consideration and without notice, takes subject to a right of set-off existing at the time of the assignment. Machado *v.* Borges, 170 Cal. 501, 150 Pac. 351; Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786; Porter *v.* Liscom, 22 Cal. 430, 83 Am. Dec. 76.

[e] **Against assigned invoices freight** may be advances set off. Illinois Cent. R. Co. *v.* First Nat. Bank, 110 Miss. 676, 70 So. 831.

[f] **But that defendant cannot assert as a counterclaim** (1) against assignee a right of action against the assignor, see Barnes *v.* McMullins, 78 Mo. 260; Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220; Scarritt Estate Co. *v.* J. F. Schmelzer & Sons Arms Co., 110 Mo. App. 406, 86 S. W. 489. (2) Thus in an action for price of goods sold brought by the assignee of the seller, the defendant cannot assert a counterclaim for breach of the contract by the assignor. Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220.

17. Adams *v.* Webster, 25 La. Ann. 117; Plunkett's Succession, 12 La. Ann. 558.

18. See 3 STANDARD PROC. 76, and *infra*, VII, D, 3, e.

19. **As to demands which may be subject matter of cross-demands,** see *supra*, VII, C.

[a] **Unliquidated damages** may not be set off against assignee. Bauerdorf *v.* Henry Vose Wall Paper Co. (Mo. App.), 203 S. W. 220. See generally *supra*, VII, C, 7, b.

20. **Ky.**—Daviess *v.* Newton, 5 J. J. Marsh. 89; Neal *v.* Cornwall, 7 Ky. L. Rep. 755. **Mich.**—Koegel *v.* Michigan Trust Co., 117 Mich. 542, 76 N. W. 74; Bradley *v.* Thompson Smith's Sons, 98 Mich. 449, 57 N. W. 576, 39 Am. St. Rep. 565, 23 L. R. A. 305; Kull *v.* Thompson, 38 Mich. 685. **Miss.** Illinois Cent. R. Co. *v.* First Nat. Bank, 110 Miss. 676, 70 So. 831. **Mont.** Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582. **N. Y.**—Martin *v.* Kunzmuller, 37 N. Y. 396; Myers *v.* Davis, 22 N. Y. 489; Duncan *v.* Stanton, 30 Barb.

assignment is given to the defendant,[21] the debt or claim sought to be set up by defendant must have become mature and actionable. But recoupment may be had of damages caused after notice of assignment,

533; Martine *v.* Willis, 2 E. D. Smith 524; Graves *v.* Woodbury, 4 Hill 550, 40 Am. Dec. 296; Siebert *v.* Dunn, 157 App. Div. 387, 142 N. Y. App. 253; Michigan Sav. Bank *v.* Millar, 110 App. Div. 670, 96 N. Y. Supp. 568; Bayne *v.* Hard, 77 App. Div. 251, 79 N. Y. Supp. 208; Richards *v.* La Tourette, 53 Hun 623, 6 N. Y. Supp. 937, 25 N. Y. St. 654; Diossy *v.* Heuberer, 1 N. Y. City Ct. 13. **Ohio.**—Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Stanbery *v.* Smythe, 13 Ohio St. 495; Ross *v.* Johnson, 1 Handy 388, 12 Ohio Dec. (Reprint) 198; Heister *v.* Enterprise Ins. Co., 5 Ohio Dec. (Reprint) 479. **S. C.**—McAlpin *v.* Wingard, 2 Rich. L. 547. **Vt.**—Campbell *v.* Martin, 89 Vt. 214, 95 Atl. 494; Walker *v.* Sargeant, 14 Vt. 247. **Wash.** King *v.* West Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081; Boston Tow Boat Co. *v.* Sesnon Co., 64 Wash. 375, 116 Pac. 1083. **W. Va.**—Phillipi Planing Mill Co. *v.* Cross, 75 W. Va. 303, 83 S. E. 1004.

[a] **The words "against the debt assigned"** in the statute providing "that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner against the debt assigned," mean against a claim matured at the time of the assignment. King *v.* West Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081.

[b] **Defendant can do nothing after the assignment to the prejudice of the assignee** by way of buying up a claim against the assignor for the purpose of a set-off and could not bargain with or pay to the assignor any sum on the claim to the prejudice of the assignee. Salt Fork Coal Co. *v.* Eldridge Coal Co., 170 Ill. App. 268.

[c] **After Substitution of Plaintiffs.**—Defendant cannot buy up a debt against the original plaintiff and make it avail as a set-off when he knows by proceedings in the cause that the original plaintiff's debt has been assigned to another and the assignment duly established by an order substituting the assignee as plaintiff. Phillipi Planing Mill Co. *v.* Cross, 75 W. Va. 303, 83 S. E. 1004.

[d] **Where an executory contract of sale** is assigned, defendant cannot when sued thereon by the assignee counterclaim a claim which was not matured against the assignor at the time of the assignment. Citizens' Nat. Bank *v.* Abbott, 72 Wash. 73, 129 Pac. 1085.

21. **Ala.**—Lewis *v.* Faber, 65 Ala. 460; Gildersleeve *v.* Caraway, 19 Ala. 246; Stewart *v.* Kirkland, 19 Ala. 162; Harwell *v.* Steel, 17 Ala. 372. **Cal.** St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876; Richmond Dredging Co. *v.* Industrial Accident Commission, 33 Cal. App. 97, 164 Pac. 407. **Conn.** Adams *v.* Leavens, 20 Conn. 73. **Ill.** First Nat. Bk. *v.* Hogg-Harris Lumber Co., 181 Ill. App. 220; Salt Fork Coal Co. *v.* Eldridge Coal Co., 170 Ill. App. 268. **Ind.**—Goldthwait *v.* Bradford, 36 Ind. 149; Adams *v.* Rodarmel, 19 Ind. 339; Sample *v.* Lamb, 3 Ind. 180. **Ky.**—Jackson, Cox & Co. *v.* Holloway, 14 B. Mon. 133, 140; Walker *v.* McKay, 2 Metc. 294; Ridgway *v.* Collins, 3 A. K. Marsh. 410; Bramblett *v.* Slemp, 32 Ky. L. Rep. 1329, 108 S. W. 339; Overby *v.* Wells, 21 Ky. L. Rep. 1316, 54 S. W. 955; King's Exr. *v.* Goddard, 8 Ky. L. Rep. 150. **La.**—Harrison *v.* Wilson, 5 Rob. 275. **Mass.** St. Andrew *v.* Mauchaug Mfg. Co., 134 Mass. 42; Backus *v.* Spaulding, 129 Mass. 234. **Mich.**—Bacon *v.* Reich, 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 311; Smith *v.* Warner, 16 Mich. 390. **Miss.**—Jefferson *v.* Arrghi, 51 Miss. 667; Freeland *v.* Man, 1 Smed. & M. 531. **N. Y.**—Soloman *v.* Holt, 3 E. D. Smith 139; Wolcott *v.* Sullivan, 1 Edw. Ch. 399; Norton *v.* McCarthy, 10 Misc. 222, 30 N. Y. Supp. 1057, 63 N. Y. St. 247. **Ohio.**—Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Williams *v.* Pultze, 5 Ohio Dec. (Reprint) 503. **Pa.**—Jordan *v.* Stewart, 1 Pittsburgh 54. **S. C.**—Bank of Columbia *v.* Gadsden, 56 S. C. 313, 33 S. E. 575; Burkett *v.* Moses, 11 Rich. L. 432. **Vt.**—Weeks *v.* Hunt, 6 Vt. 15. **Wash.**—Boston Tow Boat Co. *v.* Sesnon Co., 64 Wash. 375, 116 Pac. 1083. **W. Va.**—Cochrane *v.* Hyre, 49 W. Va. 315, 38 S. E. 554.

[a] **Demands not due at the time of notice** of the assignment are not

by the default of the assignor in non-performance or defective performance of the contract.[22]

c. *Negotiable Instruments.* — A transferee of a negotiable promissory note or bill of exchange, made in good faith and upon good consideration before maturity takes it without prejudice to any set-off available against the transferor,[23] but where the bill or note is acquired by the transferee or indorsee after maturity it is subject to any set-off which the maker had against any prior holder[24] at the time of the transfer or notice thereof.[25]

3. Applications to Particular Relations. — a. *Principal and Agent.* — **(I.) Actions Between Principal and Agent.** — The right of set-off, recoupment or counterclaim in actions between principal and agent is governed by the same rules that apply in other cases and no

available although they became due before the suit was commenced. **Ill.** Hibernian Banking Assn. *v.* Chicago, 178 Ill. App. 138. **Mass.**—Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391. **N. Y.**—Martin *v.* Kunzmuller, 37 N. Y. 396; Myers *v.* Davis, 22 N. Y. 489; Hicks *v.* McGrorty, 2 Duer 295; Wells *v.* Stewart, 3 Barb. 40; Beckwith *v.* Union Bank, 4 Sandf. 604.

22. **Ill.**—Salt Fork Coal Co. *v.* Eldridge Coal Co., 170 Ill. App. 268. **Mass.** American Bridge Co. *v.* Boston, 202 Mass. 374, 88 N. E. 1089. **Wis.**—Rockwell *v.* Daniels, 4 Wis. 432.

[a] **The reason** for the rule has been stated thus: "The right of the defendant to recoup in case the plaintiffs should fail to perform their contract . . was the law of its transaction from its inception. It existed at the making of the contract, and at the time of its assignment, and the assignee had notice of that equitable right, and that it would become available to the defendant the moment the plaintiffs should commit a breach." Rockwell *v.* Daniels, 4 Wis. 432.

23. **Ala.**—Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67. **Cal.**—Richmond Dredging Co. *v.* Industrial Accident Commission, 33 Cal. App. 97, 164 Pac. 407. **Ia.**—Taylor *v.* Beebe, 27 Iowa 564. **Mass.** Fisher *v.* Leland, 4 Cush. 456, 50 Am. Dec. 805; St. Louis Perpetual Ins. Co. *v.* Homer, 9 Metc. 39. **Mo.**—Ray *v.* Hooper (Mo. App.), 204 S. W. 30. **N. H.**—Leavitt *v.* Peabody, 62 N. H. 185; Wiggin *v.* Damrell, 4 N. H. 69. **N. Y.**—Smith *v.* Van Loan, 16 Wend. 659; Richards *v.* Union, 48 Hun 263, 16 N. Y. St. 58; Prior *v.* Jacocks, 1 Johns. Cas. 169. **Okla.**—McKay *v.* H. A. Hall & Co., 30 Okla. 773, 120 Pac. 1108, 39 L. R. A. (N. S.) 658. **Tenn.** Hooper *v.* Spicer, 2 Swan 494.

24. **Conn.**—Bigelow *v.* Lawrence, 16 Conn. 207. **Kan.**—Norton *v.* Foster, 12 Kan. 44. **Me.**—Wood *v.* Warren, 19 Me. 23; Burnham *v.* Tucker, 18 Me. 179; Shirley *v.* Todd, 9 Me. 83. **Mass.** Armstrong *v.* Chadwick, 127 Mass. 156; Braynard *v.* Fisher, 6 Pick. 355; Fisher *v.* Leland, 4 Cush. 456, 50 Am. Dec. 805. **Miss.**—Chambliss *v.* Matthews, 57 Miss. 306. **Neb.**—Wilbur *v.* Jeep, 37 Neb. 604, 56 N. W. 198. **N. H.**—McDuffie *v.* Dame, 11 N. H. 244. **N. Y.** Driggs *v.* Rockwell, 11 Wend. 504. **N. C.** Harrington *v.* Wilcox, 53 N. C. 349. **Okla.**—Curlee *v.* Ruland, 56 Okla. 329, 155 Pac. 1182; McKay *v.* H. A. Hall & Co., 30 Okla. 773, 120 Pac. 1108, 39 L. R. A. (N. S.) 658. **Ore.**—McDonald *v.* Mackenzie, 24 Ore. 573, 14 Pac. 866. **Vt.**—Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678.

[a] **Set-off of Note.**—In an action by the assignee of negotiable paper, transferred after due, the defendant may set-off a note executed by plaintiff's assignor and assigned to defendant before notice of the assignment to plaintiff. Downing *v.* Gibson, 53 Iowa 517, 5 N. W. 699.

[b] **But some cases limit the cross-demand** in such cases to demands arising out of the note transaction. **Conn.** Simpson *v.* Hall, 47 Conn. 417. **Ia.** Whittaker *v.* Kuhn, 52 Iowa 315, 3 N. W. 127. **Mo.**—Cutler *v.* Cook, 77 Mo. 388.

25. **Ind.**—Proctor *v.* Cole, 115 Ind. 15, 17 N. E. 189; Goldthwait *v.* Bradford, 36 Ind. 149. **Me.**—Robinson *v.* Perry, 73 Me. 168. **Miss.**—Chambliss *v.* Matthews, 57 Miss. 306.

particular treatment of the matter is needed.[26]

(II.) Actions by and Against Third Parties. — (A.) ACTIONS BY AND AGAINST AGENT ON INDIVIDUAL CLAIM OR OBLIGATION. — A demand against the principal cannot be set off or counterclaimed in a suit by the agent on a claim unconnected with the agency,[27] nor, where the agent is proceeded against on his individual liability, can he use by way of offset an indebtedness from the plaintiff to his principal.[28]

(B.) ACTIONS WHERE PRINCIPAL DISCLOSED. — A principal suing upon a contract made with his disclosed agent[29] is chargeable, of course, with all proper offsets owing by himself to the defendant. He cannot, however, be made liable by way of cross-demand for debts and claims which the defendant may hold against the agent in his personal capacity.[30] When, moreover, suit on the contract is brought by the third party against the disclosed principal, only demands owned by the defendant himself can be set-off or counterclaimed and personal claims of the agent against the plaintiff are not available.[31] In an action by an agent on a contract made by him for a disclosed principal, the defendant may assert as a cross-demand a debt or claim which he holds against[32] the

26. See preceding discussion.

27. Granger *v.* Hathaway, 17 Mich. 499; Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[a] **Agreement To Renew Insurance.**—Where an insurance agent sues upon an individual claim, the defendant cannot interpose a set-off based on a breach of a parol agreement to renew a fire insurance policy, since such agreement is the agreement of the company and not of the agent. Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816.

[b] **Where defendant makes overpayments** to agent upon a note of the principal, he cannot offset such overpayments in a suit by the agent upon another note made by the principal and of which the agent has become a purchaser in good faith. Granger *v.* Hathaway, 17 Mich. 500.

28. Wood *v.* Davis, 15 N. Y. Supp. 554. See *infra*, VII, D, 3, a, (II), (C).

[a] **Damages by way of recoupment** sustained by defendant's principal are not available when the principal is not a party to the action. Gibboney *v.* Wayne & Co., 141 Ala. 300, 37 So. 436.

29. **When principal deemed disclosed,** see *infra*, VII, D, 3, a, (II), (D).

30. **U. S.**—Wilson *v.* Codman, 3 Cranch. 193, 2 L. ed. 408; Moline Malleable Iron Co. *v.* York Iron Co., 83 Fed. 66, 27 C. C. A. 442. **Ill.**—Saladin *v.* Mitchell, 45 Ill. 79; Reutchler *v.* Hucke, 3 Ill. App. 144. **La.**—Braden *v.* Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277. **Md.**—Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417. **Mass.** Ilsley *v.* Merriam, 7 Cush. 242, 54 Am. Dec. 721. **N. Y.**—McLachlin *v.* Brett, 105 N. Y. 391, 12 N. E. 17; Foster *v.* Hoyt, 2 Johns. Cas. 327; Dunn *v.* Wright, 51 Barb. 244; Bliss *v.* Bliss, 7 Bosw. 339; Gordon *v.* Church, 2 Caines. 299. **N. C.**—Brown *v.* Morris, 83 N. C. 251. **S. C.**—Atkinson *v.* Teasdale, 1 Bay 299; Godfrey's Exrs. *v.* Forrest, 1 Bay 300. **Vt.**—Stewart *v.* Woodward, 50 Vt. 78, 28 Am. Rep. 488. **Eng.** Semenza *v.* Brinsley, 18 C. B. N. S. 467, 114 E. C. L. 467, 34 L. J. C. P. 161, 12 L. T. N. S. 265, 13 Wkly. Rep. 634, 144 Eng. Reprint 526; Fish *v.* Kempton, 7 C. B. 687, 62 E. C. L. 687, 18 L. J. C. P. 206, 13 Jur. 750, 137 Eng. Reprint 272.

31. Carman *v.* Garrison, 13 Pa. 158.

32. **U. S.**—Leeds *v.* Marine Ins. Co., 6 Wheat. 565, 5 L. ed. 332. **Ill.**—Hayden *v.* Alton Nat. Bank, 29 Ill. App. 458. **Eng.**—Atkyns *v.* Amber, 2 Esp. 493; Coppin *v.* Walker, 7 Taunt. 237, 2 E. C. L. 342, 2 Marsh. 497, 129 Eng. Reprint 95; Jarvis *v.* Chapple, 2 Chit. 387, 18 E. C. L. 697.

[a] **Where an auctioneer sues** for the price of goods sold by him for one whose name was disclosed, the defendant may set-off a debt due to him from such disclosed owner. Blum *v.* Torre, Riley (S. C.) 153, 3 Hill 155.

principal but not one he may own against the agent personally.[33]

(C.) UNDISCLOSED PRINCIPAL. — IN GENERAL. — The law quite generally permits an undisclosed principal[34] to maintain an action in his own name upon a contract made in his behalf in the name of his agent.[35] But in such case it protects the other party to the contract by permitting him to offset any debts or claims he may have[36] against

33. Hurlbert *v.* Pacific Ins. Co., 2 Sumn. 471, 12 Fed. Cas. No. 6,919.

34. **As to when principal deemed undisclosed,** see *infra,* VII, D, 3, a, (II), (D).

35. See the title "**Principal and Agent.**"

36. **U. S.**—Morris *v.* Chesapeake, etc. Steamship Co., 125 Fed. 62, *affirmed* 148 Fed. 11, 78 C. C. A. 179; Buchanan *v.* Cleveland Linseed Oil Co., 91 Fed. 88, 33 C. C. A. 351; Sydney *v.* Mugford Printing & Engraving Co., 214 Fed. 841. **Ala.**—Gardner *v.* Allen's Exr., 6 Ala. 187, 41 Am. Dec. 45. **Ark.**—Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33. **Cal.**—Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618. **Conn.**—Sullivan *v.* Shailor, 70 Conn. 733, 40 Atl. 1054. **Ga.**—Ruan *v.* Gunn, 77 Ga. 53; Peel *v.* Shepherd, 58 Ga. 365; Atlantic Coast Line R. Co. *v.* W. W. Gordon & Co., 10 Ga. App. 311, 73 S. E. 594; Durant Lumber Co. *v.* Sinclair & S. Lumber Co., 2 Ga. App. 209, 58 S. E. 485. **Ill.**—Stinson *v.* Gould, 74 Ill. 80. **Ia.**—Eclipse Windmill Co. *v.* Thorson, 46 Iowa 181. **Ky.**—Munroe & Co. *v.* Adamo, 136 Ky. 252, 124 S. W. 296; Violett *v.* Powell, 10 B. Mon. 347, 52 Am. Dec. 548; Tutt *v.* Brown, 5 Litt. 1, 15 Am. Dec. 33. **Me.**—Traub *v.* Milliken, 57 Me. 63, 2 Am. Rep. 14. **Md.**—Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417. **Mass.**—Huntington *v.* Knox, 7 Cush. 371; Kelley *v.* Munson, 7 Mass. 319, 5 Am. Dec. 47; Lime Rock Bank *v.* Plimpton, 17 Pick. 159, 28 Am. Dec. 286. **Minn.**—Baxter *v.* Sherman, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631. **Mo.**—Greene *v.* Chickering, 10 Mo. 109; Beatty *v.* Heath (Mo. App.), 183 S. W. 1102; Crocker *v.* Irons, 3 Mo. App. 486. **N. H.**—Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. J.**—Bernshouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789. **N. Y.** Kent *v.* De Coppet, 149 App. Div. 589, 134 N. Y. Supp. 195; Burnham *v.* Eyre, 123 App. Div. 777, 108 N. Y. Supp. 452; Pollacek *v.* Scholl, 51 App. Div. 319, 64 N. Y. Supp. 979; Pratt *v.* Collins, 20 Hun 126; Hogan *v.* Shorb, 24 Wend. 458; Bannerman *v.* Quackenbush, 11 Daly 529, 2 How. Pr. 293; Feinstein *v.* Ritter, 150 N. Y. Supp. 903. **N. C.** Winslow Bros. & Co. *v.* Staton, 150 N. C. 264, 63 S. E. 950. **Okla.**—Eldridge *v.* Finnegar, 25 Okla. 28, 105 Pac. 334, 28 L. R. A. (N. S.) 227. **Pa.**—Belfield *v.* National Supply Co., 189 Pa. 189, 42 Atl. 131, 69 Am. St. Rep. 799; Frame *v.* William Penn Coal Co., 97 Pa. 309; The Finn-Vipond Constr. Co. *v.* Wolf, 12 Pa. Super. 317; Girard *v.* Taggart, 5 Serg. & R. 19, 539, 9 Am. Dec. 327. **R. I.**—Trafford *v.* Hall, 7 R. I. 104, 82 Am. Dec. 589. **S. C.**—Conyers' Admr. *v.* Magrath, 4 McCord 392. **Tex.**—Hudgins Produce Co. *v.* J. R. Beggs & Co. (Tex. Civ. App.), 185 S. W. 339. **Utah.** Child *v.* Gillis Const. Co., 42 Utah 120, 129 Pac. 356. **Vt.**—Squires *v.* Barber, 37 Vt. 558. **Va.**—Dixon Livery Co. *v.* Bond, 117 Va. 656, 86 S. E. 106, L. R. A. 1916A, 1211. **Wash.**—Guggenheime & Co. *v.* Youell, 53 Wash. 163, 101 Pac. 711. **W. Va.**—Stevenson *v.* Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854. **Eng.**—Ex parte Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. N. S. 644, 25 Wkly. Rep. 105; Rabone *v.* Williams, 7 T. R. 360n, 4 R. R. 463, 101 Eng. Reprint 1020n; George *v.* Clagett, 7 T. R. 359, 101 Eng. Reprint 1019; Blackburn *v.* Scholes, 2 Camp. 343; Oulds *v.* Harrison, 10 Exch. 572, 3 C. L. R. 353, 24 L. J. Ex. 66, 3 Wkly. Rep. 160. **Can.**—Bowmanville Mach. Co. *v.* Dempster, 2 Can. Sup. Ct. 21; Smith *v.* Grouette, 2 Man. 314; Baird *v.* Anderson, 3 Nova Scotia Dec. 181, 9 Nova Scotia 181.

[a] **Agreement of Agent To Allow Set-off.**—Where the undisclosed agent agrees to permit the purchasers to set-off as against the purchase price of the goods an indebtedness owing from himself to the purchaser, the principal is bound thereby. Feinstein *v.* Ritter, 150 N. Y. Supp. 903.

[b] **A claim against the agent and another** cannot be set-off. Henderson *v.* Johnson, 22 **Tex.** Civ. App. 381, 55 S. W. 35.

the agent which are otherwise proper cross-demands,[37] and which existed before he obtained notice that the contract was in fact made for the principal.[38] That the agent in so acting in his own name may be doing so contrary to the express directions of his principal will not defeat the offset.[39] The rule applies to the relation of partnership and where a member of a firm holds himself out and trades as a sole trader the one with whom he deals may, when sued by the partnership, interpose any counter-demand which he possessed against the partner before knowledge of the partnership.[40]

Actions by and Against Agent. — When suit is brought by the agent of an undisclosed principal[41] upon a contract made by him in his own name, the defendant may successfully plead any cross-demand which he holds against the principal,[42] and the agent when sued on such a contract may assert any offset due him from the plaintiff,[43] but not one owing from the plaintiff to his principal.[44]

(D.) When Principal Deemed Undisclosed. — (1.) *In General.* — In order that a principal may be deemed to be undisclosed within the meaning of the foregoing rules,[45] it must clearly appear that the third party dealt with the agent as principal,[46] and was, under the circumstances, justified in assuming that he was not an agent.[47] In other words the

37. Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33.

38. **U. S.**—McCobb *v.* Lindsay, 2 Cranch C. C. 215, 15 Fed. Cas. No. 8,704. **N. Y.**—McLachlin *v.* Brett, 105 N. Y. 391, 12 N. E. 17. **Utah.**—Child *v.* Gillis Const. Co., 42 Utah 120, 129 Pac. 356. **Wash.**—Guggenheime & Co. *v.* Youell, 53 Wash. 163, 101 Pac. 711. **Can.**—Kennedy *v.* Turnbull, 15 New Bruns. 378.

39. **Ga.**—Peel *v.* Shepherd, 58 Ga. 365. **Mo.**—Rhea *v.* Buckley Custom Shirt Mfg. Co., 81 Mo. App. 400. **N. Y.** McLachlin *v.* Brett, 105 N. Y. 391, 12 N. E. 17. **Vt.**—Squires *v.* Barber, 37 Vt. 558. **Eng.**—Ex parte Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. N. S. 644, 25 Wkly. Rep. 105; Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3, 29 L. T. N. S. 689, 22 Wkly. Rep. 92.

40. See *infra*, VII, D, 3, c, (II).

41. **When principal considered undisclosed** within the rule, see *infra*, VII, D, 3, a, (II), (B), (2).

42. Leeds *v.* Marine Ins. Co., 6 Wheat. (U. S.) 565, 5 L. ed. 332.

43. Perfection Pulverizing Mills *v.* Keiser, 203 Ill. App. 383.

[a] **A set-off for breach of the contract sued on,** may be interposed by defendant agent who made the contract with plaintiff in behalf of an undisclosed principal. Perfection Pulverizing Mills *v.* Keiser, 203 Ill. App. 383. *Compare* Gibboney *v.* Wayne & Co., 141 Ala. 300, 37 So. 436.

44. Gibboney *v.* Wayne & Co., 141 Ala. 300, 37 **So. 436 (neither set-off nor** recoupment); Forney *v.* Shipp, 49 **N.** C. 527.

45. See *supra*, VII, D, 3, a, (II), (B), and (C).

46. **Ark.**—Frazier *v.* Poindexter, 78 Ark. 241, 95 **S. W. 464, 115 Am. St.** Rep. 33. **Ga.**—Atlantic Coast Line **R.** Co. *v.* W. W. Gordon & Co., 10 **Ga.** App. 311, 73 S. E. 594; Durant L. Co. *v.* Sinclair & S. L. Co., 2 Ga. App. 209, 58 S. E. 485. **Pa.**—Frame *v.* William Penn Coal Co., 97 Pa. 309; The Finn-Vipond Construction Co. *v.* Wolf, 12 Pa. Super. 317.

47. **U. S.**—Moline Malleable Iron Co. *v.* York Iron Co., 83 Fed. 66, 27 C. C. A. 442. **Ark.**—Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33. **Ky.**—Munroe & Co. *v.* Adamo, 136 Ky. 252, 124 S. W. 296, Weingartner *v.* Missouri Lumber & M. Co., 19 Ky. L. Rep. 1941, 44 S. W. 355. **Mo.**—Rhea *v.* Buckley Custom Shirt Mfg. Co., 81 Mo. App. 400. **N. Y.** McLachlin *v.* Brett, 105 N. Y. 391, 12 N. E. 17; White *v.* Jaudon, 9 Bosw. 415; Kent *v.* De Coppet, 149 App. Div. 589, 134 N. Y. Supp. 195. **Pa.**—Thompson *v.* Sproul, 179 Pa. 266, 36 Atl. 290.

third party must have had no knowledge of the agency, actual or constructive,[48] for if any facts or circumstances were brought to his notice sufficient to put a reasonably prudent person on inquiry as to the real relationship, he is not protected.[49] It is very often sufficient to put the third party on inquiry that the one with whom he is dealing is not entrusted with the indicia of ownership,[50] as in the case of brokers.[51]

(2.) *Factors.* — It is in suits upon contracts made by factors that the right to assert cross-demands against undisclosed principals is perhaps most frequently invoked. A purchaser dealing with a factor is usually innocent of the knowledge of any facts sufficient to put him on his guard. A factor is generally entrusted with the possession of the goods and the indicia of ownership and the purchaser is therefore justified in regarding him as the principal and dealing with him as such[52]

[a] **Some act of the principal,** such as entrusting the agent with the possession or indicia of ownership, must have induced the purchaser to deal with the agent as principal. Brown *v.* Morris, 83 N. C. 251.

48. **Ark.**—Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33. **La.**—Braden *v.* Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277. **Md.**—Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417. **N. Y.**—Wright *v.* Cabot, 89 N. Y. 570. **Pa.**—Thompson *v.* Sproul, 179 Pa. 266, 36 Atl. 290. **Vt.** Stewart *v.* Woodward, 50 Vt. 78, 28 Am. Rep. 488. **Eng.**—Semenza *v.* Brinsley, 18 C. B. N. S. 467, 114 E. C. L. 467, 34 L. J. C. P. 161, 12 L. T. N. S. 265, 13 Wkly. Rep. 634, 144 Eng. Reprint 526.

[a] **That he does not know who the principal** is does not alter the rule, for if he knows or has reason to know that the other party is an agent, he will not be protected. Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33; Semenza *v.* Brinsley, 18 C. B. N. S. 467, 114 E. C. L. 467, 34 L. J. C. P. 161, 12 L. T. N. S. 265, 13 Wkly. Rep. 634, 144 Eng. Reprint 526; Fish *v.* Kempton, 7 C. B. 687, 62 E. C. L. 687, 18 L. J. C. P. 206, 13 Jur. 750, 137 Eng. Reprint 272.

49. **Ark.**—Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33. **Ga.**—Rosser *v.* Darden, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152. **Ill.**—Clark *v.* Smith, 88 Ill. 298. **Ky.**—Munroe & Co. *v.* Adamo, 136 Ky. 252, 124 S. W. 296; Weingartner *v.* Missouri Lumber & M. Co., 19 Ky. L. Rep. 1941, 44 S. W. 355. **Me.**—Munroe *v.* Whitehouse, 90 Me. 139, 37 Atl. 866; Traub *v.* Milliken, 57 Me. 63, 2 Am. Rep. 14. **Md.**—Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417. **Mich.**—Kornemann *v.* Monaghan, 24 Mich. 36. **Minn.** Baxter *v.* Sherman, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631. **N. J.** Bernshouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789. **N. Y.**—McLachlin *v.* Brett, 34 Hun 478; Judson *v.* Stilwell, 26 How. Pr. 513; Pratt *v.* Collins, 20 Hun 126; Harrison *v.* Ross, 12 Jones & S. 230; Browne *v.* Robinson, 2 Caines Cas. 341. **Ohio.**—Crosby *v.* Hill, 39 Ohio St. 100. **Pa.**—The Finn-Vipond Construction Co. *v.* Wolf, 12 Pa. Super. 317. **Vt.**—Bertoli *v.* Smith, 69 Vt. 425, 38 Atl. 76. **Va.**—Dixon Livery Co. *v.* Bond, 117 Va. 656, 86 S. E. 106, L. R. A. 1916A, 1211. **Eng.**—Pearson *v.* Scott, 9 Ch. D. 198, 38 L. T. N. S. 747, 26 Wkly. Rep. 796; Baring *v.* Corrie, 2 B. & Ald. 137, 106 Eng. Reprint 317.

50. **Ark.**—Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33. **Ga.**—Rosser *v.* Darden, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152. **Ill.**—Clark *v.* Smith, 88 Ill. 298. **N. J.**—Bernshouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789.

51. See *infra*, this subsection.

52. **Ga.**—Ruan *v.* Gunn, 77 Ga. 53. **Ill.**—Stinson *v.* Gould, 74 Ill. 80. **Mo.** Butler *v.* Dorman, 68 Mo. 298, 30 Am. Rep. 795; Greene *v.* Chickering, 10 Mo. 109; Beatty *v.* Heath (Mo. App.), 183 S. W. 1102; Henderson *v.* Botts, 56 Mo. App. 141; Crocker *v.* Irons, 3 Mo. App. 486. **N. J.**—Bernshouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789. **N. Y.** Dunn *v.* Wright, 51 Barb. 244; Feinstein *v.* Ritter, 150 N. Y. Supp. 903. **Pa.**—Hall *v.* Fay, H. & Co., 15 Pa. Dist 207. **Eng.**—Isberg *v.* Bowden, 8 Exch.

without making any further inquiries as to the agency.[53] The rule does not apply, however, where the factor discloses his agency,[54] or where the buyer has knowledge of facts sufficient to put him on inquiry as to the existence of a principal.[55]

(3.) *Brokers.* — Unlike factors, brokers do not have possession of the goods in respect to which they contract. The very nature of their operations is sufficient to challenge the notice of third persons to the fact that they are not acting in their own right, but as agents of others. Consequently claims and debts against a broker cannot as a rule be set-off in suit by the principal.[56]

b. *Principal and Surety.* — The principal when sued together with his sureties may plead as a cross-demand a debt or claim due to him from the plaintiff,[57] he being the real party in interest.[58] But a cause of action in favor of the surety alone cannot be set-off or counter-

852, 1 C. L. R. 722, 22 L. J. Ex. 322; Semenza *v.* Brinsley, 18 C. B. (N. S.) 467, 114 E. C. L. 467, 34 L. J. C. P. 161, 12 L. T. N. S. 265, 13 Wkly. Rep. 634, 144 Eng. Reprint 526; Ex parte Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. N. S. 644, 25 Wkly. Rep. 105.

53. Feinstein *v.* Ritter, 150 N. Y. Supp. 903.

54. See *supra,* this subsection.

55. See *supra,* this subsection.

56. **Ill.**—Saladin *v.* Mitchell, 45 Ill. 79. **N. H.**—Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. J.**—Bernshouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789. **N. Y.**—Dunn *v.* Wright, 51 Barb. 244. **Eng.**—De Bouchout *v.* Goldsmid, 5 Ves. Jr. 211, 31 Eng. Reprint 551; Baring *v.* Corrie, 2 B. & Ald. 137, 106 Eng. Reprint 317.

57. **Ga.**—Harrison *v.* Henderson, 4 Ga. 198. **Ill.**—Himrod *v.* Baugh, 85 Ill. 435; Waterman *v.* Clark, 76 Ill. 428; Engs *v.* Matson, 11 Ill. App. 639. **Ia.** Reeves *v.* Chambers, 67 Iowa 81, 24 N. W. 602. **Md.**—Spencer *v.* Almoney, 56 Md. 551. **Mich.**—Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256. **Neb.**—Raymond Bros. *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763. **N. H.** Concord *v.* Pillsbury, 33 N. H. 310; Mahurin *v.* Pearson, 8 N. H. 539; Woods *v.* Carlisle, 6 N. H. 27. **N. Y.**—Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600; Bathgate *v.* Haskin, 59 N. Y. 533; Springer *v.* Dwyer, 50 N. Y. 19, Feinstein *v.* Jacobs, 139 App. Div. 192, 123 N. Y. Supp. 750; Newell *v.* Salmons, 22 Barb. 647. **Ohio.**—Wagner *v.* Stocking, 22 Ohio St. 297. **Tenn.**—Guggenheim *v.* Rosenfeld, 9 Baxt. 533. **Vt.** Downer *v.* Dana, 17 Vt. 518; Brundridge *v.* Whitecomb, 1 D. Chip. 180. **Va.**—Wartman *v.* Yost, 22 Gratt. (63 Va.) 595.

[a] **The doctrine is an equitable one** and will be applied only so far as is necessary for the proper protection of a surety and only so far as can be done without injury to the rights of others having equal or superior equities. Graham *v.* Middleby, 213 Mass. 437, 100 N. E. 750, Ann. Cas. 1914A, 384, 43 L. R. A. (N. S.) 977.

[b] **A judgment** in favor of the principal against the plaintiff may be counterclaimed. Feinstein *v.* Jacobs, 139 App. Div. 192, 123 N. Y. Supp. 750.

58. Raymond Bros. *v.* Green & Co., 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763; Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600.

[a] "**The principal debtor is the real debtor,** and the surety but security for the payment of the principal's separate debt; and off-setting a demand in favor of the principal debtor alone, when sued with his surety, is setting off against each other what may be regarded as, essentially, mutual debts." Himrod *v.* Baugh, 85 Ill. 435, 438.

[b] "**It seems to be in consonance with the equitable principles** which so largely govern the relation of principal and surety, and we are struck with the fitness of allowing whatever, not merely personal, would be matter of defense for the principal debtor, were he sued alone, to be admitted as a defense in favor of the principal and surety, when they are sued together." Himrod *v.* Baugh, 85 Ill. 435.

claimed in such action,[59] nor can the surety when sued alone interpose as a valid set-off or counterclaim any cause of action existing in favor of the principal,[60] unless the principal assents thereto,[61] or there are equitable grounds for allowing the set-off,[62] in which case the debt due to the principal may be used to reduce or defeat plaintiff's claim.[63] The surety when sued alone is entitled, of course to set-off or counterclaim demands due to him from the plaintiff.[64]

59. **Ia.**—Corbett *v.* Hughes, 75 Iowa 281, 39 N. W. 500. **N. C.**—Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322. **Tenn.** Knaffle *v.* Knoxville Banking, etc. Co., 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167.

60. **Ala.**—Winston *v.* Metcalf, 6 Ala. 756. **Cal.**—Stockton Sav. & L. Soc. *v.* Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181, 21 L. R. A. 406. **Colo.**—Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779. **Ill.**—Graff *v.* Kahn, 18 Ill. App. 485. **La.**—Fink *v.* Martin, 12 Rob. 416. **Mass.**—Graham *v.* Middleby, 213 Mass. 437, 100 N. E. 750, Ann. Cas. 1914A, 384, 43 L. R. A. (N. S.) 977. **Mo.**—Vastine *v.* Dinan, 42 Mo. 269. **N. Y.**—Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600; O'Blenis *v.* Karing, 57 N. Y. 649; Lasher *v.* Williamson, 55 N. Y. 619; Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Lewis *v.* McMillen, 41 Barb. 420; La Farge *v.* Halsey, 1 Bosw. 171, 4 Abb. Pr. 397; People *v.* Brandreth, 36 N. Y. 191, 3 Abb. Pr. N. S. 224, 34 How. Pr. 171. **W. Va.**—Baltimore & O. R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820.

But see **N. C.**—Jarratt *v.* Martin, 70 N. C. 459. **Pa.**—Hollister *v.* Davis, 54 Pa. 508. **Va.**—Edmunds' Assignee *v.* Harper, 31 Gratt. (72 Va.) 637.

[a] **A guarantor sued alone** cannot set-off a debt due from plaintiff to defendant's principal. Burroughs *v.* Garrison, 15 Abb. Pr. N. S. (N. Y.) 144.

[b] "**On principle it is difficult to concede such right** to the surety. It is the right of the principal to elect for himself whether he will discharge a claim which he holds against the obligee in the bond by off-setting it against his liability to such obligee. If the surety has the right to set-off such a claim without the concurrence of the principal, then he has the right to set-off a claim that is larger as well as one that is less than the penalty in the bond, or the amount of damages claimed, and thus he might sacrifice his principal's right of action for a thousand dollars in discharging a liability against him of one hundred dollars or less." Graff *v.* Kahn, 18 Ill. App. 485, 487.

[c] **A surety when sued by his cosurety for contribution,** cannot counter-demand a claim owned by his principal against the plaintiff. O'Blenis *v.* Karing, 57 N. Y. 649.

61. Winston *v.* Metcalf, 6 Ala. 756. See Graff *v.* Kahn, 18 Ill. App. 485.

[a] **Thus the surety on a note** has been allowed to set-off a claim of his principal against the payee of the note, where the plea of set-off expressly alleged that it was with the concurrence and assent of the principal and the note which constituted the set-off, was in the plea offered to be produced in court. "The principal debtor is liable to indemnify his surety whenever the latter pays the debt, and when the former has procured a valid set-off, we perceive no sound reason why the surety should not be permitted, with his consent and concurrence, to enforce it in the same manner as if the suit was against both jointly." Winston *v.* Metcalf, 6 Ala. 756.

62. See *supra*, I, G.

[a] **Insolvency of principal** a good ground. **N. Y.**—Coffin *v.* McLean, 80 N. Y. 560; Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Morgan *v.* Smith, 7 Hun 244. **N. D.**—Clark *v.* Sullivan, 2 N. D. 103, 49 N. W. 416, 13 L. R. A. 233. **Ohio.**—Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466.

[b] **Non-residence of principal,** sufficient ground for permitting surety to set-off claim owing to principal. Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543.

63. Morgan *v.* Smith, 7 Hun (N. Y.) 244.

64. Wieland *v.* Oberne, 20 Ill. App. 118; Graff *v.* Kahn, 18 Ill. App. 485; *Ex parte* Stephens, 11 Ves. Jr. 24, 32

c. *Partnership and Individual Claims.* — **(I.) In General.** — Partnership demands and demands due to individual partners can be offset against each other where the liability of partners is joint and several,[65] but not where such liability is a joint one merely.[66]

In Equity. — The rule that cross-demands must be mutual obtains in equity as well as at law,[67] and prevents the setting-off of partnership demands against individual ones,[68] unless the particular equities of the case justify it.[69]

(II.) Actions Upon Partnership Demands. — In an action on a partnership demand, a debt or claim owing to the defendant from the partnership is available as a cross-demand,[70] but, where the demand sued on is a joint one, an indebtedness of an individual member of the plaintiff firm cannot be used.[71] If the contract sued upon was made by the in-

Eng. Reprint 996.

65. **U. S.**—Davis *v.* Bessemer City Cotton Mills, 178 Fed. 784, 102 C. C. A. 232. **Ark.**—Coats *v.* Milner, 203 S. W. 701. **Ga.**—Smith *v.* State, 11 Ga. App. 89, 74 S. E. 711. **Ia.**—Allen *v.* Maddox, 40 Iowa 124. **Mo.**—Ruddle *v.* Horine, 34 Mo. App. 616.

66. **Colo.**—Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155. **Del.**—Sussex Trust Co. *v.* Bacon (Del. Ch.), 102 Atl. 785; Greer *v.* Arlington Mills Mfg. Co., 1 Penne. 581, 43 Atl. 609. **Ga.** West *v.* Kendrick, 46 Ga. 526; Hardy & Co. *v.* Jones Bros., 13 Ga. App. 457, 79 S. E. 246; Sutton *v.* Hurley, 12 Ga. App. 312, 77 S. E. 218. **Ill.**—Pegram *v.* Miser, 176 Ill. App. 352; Hilliard *v.* Walker, 11 Ill. 644. **Ind.**—Wasson *v.* Gould, 3 Blackf. 18. **Ky.**—Bauer Cooperage Co. *v.* Ewell, 149 Ky. 838, 149 S. W. 1137. **Md.**—Mitchell *v.* Sellman, 5 Md. 376. **Mich.**—Stewart *v.* Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas. 1915C, 808. **Miss.**—Green *v.* Bounds, 112 Miss. 252, 72 So. 1001. **N. Y.** Cummings *v.* Morris, 25 N. Y. 625. **Ore.** Barnes *v.* Esch, 87 Ore. 1, 169 Pac. 512. **Va.**—Edmondson *v.* Thomasson, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301.

67. See *supra*, VII, D, 1, a, (III).

68. **U. S.**—Howe *v.* Sheppard, 2 Sumn. 409, 12 Fed. Cas. No. 6,773. **Cal.**—Collins *v.* Butler, 14 Cal. 223. **N. Y.**—Cummings *v.* Morris, 25 N. Y. 625.

69. **Ill.**—Hall *v.* Kimball, 77 Ill. 161. **Minn.**—Noyes *v.* Ostrom, 113 Minn. 111, 129 N. W. 142. **Wis.**—Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

[a] **Insolvency of partnership, considered sufficient ground. Ill.**—Hall *v.* Kimball, 77 Ill. 161. **Md.**—Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965. **Wis.**—Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

[b] **Non-residence of partner as ground,** see Wallenstein *v.* Seligman & Co., 7 Bush. (Ky.) 175.

70. Shell *v.* Aiken, 155 N. C. 212, 71 S. E. 230.

71. **U. S.**—Beauregard *v.* Case, 91 U. S. 134, 23 L. ed. 263; Boehm *v.* United States, 20 Ct. Cl. 142; Lynn *v.* Hall, 2 Cranch C. C. 52, 15 Fed. Cas. No. 8,641. **Ala.**—Tillis *v.* McKinna, 114 Ala. 311, 21 So. 465; Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Watts *v.* Sayre, 76 Ala. 397; Taylor *v.* Bass, 5 Ala. 110. **Ark.**—Collier *v.* Dyer, 27 Ark. 478. **Cal.**—Collins *v.* Butler, 14 Cal. 223. **Colo.**—Morganthau *v.* King, 15 Colo. 413, 24 Pac. 1048. **Conn.** Meeker *v.* Thompson, 43 Conn. 77. **Ga.** Wise *v.* Copley, 36 Ga. 508; Harlow *v.* Rosser, S. & Co., 28 Ga. 219; Hardy & Co. *v.* Jones Bros., 13 Ga. App. 457, 79 S. E. 246. **Ill.**—International Bank *v.* Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807; Burgwin *v.* Babcock, 11 Ill. 28; Gregg *v.* James, 1 Ill. 143, 12 Am. Dec. 151. **Ind.**—Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Wasson *v.* Gould, 3 Blackf. 18. **Ia.**—Hoaglin *v.* Henderson & Co., 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756. **Kan.**—Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279. **Ky.**—Bauer Cooperage Co. *v.* Ewell, 149 Ky. 838, 149 S. W. 1137; Warder & Co. *v.* Newdigate, 11 B. Mon. 174, 52 Am. Dec. 567; Bourne *v.* Wooldridge, 10 B. Mon. 492; Smith *v.* Brannon, 21 Ky. L. Rep. 267, 51 S. W. 178. **La.**—Ward *v.* Brandt, 11 Mart. O. S. 331, 13 Am. Dec. 352; Thomas *v.* Elkins, 4 Mart.

dividual partner in his own name without disclosing the partnership, a debt due from him individually may be set off in a suit by the firm in whose behalf he in reality acted.[72]

(III.) Actions To Enforce Partnership Obligations. — In an action to enforce a partnership liability, a debt or demand due from plaintiff to the firm is pleadable as a cross-demand,[73] but the individual claims of the partners are generally not available,[74] unless all the parties agree to allow the offset.[75] Where a partner is proceeded against upon a debt contracted by the partnership, he may avail himself of any proper

O. S. 376. **Me.**—Jones *v.* Vinal Haven Steamboat Co., 90 Me. 120, 37 Atl. 879. **Md.**—Howard *v.* Warfield's Admr., 4 Harr. & McH. 21. **Mass.**—Williams *v.* Brimhall, 13 Gray 462. **Minn.** Noyes *v.* Ostrom, 113 Minn. 111, 129 N. W. 142; Birdsall *v.* Fischer, 17 Minn. 100. **Miss.**—Jones *v.* Howard, 53 Miss. 707. **Neb.**—Folsom *v.* Pailing, 58 Neb. 478, 78 N. W. 926. **N. H.**—Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. Y.**—Pinckney *v.* Keyler, 4 E. D. Smith 469; Gram *v.* Cadwell, 5 Cow. 489; Thomas *v.* Noonan, 133 App. Div. 459, 118 N. Y. Supp. 25; Hunter *v.* Booth, 84 App. Div. 585, 82 N. Y. Supp. 1000; Pophan *v.* Rubin, 134 N. Y. Supp. 1067. **Okla.**—Gotthauer *v.* Cunningham, 4 Okla. 551, 47 Pac. 479. **Pa.**—Archer *v.* Dunn, 2 Watts & S. 327; Lee *v.* Perry, 6 Kulp. 339. **R. I.** Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913. **S. C.** Powrie *v.* Fletcher, 2 Bay 146; Lovel *v.* Whitridge, 1 McCord 7. **Tex.**—Ward *v.* Newell, 37 Tex. 261. **Vt.**—Wells *v.* Mace, 17 Vt. 503.

72. **Ind.**—Ward *v.* Leviston, 7 Blackf. 466. **N. H.**—Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. Y.** Harrison *v.* Vanderbilt, 45 Hun 589, 9 N. Y. St. 810. **Va.**—Dixon Livery Co. *v.* Bond, 117 Va. 656, 86 S. E. 106, L. R. A. 1916A, 1211.

Rule as applied to undisclosed principal generally, see *supra*, VII, D, 3, a, (II), (C).

[a] **Where a partnership sues on a check** given for goods bought, the defendant may set up as against the claim an indebtedness of one of the partners with whom the defendant dealt in purchasing the goods believing him to be a sole trader. Dixon Livery Co. *v.* Bond, 117 Va. 656, 86 S. E. 106, L. R. A. 1916A, 1211.

73. **Ga.**—Ocmulgee Guano Co. *v.* Price, 18 Ga. App. 206, 89 S. E. 156. **Ia.**—Bird, S. & Co. *v.* McCoy, 22 Iowa 549. **N. Y.**—Tilden *v.* Washburn, 6 N. Y. Supp. 556, 24 N. Y. St. 925. **Pa.** Bartlett *v.* Loomis, 16 Montg. Co. Rep. 206.

[a] **Where a partnership is sued in its firm name,** a counterclaim in favor of all the persons actually composing the firm may be pleaded although it discloses the existence of partners who had not been mentioned as such in the petition or complaint. Bird, S. & Co. *v.* McCoy, 22 Iowa 549.

74. **U. S.**—Coleman *v.* Elmore, 12 Sawy. 463, 31 Fed. 391. **Cal.**—Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922. **Colo.**—Rogers *v.* McMillen, 6 Colo. App. 14, 39 Pac. 891. **Ill.** Peretes *v.* Tompary, 182 Ill. App. 495; Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642. **Ia.**—Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510. **Ky.**—Bauer Cooperage Co. *v.* Ewell, 149 Ky. 838, 149 S. W. 1137. **Mich.**—Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256; Sager *v.* Tupper, 38 Mich. 258. **N. J.** Williams *v.* Hamilton, 4 N. J. L. 220; Bowne's Exrs. *v.* Thompson, 1 N. J. L. 2. **N. Y.**—Peabody *v.* Beach, 6 Duer 53; Hunter *v.* Booth, 84 App. Div. 585, 82 N. Y. Supp. 1000; Pophan *v.* Rubin, 134 N. Y. Supp. 1067; Blumenthal *v.* Katz, 132 N. Y. Supp. 314. **Ore.**—Sanford *v.* Pike, 87 Ore. 614, 170 Pac. 729, 171 Pac. 394. **S. C.**—Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787. **Tex.**—Olive *v.* Morgan, 8 Tex. Civ. App. 654, 28 S. W. 572. **Va.** Ritchie *v.* Moore, 5 Munf. (19 Va.) 388, 7 Am. Dec. 688. **Wis.**—Wilson *v.* Runkel, 38 Wis. 526.

75. Barnes *v.* Esch, 87 Ore. 1, 169 Pac. 512.

[a] **Where all the partners agree** with an individual that a set-off may be allowed, the courts will enforce it. Barnes *v.* Esch, 87 Ore. 1, 169 Pac. 512.

cross-demand owned by the partnership,[76] or by himself individually.[77]

(IV.) Actions by and Against Partner Individually. — Where plaintiff sues as an individual, the defendant cannot successfully assert a cross-demand owing by the firm of which plaintiff is a member,[78] nor where a partner is sued upon an individual debt can he set-off or counterclaim a demand which his firm holds against plaintiff,[79] unless in either case the parties consent thereto,[80] or unless the liability sued on is a

76. McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Smith *v.* State, 11 Ga. App. 89, 74 S. E. 711; Danielson *v.* Scott, 88 Kan. 789, 129 Pac. 1190.

[a] **The debt of a firm is the debt of each of its members,** so (1) where a firm is sued on a note made by the firm, and each individual member of the firm is served, the right of set-off exists in favor of the individual members for indebtedness due by the plaintiff to them (Smith *v.* State, 11 Ga. App. 89, 74 S. E. 711), as well as (2) for indebtedness due by the plaintiff to the firm. Smith *v.* State, 11 Ga. App. 89, 74 S. E. 711.

Suits against surviving partner, see *infra,* VII, D, 3, c, (V).

77. Ala.—Jones & Co. *v.* Jones, 12 Ala. 244. **Ga.**—McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Smith *v.* State, 11 Ga. App. 89, 74 S. E. 711. **Ia.**—Mason *v.* Rice, 19 N. W. 897. **Ky.** Fidelity Trust Co. *v.* Shannahan, 14 Ky. L. Rep. 111.

78. Ala.—Bradley Fertilizer Co. *v.* Pollock, 104 Ala. 402, 16 So. 138. **Cal.**—Wood *v.* Brush, 72 Cal. 224, 13 Pac. 627. **Colo.**—Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155. **Conn.**—Francis *v.* Rand, 7 Conn. 221. **Del.**—Sussex Trust Co. *v.* Bacon, 102 Atl. 785; Greer *v.* Arlington Mills Mfg. Co., 1 Penne. 581, 43 Atl. 609. **Ga.**—West *v.* Kendrick, 46 Ga. 526. **Ill.**—International Bank *v.* Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807; Coates *v.* Preston, 105 Ill. 470; Hilliard *v.* Walker, 11 Ill. 644. **La.**—Ashley *v.* Sholars, 22 La. Ann. 442. **Me.**—Jones *v.* Vinal Haven Steamboat Co., 90 Me. 120, 37 Atl. 879; Fessenden *v.* Forest Paper Co., 63 Me. 175. **Md.**—Mitchell *v.* Sellman, 5 Md. 376. **Mass.**—Reed *v.* Whitney, 7 Gray 533. **Mich.**—Stewart *v.* Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas. 1915C, 808. **N. Y.**—Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350; McCulloch *v.* Vibbard, 51 Hun 227, 4 N. Y. St. 202, 21 N. Y. St. 51. **Ore.**—Schade *v.* Muller, 75 Ore. 225, 146 Pac. 144. **Pa.**—Jarecki Mfg. Co. *v.* Haymaker, 138 Pa. 541, 21 Atl. 99; Jackson *v.* Clymer, 43 Pa. 79; McDowell *v.* Tyson, 14 Serg. & R. 300. **Tenn.** Flint *v.* Tillman, 2 Heisk. 202. **Tex.** Wise *v.* Ferguson (Tex. Civ. App.), 138 S. W. 816; Haley *v.* Cusenbary (Tex. Civ. App.), 30 S. W. 587. **Wis.**—McConihe *v.* Hollister, 19 Wis. 269.

In actions by surviving partner, see *infra,* VII, D, 3, c, (V).

[a] **In an action on an assigned claim,** the defendant cannot set up as a counterclaim a demand against a firm of which plaintiff's assignor was a member. Samuels *v.* Twin State Realty Co., 145 N. Y. Supp. 44.

79. Ala.—Drennen *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902; Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; Evans *v.* Sims, 37 Ala. 710; Ross *v.* Pearson, 21 Ala. 473; Taylor *v.* Bass, 5 Ala. 110. **Colo.**—Doyle *v.* Nesting, 37 Colo. 522, 88 Pac. 862. **Ga.**—Bishop *v.* Mathews, 109 Ga. 790, 35 S. E. 161. **Idaho.** McGuire *v.* Lamb, 2 Idaho 378, 17 Pac. 749. **Ill.**—Pegram *v.* Miser, 176 Ill. App. 352. **Ia.**—Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978. **La.**—Terran *v.* De Lastra, 2 La. 324; Byrd *v.* McMicken, 8 Mart. N. S. 163. **Me.** Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458; Stevens *v.* Lunt, 19 Me. 70. **Mass.**—Howe *v.* Snow, 3 Allen 111. **Miss.**—Green *v.* Bounds, 112 Miss. 252, 72 So. 1001. **Mo.**—Lamb *v.* Brolaski, 38 Mo. 51; State *v.* Allen, 124 Mo. App. 465, 103 S. W. 1090. **Neb.**—Olson *v.* Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670. **N. Y.**—Campbell *v.* Genet, 2 Hilt. 290. **Pa.**—Craig *v.* Henderson, 2 Pa. 261, 44 Am. Dec. 193. **Tex.**—Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849. **Vt.**—Wells *v.* Mace, 17 Vt. 503. **Va.** Edmondson *v.* Thomasson, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301; Porter *v.* Nekervis, 4 Rand. (25 Va.) 359.

80. U. S.—Howes & Co. *v.* United

joint and several one against the firm and its members.[81]

(V.) Surviving and Liquidating Partners. — The defendant when sued by a surviving partner for a debt due to the partnership, may set-off or counterclaim an indebtedness due from the plaintiff individually,[82] and where the surviving partner sues upon an individual claim, a debt or demand owing to the defendant from the partnership may be offset.[83] In an action against a surviving partner upon a firm demand, the defendant may set-off his individual claim against the plaintiff,[84] or a claim due to the firm,[85] and when sued upon an individual indebtedness, the surviving partner may use a debt of the partnership as a counter-demand.[86] A firm debt may properly be set-off against an individual demand upon which a liquidating partner is sued.[87]

d. *Corporations and Its Officers and Stockholders.* — **(I.) Corporation and Stockholders.** — A corporation is a legal entity separate and distinct from its stockholders,[88] and debts and demands owing to and from the one cannot be used as cross-demands in suits by and against the other.[89] A stockholder when made defendant cannot interpose as a set-off or counterclaim a demand in favor of the corporation,[90] even though he may own practically all of the stock of the corporation.[91]

States, 24 Ct. Cl. 170. **Ill.**—Pegram *v.* Miser, 176 Ill. App. 352. **Me.**—Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458. **Md.**—Mitchell *v.* Sellman, 5 Md. 376. **Ore.**—McDonald *v.* Mackenzie, 24 Ore. 573, 14 Pac. 866. **Pa.**—Jack *v.* Klepser, 196 Pa. 187, 46 Atl. 479, 79 Am. St. Rep. 699; Montz *v.* Morris, 89 Pa. 392; Edelman *v.* Scholl, 65 Pa. Super. 357.

81. **U. S.**—Davis *v.* Bessemer City Cotton Mills, 178 Fed. 784, 102 C. C. A. 232. **Ark.**—Coats *v.* Milner, 203 S. W. 701. **Ia.**—See Allen *v.* Maddox, 40 Iowa 124. **Mo.**—Ruddle *v.* Horine, 34 Mo. App. 616.

82. **Mass.**—Holbrook *v.* Lackey, 13 Metc. 132, 46 Am. Dec. 726. **Mich.** Newberry *v.* Trowbridge, 13 Mich. 263. **Mo.**—Cowden *v.* Elliot, 2 Mo. 60. **Pa.** Lewis *v.* Culbertson, 11 Serg. & R. 48, 14 Am. Dec. 607. **Tex.**—Masterson *v.* Goodlett, 46 Tex. 402; Amarillo Nat. Bank *v.* Harrell (Tex. Civ. App.), 159 S. W. 858. **Vt.**—Meader *v.* Scott, 4 Vt. 26; Meader *v.* Leslie, 2 Vt. 569.

83. Waln *v.* Hewes, 5 Serg. & R. (Pa.) 468; Masterson *v.* Goodlett, 46 Tex. 402.

84. **Ind.**—Skillen *v.* Jones, 44 Ind. 136. **Mich.**—Newberry *v.* Trowbridge, 13 Mich. 263. **N. J.**—Johnson *v.* Kaiser, 40 N. J. L. 286. **Pa.**—Lewis *v.* Culbertson, 11 Serg. & R. 48, 14 Am. Dec. 607.

[a] **Whether it arose before or after the death** of his partner. Newberry *v.* Trowbridge, 13 Mich. 263.

85. First Nat. Bank *v.* Silver, 45 Mont. 231, 122 Pac. 584.

[a] **In a suit on a firm note** against a surviving partner he may counterclaim upon an implied contract for the value of firm property which the plaintiff has converted. First Nat. Bank *v.* Silver, 45 Mont. 231, 122 Pac. 584.

86. **Mass.**—Holbrook *v.* Lackey, 13 Metc. 132, 46 Am. Dec. 726. **Mich.** Newberry *v.* Trowbridge, 13 Mich. 263. **Mo.**—Cowden *v.* Elliot, 2 Mo. 60. **Pa.** Henderson *v.* Lewis, 9 Serg. & R. 379, 11 Am. Dec. 733. **Tex.**—Amarillo Nat. Bank *v.* Harrell (Tex. Civ. App.), 159 S. W. 858.

87. Craig *v.* Henderson, 2 Pa. 261, 44 Am. Dec. 193.

88. See the title **"Corporations."**

89. Hapke *v.* Davidson, 180 Mich. 138, 146 N. W. 624; Gallagher *v.* Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115.

90. Ballard *v.* Thompson, 139 La. 267, 71 So. 505; Hapke *v.* Davidson, 180 Mich. 138, 146 N. W. 624.

[a] **Plaintiff's debt to a sugar corporation** of which the defendant is a principal stockholder, not available to defendant as a set-off when sued for services rendered by plaintiff in removing his factory. Hapke *v.* Davidson, 180 Mich. 138, 146 N. W. 624.

91. Hapke *v.* Davidson, 180 Mich. 138, 146 N. W. 624.

And defendant when sued by a corporation cannot avail himself by way of offset of debts and demands due from a stockholder.[92] Debts or claims, otherwise proper as cross-demands, may be pleaded by a stockholder in offset to a claim of the corporation against him,[93] and the right includes dividends which are declared and due to the stockholder.[94] When a stockholder sues to enforce an obligation against the corporation, the latter may interpose as a cross-demand any available indebtedness of the plaintiff to it.[95]

(II.) Corporation and Officers. — In a suit by an individual a cross-demand against a corporation of which the plaintiff is an officer is not available,[96] unless it be shown that the corporation is the real party in interest as complainant.[97] And a claim against an officer of a corporation cannot be set-off against a claim upon which the corporation sues.[98]

(III.) In Actions To Enforce Stockholder's Liability to Creditors. — The right to interpose cross-demands in actions to enforce a stockholder's liability to creditors is treated elsewhere in this work.[99]

e. *Receivers.* — **(I.) In General.** — It is generally held that a receiver occupies no better position than that which was occupied by the party for whom he acts.[1] He takes the property and rights of the one

92. Gallagher *v.* Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115.

93. Northwestern Marble & Tile Co. *v.* Carlson, 116 Minn. 438, 133 N. W. 1014, Ann. Cas. 1913B, 552.

In action upon stock subscription, see the title "**Stock and Stockholders.**"

94. **Ga.**—Crawford *v.* Roney, 130 Ga. 515, 61 S. E. 117. **Md.**—Whittington *v.* Farmers' Bank, 5 Harr. & J. 489. **Minn.**—Northwestern Marble & Tile Co. *v.* Carlson, 116 Minn. 438, 133 N. W. 1014, Ann. Cas. 1913B, 552.

[a] **Unpaid dividends not available as set-off.** Ruckersville Bank *v.* Hemphill, 7 Ga. 396.

95. **U. S.**—United Cigarette Mach. Co. *v.* Winston Cigarette Mach. Co., 194 Fed. 947, 114 C. C. A. 583; Ex parte Winsor, 3 Story 411, 30 Fed. Cas. No. 17,884. **Mass.**—Coyle *v.* Taunton Safe Deposit & Trust Co., 216 Mass. 156, 103 N. E. 288. **N. Y.**—McGill *v.* Holmes, 23 Misc. 524, 52 N. Y. Supp. 840.

[a] **Dividends due the stockholder** may be set-off. See **Me.**—Hagar *v.* Union Nat. Bank, 63 Me. 509. **Mass.** Sargent *v.* Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306. **N. J.**—King *v.* Paterson & H. R. R. Co., 29 N. J. L. 504. **Pa.**—Philadelphia, W. & B. R. Co. *v.* Cowell, 28 Pa. 329, 70 Am. Dec. 128. **Tex.**—First Nat. Bank *v.* De Morse (Tex. Civ. App.), 26 S. W. 417. **W. Va.**—Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

[b] **Set-off by corporation in action for dividends** brought by the stockholder. United Cigarette Mach. Co. *v.* Winston Cigarette Mach. Co., 194 Fed. 947, 114 C. C. A. 583.

96. McGill *v.* Sorensen, 209 Fed. 876.

[a] **In a suit for infringement of a patent** brought by an assignee of the patentee, the defendant cannot counterclaim for the infringement of another patent by a corporation of which the plaintiff is an officer where it is not shown that the corporation is the party entitled to bring the suit. McGill *v.* Sorensen, 209 Fed. 876.

97. See *supra,* VII, D, 1, b, (IV).

98. Cragin Mfg. Co. *v.* Geuder & P. Mfg. Co., 85 Ill. App. 379; Peck-Williamson Heating & Ventilating Co. *v.* Board of Education, 6 Okla. 279, 50 Pac. 236.

99. See the title "**Stock and Stockholders.**"

1. **Ark.**—Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060. **Conn.**—Booth *v.* Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863. **Ga.**—State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138. **Minn.**—St. Paul & Minneapolis Trust Co. *v.* Leck, 51 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 576. **Mo.** Green *v.* Conrad, 114 Mo. 651, 21 S. W.

for whom he was appointed precisely in the same condition and subject to the same equities and offsets as existed in favor of and against the original party.[2] The particular time when the rights in respect to cross-demands as between the receiver and third persons become fixed is different in different jurisdictions. In some, their rights relate to the moment of transfer of the insolvent's property,[3] in others to the filing of the petition for the appointment of a receiver,[4] and in still others the act of insolvency determines the matter.[5] Debts and claims acquired by the debtor after the times thus specified cannot be asserted against the receiver.[6]

(II.) Actions by Receiver. — It follows from the principle above stated[7] that when a receiver proceeds to enforce a demand which came to him in virtue of his office, the defendant may plead by way of cross-demand an otherwise proper debt or claim which he could have asserted against the insolvent.[8] The debtor cannot set-off against his own liability claims against the insolvent which he purchased after the transfer

839. **Tenn.**—Nashville Trust Co. *v.* Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

See the title "**Receivers.**"

2. U. S.—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059. **Ind.**—Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583. **Ia.**—Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419. **N. Y.**—Osgood *v.* De Groot, 36 N. Y. 348; Jones *v.* Robinson, 26 Barb. 310. **Ohio.**—Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466. **Pa.**—Barclay *v.* Edlis Barber Supply Co., 39 Pa. Super. 482. **Wash.** Sheafe *v.* Hastie, 16 Wash. 563, 48 Pac. 246.

[a] **Not Purchasers for Value.** "Assignees and receivers of insolvents are not regarded as purchasers for value without notice, but rather as personal representatives of the insolvents and standing in their shoes so far as their assets are concerned, and take same subject to set-offs, liens, and incumbrances as they existed at the time of their appointment." Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060.

3. U. S. Brick Co. *v.* Middleton Shale Brick Co., 228 Pa. 81, 77 Atl. 395.

4. Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Colt *v.* Brown, 12 Gray (Mass.) 233.

5. Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059; Davis *v.* Knipp, 92 Hun 297, 36 N. Y. Supp. 705, 71 N. Y. St. 770; Schlesinger *v.* Goldberg, 43 Misc. 149, 93 N. Y. Supp. 592.

6. See *infra*, VII, D, 3, e, (II).

7. See *supra*, VII, D, 3, e, (I).

8. **U. S.**—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059. **D. C.**—Darby *v.* Freedman's Sav. & T. Co., 3 McArthur 349. **Ind.**—Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583. **Ia.**—Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419. **N. J.**—Van Wagoner *v.* Paterson Gas Light Co., 23 N. J. L. 283. **N. Y.**—Hughitt *v.* Hayes, 136 N. Y. 163, 32 N. E. 706; Smith *v.* Felton, 43 N. Y. 419; Osgood *v.* De Groot, 36 N. Y. 348; Miller *v.* Franklin Bank, 1 Paige 444; Jones *v.* Robinson, 26 Barb. 310; In re Middle Dist. Bank, 9 Cow. 414, 1 Paige 585, 19 Am. Dec. 452. **Ohio.**—Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466. **Pa.**—Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; Farmers' Deposit Nat. Bank *v.* Penn Bank, 123 Pa. 283, 16 Atl. 761, 2 L. R. A. 273; Barclay *v.* Edlis Barber Supply Co., 39 Pa. Super 482. **Wash.**—Sheafe *v.* Hastie, 16 Wash. 563, 48 Pac. 246.

[a] **Leave of Court.**—A counterclaim or set-off comes within the spirit of the act of August 13, 1888, c. 866, sec. 3, 25 St. at L. 436, granting the right to sue a receiver appointed by a federal court without leave of the court appointing him. Grant *v.* Buckner, 172 U. S. 232, 19 Sup. Ct. 163, 43 L. ed. 430.

[b] **Demands not matured as against** the insolvent at the time the receiver was appointed not available. Central Trust Co. *v.* Morton Trust Co., 200 N.

of the insolvent's property to the receiver,[9] or after the petition for the appointment of a receiver,[10] or after the act of insolvency,[11] depending upon the rule prevailing the particular jurisdiction as above stated.[12]

Upon Contracts of Receiver.— Where suit is brought by the receiver upon a contract made by him, his action is subject to offsets growing out of such contract,[13] but demands accruing against the insolvent before the receiver was appointed are not available.[14] This latter rule does not prevent a right of set-off of such demands when the receiver sues not on his own contract alone, but for what he has done in part performance of his insolvent's contract,[15] provided what was done by the receiver in thus carrying out the contract was beneficial to the insolvent's estate.[16]

(III.) Actions Against Receiver.— The receiver, on the other hand,

Y. 577, 93 N. E. 975.

[c] **Notes not yet due** cannot be set-off, in the absence of equitable grounds. McManus-Kelly Co. *v.* Pope Mfg. Co. (N. J. Eq.), 70 Atl. 297.

9. United States Brick Co. *v.* Middleton Shale Brick Co., 228 Pa. 81, 77 Atl. 395.

[a] **A claim acquired pending application for a receiver** may be used as a set-off by the debtor. United States Brick Co. *v.* Middletown Shale Brick Co., 228 Pa. 81, 77 Atl. 395.

10. **Ga.**—Nix *v.* Ellis, 118 Ga. 345. 45 S. E. 404, 98 Am. St. Rep. 111, Moise *v.* Chapman, 24 Ga. 249. **Mass.** Colt *v.* Brown, 12 Gray 233. **N. Y.** Ogden *v.* Cowley, 2 Johns. 274.

[a] **The reason** is that "at that moment the rights of creditors attach. It ceases to be a going concern. The assets are impressed with a trust for the benefit of all alike. Prior thereto the privilege of buying claims to be used as a set-off continues, even though the assignee may know of the insolvency. The right exists up to the prohibited date." Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111.

[b] **Claims acquired after notice of insolvency** are usable as a set-off. Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111, unless the statute provides otherwise. See Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111.

11. **U. S.**—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059. **N. Y.**—Van Dyck *v.* McQuade, 85 N. Y. 616; Davis *v.* Knipp, 92 Hun 297, 36 N. Y. Supp. 705, 71 N. Y. St. 770; Schlesinger *v.* Goldberg, 47 Misc. 149, 93 N. Y. Supp. 592. **Pa.**—Venango Nat. Bank *v.* Taylor, 56 Pa. 14.

12. See *supra*, VII, D, 3, e, (I).

13. Grant *v.* Buckner, 49 La. Ann. 668, 21 So. 580. See Bush *v.* Harrison Granite Co., 82 Vt. 85, 71 Atl. 1042.

[a] **Money Collected in Excess of Rent.**—Where a receiver sues for rent upon a contract made by him the defendant may plead in compensation a sum which the receiver has previously collected under the contract in excess of what he was entitled to. Grant *v.* Buckner, 49 La. Ann. 668, 21 So. 580.

14. **U. S.**—Barber Asphalt Co. *v.* Forty-second St. M. & St. N. Ave. Ry. Co., 175 Fed. 154. **Del.**—Greif *v.* James H. Wright Co., 10 Del. Ch. 308, 91 Atl. 205. **Ill.**—Chicago Architectural Iron Works *v.* McKey, 93 Ill. App. 244. **Pa.** Kuebler *v.* Haines, 229 Pa. 274, 78 Atl. 141.

[a] **Receiver's Certificates as Set-off.**—In a proceeding by a receiver to recover the balance of purchase price of property sold by him, the defendants cannot set-off receiver's certificates held by them. Ten Broek *v.* Caldwell, 95 Neb. 464, 145 N. W. 980, Ann. Cas. 1916D, 613.

[b] **Where receivers continue to operate a railroad,** doing so not merely as successors of the insolvent, but as independent operators, the defendant when sued by such receivers for power supplied by them, cannot set-off a claim existing against the insolvent at the time of its insolvency. Barber Asphalt Co. *v.* Forty-second St. M. & St. N. Ave. Ry. Co., 175 Fed. 154.

15. Kuebler *v.* Haines, 229 Pa. 274, 78 Atl. 141.

16. Butterworth *v.* Degnon Contracting Co., 214 Fed. 772, 131 C. C. A. 184.

when sued upon obligations of the insolvent, is entitled to plead any set-off or counterclaim which the insolvent might have asserted.[17]

(IV.) Receivers of Insolvent Banks. — The foregoing rules as to the right to assert cross-demands by and against receivers are frequently applied in respect to receivers of insolvent banks.[18] And in a suit by a receiver of an insolvent bank upon a note or obligation due the bank, the defendant will be allowed to set-off his deposit or certificate of deposit held by him at the time of the suspension of the bank,[19] even though the paper or other obligation sued on had not then matured.[20] Defendant may also set-off a debt due to him from the bank, although

17. **Koegel** *v.* Michigan Trust Co., 117 Mich. 542, 76 N. W. 74.

18. See the following: **U. S.**—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059; Cook County Nat. Bank *v.* United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. ed. 537. **Cal.** People *v.* California Safe Deposit & Trust Co., 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299; Ainsworth *v.* Bank of California, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686. **Ga.**—State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138. **Ind.**—Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111. **Mo.** Stephens *v.* Schuchmann, 32 Mo. App. 333. **N. Y.**—Schlesinger *v.* Goldberg, 47 Misc. 149, 93 N. Y. Supp. 592. **N. C.** Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322. **Ohio.** Hade *v.* McVay, Allison & Co., 31 Ohio St. 231. **Va.**—Terry *v.* Wooding, 2 Patton & H. 178. **Wash.**—Sheafe *v.* Hastie, 16 Wash. 563, 48 Pac. 246.

19. **U. S.**—Wheaton *v.* Daily Telegraph Co., 124 Fed. 61, 59 C. C. A. 427. **Ark.**—Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060. **Cal.**—People *v.* California Safe Deposit & Trust Co., 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299. **Ky.** Wallace *v.* Estill County Deposit Bank, 116 S. W. 351. **Mo.**—Mingus *v.* Bank of Ethel, 136 Mo. App. 407, 117 S. W. 683. **N. Y.**—Davenport *v.* National Bank, 127 App. Div. 391, 112 N. Y. Supp. 291.

[a] **That the set-off had never been filed with the receiver** in pursuance of the general notice to creditors, will not prevent its being used in an action by the receiver. Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583.

[b] **Claims acquired after the bank became insolvent** cannot be offset. Schlesinger *v.* Goldberg, 47 Misc. 149, 93 N. Y. Supp. 592.

20. **U. S.**—Scott *v.* Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059 (*reversing* 36 Fed. 63); Williams *v.* Rose, 218 Fed. 898; Adams *v.* Spokane Drug Co., 57 Fed. 888, 23 L. R. A. 334; Yardley *v.* Clothier, 49 Fed. 337 (*affirmed*, 51 Fed. 506, 2 C. C. A. 349, 17 L. R. A. 462); Snyders' Sons Co. *v.* Armstrong, 37 Fed. 18. **Ark.** Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060. **Ill.**—McCagg *v.* Woodman, 28 Ill. 84. **Md.**—Colton *v.* Drovers' P. B. & L. Assn., 90 Md. 85, 45 Atl. 23, 78 Am. St. Rep. 431, 46 L. R. A. 388. **Mich.** Thompson *v.* Union Trust Co., 130 Mich. 508, 90 N. W. 294, 97 Am. St. Rep. 494. **Mo.**—Smith *v.* Spengler, 83 Mo. 408. **Mont.**—Mercer *v.* Dyer, 15 Mont. 317, 39 Pac. 314. **N. J.**—Receivers of People's Bank *v.* Paterson G. L. Co., 23 N. J. L. 283. **N. Y.**—Curtis *v.* Davidson, 215 N. Y. 395, 109 N. E. 481 (*affirming* 164 App. Div. 597, 150 N. Y. Supp. 305); Richards *v.* La Tourette, 119 N. Y. 54, 23 N. E. 531 (*reversing* 53 Hun 623, 6 N. Y. Supp. 937, 25 N. Y. St. 654); Smith *v.* Felton, 43 N. Y. 419; O'Connor *v.* Brandt, 12 App. Div. 596, 42 N. Y. Supp. 1079; Clute *v.* Warner, 8 App. Div. 40, 40 N. Y. Supp. 392; In re Van Allen, 37 Barb. 225; Jones *v.* Robinson, 26 Barb. 310; *In re* Receiver Middle Dist. Bank, 1 Paige 585, 19 Am. Dec. 452, 9 Cow. 414. **N. C.**—Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322. **Ohio.**—Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; Second Nat. Bank *v.* Hemingray, 34 Ohio St. 381. **Pa.**—Jordan *v.* Sharlock, 84 Pa. 366, 24 Am. Rep. 198; Arnold *v.* Niess, 1 Walk. 115. **W. Va.**—Williams *v.* Burgess, 74 W. Va. 623, 82 S. E. 507, Ann. Cas. 1917C, 1185. **Wis.**—Jones *v.* Piening, 85 Wis. 264, 55 N. W. 413. **Eng.** Ex parte Clennell, 4 L. T. N. S. 60, 9 Wkly. Rep. 380.

such debt was not payable at the time the bank became insolvent.[21]

f. *Trustees.* — One who is proceeded against by a trustee in his official or fiduciary capacity is entitled to counter-demand claims which he could set up against the cestui que trust,[22] but not those which he holds against the plaintiff personally.[23] And where the trustee brings the action in his individual right, demands against him as trustee cannot be used.[24] When sued in his representative capacity the trustee

21. **Minn.**—St. Paul & M. Trust Co. *v.* Leck, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 576; Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467. **N. C.** Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322. **Ore.** *In re* Hamilton, 26 Ore. 579, 38 Pac. 1088.

[a] **Maturity Accellerated by Insolvency.**—In some cases the set-off of an immature debt of a bank to its depositor has been based upon the ground that the bank's insolvency cancel all its obligations, both as to general deposits, certificates and time-deposits to become at once due and payable. First Nat. Bank *v.* Lewis, 57 Colo. 124, 139 Pac. 1102; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 331, 19 S. E. 371, 23 L. R. A. 322.

[b] **Note Assigned While Bank Solvent.**—The rule applies where the depositing bank has, while solvent, assigned to plaintiff the note in question, and, prior to institution of plaintiff's action, become insolvent. Puget Sound State Bank *v.* Washington Pav. Co., 94 Wash. 504, 162 Pac. 870.

[c] **Savings Deposit.**—Deposit in savings bank payable only on time, or after notice, becomes due, for purposes of set-off immediately upon the bank's insolvency. Williams *v.* Johnson, 50 Mont. 7, 144 Pac. 768, Ann. Cas. 1916D, 595.

[d] **Right of Bank's Surety.**—Certificates of deposit though not mature according to their terms, become due upon bank's insolvency, and the right of one who, as surety for, or guarantor of the payment of such certificates, pays them, matures as against the bank, and he may set off the amount paid in action upon his note to the bank. Kilby *v.* First Nat. Bank, 32 Misc. 370, 66 N. Y. Supp. 579.

22. **U. S.**—Campbell *v.* Hamilton, 4 Wash. C. C. 92, 4 Fed. Cas. No. 2,359. **Ind.**—Waddle *v.* Harbeck, 33 Ind. 231. **N. Y.**—Hamilton *v.* Gunther, 32 Hun 22. **Pa.**—Krause *v.* Beitel, 3 Rawle 199, 23 Am. Dec. 113. **Tenn.**—Litterer *v.* Berry, 4 Lea 193.

23. **Conn.**—Miller *v.* Bellamore Armored Car & Equipment Co., 86 Conn. 548, 86 Atl. 13. **Ga.**—Daniel *v.* Bush, 80 Ga. 218, 4 S. E. 271; Vason *v.* Beall, 58 Ga. 500. **Ind.**—Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468. **Ky.**—Thompson *v.* Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89; Wolfe *v.* Bate, 9 B. Mon. 208. **Md.** McPherson *v.* Ross, 1 Md. 181. **Mich.** First Nat. Bank *v.* E. T. Barnum Wire & Iron Works, 58 Mich. 124, 24 N. W. 543, 55 Am. Rep. 660; Paige *v.* Stephens, 23 Mich. 357. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

[a] **Where trustee in bankruptcy sues on a note** in his official capacity, a cross-demand against him for a personal liability based on false representations made to the maker of the note concerning the bankrupt estate, not available. Thompson *v.* Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89.

[b] **Where trustee as such, sues to foreclose a mortgage** a debt due from him personally is not a proper cross-demand. Miller *v.* Bellamore Armored Car & Equipment Co., 86 Conn. 548, 86 Atl. 13.

[c] **A contract of pledge creates a fiduciary relation** between the pledgor and the pledgee, and when the pledgee is sued for conversion of the pledged chattel he cannot set-off his individual debt. Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972.

[d] **In a suit on note by trustee in bankruptcy** in his official capacity, the defendant cannot counterclaim a personal liability of the trustee for false representations respecting the property for which the note was given. Thompson *v.* Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89.

24. Watson *v.* Andrews & Co. (Mich.), 167 N. W. 1013.

can undoubtedly offset demands due him as trustee, but not those accruing to him as an individual.[25] And where he is made defendant in his individual capacity he cannot assert a set-off or counterclaim due to him as trustee.[26]

g. *Husband and Wife.* — The requirement that cross-demands be mutual prevents one spouse from using as a set-off or counterclaim a debt or claim owing to the other,[27] and prohibits the defendant when sued by either spouse from pleading as a cross-demand a liability due from the other alone.[28] When the wife is sued she cannot use by way of offset a demand due from the plaintiff to her husband,[29] and the husband cannot as defendant assert by way of cross-demand an indebtedness owned by the wife alone.[30] But where the husband could maintain an action in his own name for a claim or debt, he may use the same as an offset when sued by the person owing it.[31] In an action by the wife to recover a demand due to her personally, a claim against the husband cannot be set-off or counterclaimed where he is not a party to the suit,[32] or where he is merely a nominal party.[33] But if it appears that the husband is the real party in interest though not a party to the record the defendant may assert as cross-demand a claim against him.[34] Where the husband sues alone upon his individual demand, no

[a] **Purchasers of stock from trustee of an estate** who knew or should have known that he was acting in his representative capacity, cannot when sued by him in his individual capacity, set-off damages for his failure to deliver the stock. Watson *v.* Andrews & Co. (Mich.), 167 N. W. 1013.

25. **Tagg** *v.* Bowman, 99 **Pa.** 376; Peters *v.* Nashville Sav. Bank, 86 Tenn. 224, 6 S. W. 133.

26. Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61; Wolf *v.* Bealés, 6 Serg. & R. 242, 9 Am. Dec. 425.

27. McCarty *v.* Mewhinney, 8 Ind. 513; **Barnes** *v.* Esch, 87 Ore. 1, 169 Pac. 512.

28. **Ala.**—Yaught *v.* Wellborn, 16 Ala. 377. **Colo.**—Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209. **Kan.**—Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438. **N. Y.**—Paine *v.* Hunt, 40 Barb. 75. **S. D.**—Harrison *v.* State Banking & Trust Co., 15 S. D. 304, 89 N. W. 477.

29. See *infra,* this note.

[a] **Insolvency and nonresidence of the judgment creditor,** do not entitle her to assert such a cross-demand. Barnes *v.* Esch, 87 Ore. 1, 169 Pac. 512.

30. **U. S.**—Sutton *v.* Mandeville, 1 Cranch C. C. 2, 23 Fed. Cas. No. 13,648. **Ind.**—McCarty *v.* Mewhinney, 8 Ind. 513. **Va.**—Glazebrook's Admr. *v.* Ragland's Admr., 8 Gratt. (49 Va.) 332. **Wis.**—Dolph *v.* Rice, 21 Wis. 590.

31. Way *v.* Root, 174 Mich. 418, 140 N. W. 577.

[a] **A claim for rental of land owned by entireties** may be used as an off-set by the husband in an action to which his wife is not a party. He is entitled to the rent, could maintain an action in his own name to collect it and so may recover it as an off-set. Way *v.* Root, 174 Mich. 418, 140 N. W. 577.

32. Paine *v.* Hunt, 40 Barb. (N. Y.) 75; Jamison *v.* Brady, 6 Serg. & R. (Pa.) 466, 9 Am. Dec. 460; Flory *v.* Becker, 2 Pa. 470, 45 Am. Dec. 610.

33. Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423.

34. See *supra,* VII, D, 1, b, (IV).

[a] **Husband's Money in Wife's Name.**—Where, to defraud his creditors a husband caused his own money to be deposited in bank to his wife's account, a debt held by the bank against him may be set-off against his wife's action to recover such money. Citizens' Bank *v.* Bowen, 21 Kan. 354, 364; Moore *v.* Greenville Banking & T. Co., 173 N. C. 180, 91 S. E. 793.

[b] **Wife Payee of Note, Debt Due Husband.**—A defendant, indebted to the husband, who makes a note for such debt to the wife, may, in an action by the wife, set-off claims held by him against the husband. Reppy *v.* Reppy, 46 Mo. 571.

cause of action against the wife can be set-off or counterclaimed.[35] In an action on a joint liability of the husband and wife, the husband cannot counter-demand his individual claim,[36] even though the wife is not served with process.[37]

h. *Garnishees.* — A plaintiff in garnishment stands in general in the shoes of the original defendant, and has in consequence no greater rights, and as against him the defendant therefore enjoys the same rights of set-off, counterclaim and recoupment as he would have were the principal debtor himself prosecuting the claim.[38] The cross-demand

35. Harrison *v.* State Banking & Trust Co., 15 S. D. 304, 89 N. W. 477.

36. Lucas *v.* Johnson, 176 Ill. App. 143.

37. Lucas *v.* Johnson, 176 Ill. App. 143.

38. **U. S.**—North Chicago Rolling Mill Co. *v.* St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565; Schuler *v.* Isreal, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. ed. 707; Thebideau *v.* Cairns, 171 Fed. 233; Daugherty *v.* Bogy, 104 Fed. 938; Piquet *v.* Swan, 4 Mason 443, 465, 19 Fed. Cas. No. 11,133. **Ala.**—Minge *v.* First Nat. Bank, 191 Ala. 271, 68 So. 141; Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Price *v.* Masterson's Exr., 35 Ala. 483; Powell *v.* Sammons, 31 Ala. 552. **Cal.**—John M. C. Marble Co. *v.* Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59. **Colo.**—Tabor *v.* Bank of Leadville, 35 Colo. 1, 83 Pac. 1060; Sauer *v.* Nevadaville, 14 Colo. 54, 23 Pac. 87. **D. C.** Rhodes *v.* Bowling Green White Stone Co., 43 App. Cas. 298. **Fla.**—Howe *v.* Hyer, 36 Fla. 12, 17 So. 925. **Ga.**—Mutual R. L. Ins. Co. *v.* Fowler, 2 Ga. App. 537, 59 S. E. 469; Holmes *v.* Pope, 1 Ga. App. 338, 58 S. E. 281. **Ill.** Rankin *v.* Simonds, 27 Ill. 352; McCoy *v.* Williams, 6 Ill. 584; Cohn *v.* Malo, 198 Ill. App. 538; Bank of Commerce *v.* Franklin, 90 Ill. App. 91, applying Rev. St., c. 63, §13. **Ia.**—Meyer *v.* Brogan, 178 Iowa 1326, 160 N. W. 904; J. J. Smith Lumber Co. *v.* Scott County Garbage R. & F. Co., 149 Iowa 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184. **La.**—First Nat. Bank *v.* Martin, 127 La. 733, 742, 53 So. 973, *s. c.* 127 La. 744, 53 So. 977. **Me.**—Cota *v.* Mishow, 62 Me. 124; Shreve *v.* Fenno, 49 Me. 78; Stedman *v.* Vickrey, 41 Me. 132, 140; Manufacturers' Bank *v.* Osgood, 12 Me. 117. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 414, 102 N. E. 653; Nutter *v.* Framingham & L. R. Co., 132 Mass. 427; Eddy *v.* O'Hara, 132 Mass. 56; Doyle *v.* Gray, 110 Mass. 206; Smith *v.* Stearns, 19 Pick. 20; Mason *v.* Ambler, 6 Allen 124; Boston T. & S. T. Co. *v.* Mortimer, 7 Pick. 166, 19 Am. Dec. 266; Hathaway *v.* Russell, 16 Mass. 473. **Minn.**—Truan *v.* London G. & A. Co., 124 Minn. 339, 145 N. W. 26; Wunderlick *v.* Merchants' Nat. Bank, 109 Minn. 468, 124 N. W. 223, 134 Am. St. Rep. 788, 27 L. R. A. N. S. 811, 18 Ann. Cas. 212; Bacon *v.* Felthous, 103 Minn. 387, 115 N. W. 205. **Mo.**—Johnson *v.* Geneva Pub. Co., 122 Mo. 102, 26 S. W. 676; Firebaugh *v.* Stone, 36 Mo. 111. **N. H.**—Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442; Boston & M. R. Co. *v.* Oliver, 32 N. H. 172; Swamscott Mach. Co. *v.* Partridge, 25 N. H. 369; Sampson *v.* Hyde, 16 N. H. 492; Boardman *v.* Cushing, 12 N. H. 105, 118. **Pa.**—Bennett *v.* Campbell, 189 Pa. 647, 42 Atl. 373. **Tenn.**—Mowry *v.* Davenport, 6 Lea 80, 94; Mayor *v.* Potomac Ins. Co., 2 Baxt. 296, 303. **Tex.**—Farmers' & Merchants' State Bank *v.* Setzer (Tex. Civ. App.), 185 S. W. 596. **Wis.**—Keyes *v.* Milwaukee & St. P. Ry. Co., 25 Wis. 691.

See 10 STANDARD PROC. 522.

[a] **Recoupment.** — The garnishee, made such by reason of owing defendant money on a certain contract, may recoup damages caused by defendant's breach of that contract. Powell *v.* Sammons, 31 Ala. 552, 561.

[b] **An insurance company** may set-off a claim against defendant for premiums. Truan *v.* London G. & A. Co., 124 Minn. 339, 145 N. W. 86.

[c] **An agent** selling principal's property may set-off his sale commission against the principal's creditor. Steele *v.* Thompson, 38 Mo. App. 312.

Setting off claim against plaintiff, see *infra*, this section.

must conform to the requisites hereinbefore discussed.[39] It must amount to a cause of action against the principal debtor[40] of the character recognized by law as a proper subject of cross-demand,[41] and be in existence when the garnishment suit is begun,[42] although it need not necessarily have matured at that time provided it ripened into an actionable demand at the time it is pleaded or asserted.[43] As in other

39. See preceding discussion, and 10 STANDARD PROC. 524.

40. Rhodes *v.* Bowling Green, etc. Co., 43 App. Cas. (D. C.) 298; Randolph, B. & Co. *v.* Randolph, 34 Tex. 181.

[a] **Performance by Garnishee.** Where a contract claim is set-off, it must appear that the garnishee has performed the agreement on his part, or is ready, willing and able to perform it. Randolph, B. & Co. *v.* Randolph, 34 Tex. 181.

[b] **Contingent and uncertain demands** not available. **Ill.**—Rankin *v.* Simonds, 27 Ill. 352. **Minn.**—Milliken *v.* Mannheimer, 49 Minn. 521, 52 N. W. 139. **N. H.**—Smith *v.* Boston, C. & M. R. R. 33 N. H. 337. **Vt.**—Husted *v.* Stone, 69 Vt. 149, 37 Atl. 253.

41. See *supra*, VII, C, 2.

[a] **Costs in Attachment Suit.**—A garnishee may set-off his costs incurred in the attachment suit. Swamscott Mach. Co. *v.* Partridge, 25 N. H. 369, 380.

[b] **Cost of Defending Trust.**—Trustees as garnishees may set-off costs of defending trust property. Guild *v.* Holbrook, 11 Pick. (Mass.) 101.

Equitable demands, see 10 STANDARD PROC. 525.

Unliquidated Demands, see 10 STANDARD PROC. 524, and see *supra*, VII, C, 7.

[c] **That a secured claim** may be set-off, see Johnson *v.* Geneva Pub. Co., 122 Mo. 102, 26 S. W. 676.

[d] **A claim voidable under the statute of frauds** may be used as off-set by the garnishee. McCoy *v.* Williams, 6 Ill. 584.

42. **Ala.**—Self *v.* Kirkland, 24 Ala. 275. **Cal.**—Nordstrom *v.* Corona, etc. Co., 155 Cal. 206, 100 Pac. 242, 132 Am. St. Rep. 81, 87. **Conn.**—Edwards *v.* Baldwin, 2 Root 23. **Ill.**—Crain *v.* Gould, 46 Ill. 293; McCoy *v.* Williams, 6 Ill. 584. **Ia.**—Dyer *v.* McHenry, 13 Iowa 527. **Md.**—Farmers' & M. Bank *v.* Franklin Bank, 31 Md. 404. **Mo.** Clark *v.* Kinealy, 13 Mo. App. 104. **N. H.**—Wheeler *v.* Emerson, 45 N. H. 526. **Pa.**—Pennell *v.* Grubb, 13 Pa. 552. **W. Va.**—Farmers' Bank *v.* Gettinger, 4 W. Va. 305; Seamon *v.* Bank of Berkeley, 4 W. Va. 339.

See 10 STANDARD PROC. 524.

[a] **Thus a garnishee cannot set off an assigned note** executed by defendant, unless the assignment thereof preceded service of the writ. Self *v.* Kirkland, 24 Ala. 275; Bostwick *v.* Beach, 18 Ala. 80; Loftin *v.* Shackelford, 17 Ala. 455; Dyer *v.* McHenry, 13 Iowa 527.

[b] **Payments to defendant on a letter of credit** issued prior to service cannot be set off if such payment made after service. Burke, Watt & Co. *v.* Taylor, 15 La. 236.

43. **U. S.**—North Chicago Rolling Mill Co. *v.* St. Louis O. & S. Co., 152 U. S. 596, 621, 14 Sup. Ct. 710, 38 L. ed. 565. **Ala.**—Mobile St. R. Co. *v.* Turner, 91 Ala. 213, 8 So. 684. **Ill.** McCoy *v.* Williams, 6 Ill. 584; Bank of Commerce *v.* Franklin, 90 Ill. App. 91. **Md.**—Farmers' & M. Bank *v.* Franklin Bank, 31 Md. 404, 412. **Mass.** Lannan *v.* Walter, 149 Mass. 14, 20 N. E. 196; Doyle *v.* Gray, 110 Mass. 206; Smith *v.* Stearns, 19 Pick. 20; Boston T. & S. T. Co. *v.* Mortimer, 7 Pick. 166, 19 Am. Dec. 266. **N. H.** Boardman *v.* Cushing, 12 N. H. 105, 118. **Vt.**—Strong *v.* Mitchell, 19 Vt. 644.

[a] **Where, under a construction contract** providing that if the contractor did not pay his laborers the owner might do so, and deduct such payments from the contractor's compensation, the owner, after service on him of the writ, paid money to the contractor's laborers, it was held that the garnishee could offset sums so paid, as they were paid in pursuance of a right created prior to service of the writ. Doyle *v.* Gray, 110 Mass. 206.

[b] **Check Drawn Before, Paid After, Writ.**—A bank may set off a check drawn by its depositor, the attachment defendant, prior to service on it of the writ but not paid until after such service, since (in Illinois) the check amounts to an assignment of the

cases,[44] the cross-demand interposed by the garnishee must possess the requisite of mutuality,[45] and, unless authorized by statute,[46] a claim owing to the garnishee from the plaintiff would perhaps be unavailable.[47]

i. *Decedent and Representatives, Heirs, Legatees and Devisees.* **(I.) In General.** — The death of a party does not extinguish the right of offset which might have been asserted by or against him.[48] A set-off or counterclaim which the deceased could have interposed in answer

deposit, pro tanto. Nat. Bank of America *v.* Indiana Bank Co., 114 Ill. 483, 2 N. E. 401.

44. See *supra,* VII, D, 1.

45. Story *v.* Kemp, 55 Ga. 276; Woodward *v.* Tupper, 58 N. H. 577; Wheeler *v.* Emerson, 45 N. H. 526; Smith *v.* Boston, C. & M. R. R., 33 N. H. 337.

[a] **Joint Claims and Several Claims.**—Where two persons are jointly indebted to defendant, they may, when made garnishees, set off not only their joint claims against defendant but each may set off his several claim. Robinson *v.* Furbush, 34 Me. 509; Brown *v.* Warren, 43 N. H. 430. But see Wells *v.* Mace, 17 Vt. 503.

[b] **Assigned Claim.**—Garnishee may set off a claim against defendant, procured by assignment, if such assignment preceded the filing of the attachment suit. Kelly *v.* Talbott, 19 Ky. L. Rep. 632, 41 S. W. 439.

[c] **Assignment Void as to One Creditor.** — Attaching creditor as to whom an assignment has been admitted to be void cannot defeat garnishee's right of set-off by claiming that such assignment was valid as to other creditors; and thus, cannot claim such assignment having been made prior to the maturity of garnishee's claim, the latter had no right of set-off. Bennett *v.* Campbell, 189 Pa. 647, 42 Atl. 373.

[d] **Assignment of Judgment.**—If a judgment be assigned to A, B and C, not partners, to secure attorneys' fees, and the proceeds of such judgment be attached in A's hands, he may set off not only his own claim, but the claims of B and C. But he cannot set off a claim of B and C based upon an instrument other than such assignment. Manufacturers' Bank *v.* Osgood, 12 Me. 117.

[e] **An executor or administrator made a garnishee** (1) may set off a debt due from defendant to the testator or intestate (Nickerson *v.* Chase, 122 Mass. 296; Strong's Exr. *v.* Bass, 35 Pa. 333), but (2) one summoned as a garnishee in his individual capacity cannot set off a debt due him as administrator or executor. Legal Representatives of Thomas *v.* Hopper, 5 Ala. 442.

[f] **Legatee Charged With Testamentary Trust.**—If testator's entire estate be devised to a garnishee charged with a trust to pay a legacy to defendant, garnishee may set off notes held by testator against defendant. Green *v.* Nelson, 12 Metc. (Mass.) 567.

[g] **Trustee for Benefit of Creditors.**—One who as mortgagee or grantee of deed of trust, takes property of another to sell the same and pay the debts of his mortgagor or grantor may, when made garnishee in an action against such grantor or mortgagor, set off his own debt. **U. S.** Daugherty *v.* Bogy, 104 Fed. 938, 44 C. C. A. 266. **Ala.**—Price *v.* Masterson's Exr., 35 Ala. 483 (so held under statute); Hagard *v.* Franklin, 2 Ala. 349. **Md.**—Peters *v.* Cunningham, 10 Md. 554. **Mo.**—Firebaugh *v.* Stone, 36 Mo. 111.

[h] **Garnishee as Depositary.**—When garnishee is a fiduciary depositary of funds to be applied to the use of defendant or his creditors, he cannot in an action in which such funds are attached set up his individual debt against defendant. Fox *v.* Reed, 3 Grant Cas. (Pa.) 81, 97.

46. Colo. Ann. Code, 1910, §146; Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337.

47. U. S.—See Crammond *v.* Bank of United States, 4 Dall. 291, 1 L. ed. 838. **Ga.**—Story *v.* Kemp, 55 Ga. 276. **Me.**—Howe *v.* Howe, 97 Me. 422, 54 Atl. 908; Wadleigh *v.* Jordan, 74 Me. 483.

48. N. Y. — Haberle-Crystal Spring Brewing Co. *v.* Handrahan, 100 Misc.

to the cause of action may be pleaded by one who has succeeded to deceased's rights as heir,[49] legatee or devisee,[50] or personal representative.[51]

(II.) Actions by Executor or Administrator. — (A.) UPON CAUSES OF ACTION ORIGINATING AFTER DECEDENT'S DEATH. — (1.) *Debts or Claims Due From Decedent as Cross-Demands.* — In an action by an executor or administrator upon an obligation owing to the estate, which originated after the decedent's death,[52] the defendant cannot set-off a debt or claim owing to him from the testator or intestate in his lifetime[53] though the con-

163, 165 N. Y. Supp. 251. **Pa.**—Wolfersberger *v.* Bucher, 10 Serg. & R. 10. **Tex.**—Guthrie *v.* Guthrie's Admrs., 17 Tex. 541.

[a] **It is provided by statute** in some states that cross-demands which have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the death of the other but the two demands must be deemed compensated so far as they equal each other. Ainsworth *v.* Bank of California, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686; Curlee *v.* Ruland, 56 Okla. 329, 155 Pac. 1182.

49. Haberle-Crystal Spring Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251.

50. Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490.

51. See *infra*, VII, D, 3, i, (II).

52. See *infra*, this note.

[a] **What Causes of Action Included.**—"Nor is there room for difference as to what is meant by the phrases 'cause of action has accrued,' or 'cause of action has arisen,' since the death of the testator. They do not mean the contracting of the indebtedness, for a cause of action does not accrue or arise from the making of the contract of indebtedness alone, but out of the non-performance of it as well. 'Cause of action' implies a right to bring an action, and some one who has a right to sue and some one who may be lawfully sued. Thus, where the payee of a note was dead when it fell due, that is, beame payable, the cause of action did not accrue until letters of administration had been granted." Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

53. **Ala.**—Rapier *v.* Holland, Minor 176. **Ark.**—Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341; Bizzell *v.* Stone, 12 Ark. 378. **Cal.**—People *v.* California Safe Deposit, etc. Co., 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299. **Ga.**—Weaver *v.* Tuten, 144 Ga. 8, 85 S. E. 1048; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677; Crawford *v.* Beal, Dudley 204; Golding *v.* McCall, 5 Ga. App. 545, 63 S. E. 706. **Ill.** Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753; Harding *v.* Shepard, 107 Ill. 264; Newhall *v.* Turney, 14 Ill. 338. **Ind.** Welborn *v.* Coon, 57 Ind. 270; Ferris *v.* Mullan, 56 Ind. 164; Harte *v.* Houchin, 50 Ind. 327; Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158. **Ia.**—Eldredge *v.* Bell, 64 Iowa 125, 19 N. W. 879. **Ky.** Willis *v.* Loan, 2 T. B. Mon. 141; Crews *v.* Williams, 2 Bibb 262, 4 Am. Dec. 701; Dunn *v.* Carpenter's Exrs., 10 Ky. L. Rep. 494. **La.**—Pendarvis *v.* Wall, 14 La. Ann. 449; Mercer *v.* Lobit, 10 La. Ann. 47; Brooks *v.* Walker, 3 La. Ann. 150; Green *v.* Davis, 7 Mart. (N. S.) 238. **Mass.**—Laighton *v.* Brookline Trust Co., 225 Mass. 458, 114 N. E. 671, L. R. A. 1917C, 129; Seaver *v.* Weston, 163 Mass. 202, 39 N. E. 1013; Grew *v.* Burditt, 9 Pick. 265. **Miss.**—Bales *v.* Hyman, 57 Miss. 330; Mellen *v.* Boarman, 13 Smed. & M. 100. **Mo.**—Woodward *v.* McGaugh, 8 Mo. 161; Padgett *v.* Bank, 141 Mo. App. 374, 125 S. W. 219. **N. H.**—Shaw *v.* Gookin, 7 N. H. 16; Woodman *v.* Barker, 2 N. H. 479; Colby *v.* Colby, 2 N. H. 419. **N. M.**—First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114. **N. Y.**—Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Merritt *v.* Seaman, 6 N. Y. 168; Mercein *v.* Smith, 2 Hill 210. **N. C.**—State *v.* Oliver, 104 N. C. 458, 10 S. E. 709; Brandon *v.* Allison, 66 N. C. 532. **Ohio.**—McDonald *v.* Black's Admr., 20 Ohio 185, 55 Am. Dec. 448. **Pa.**—Stephens *v.* Cotterell, 99 Pa. 188; Singerly *v.* Swain's

tract out of which the cause of action arose existed in the testator's lifetime,[54] and even though the plaintiff had agreed to allow the set-

Admrs., 33 Pa. 102, 75 Am. Dec. 581; Steel *v.* Steel, 12 Pa. 64; Wolfersberger *v.* Bucher, 10 Serg. & R. 10. **R. I.**—Tobey *v.* Manufacturers' Nat. Bank, 9 R. I. 236. **Tex.**—Robb *v.* Smith, 40 Tex. 89. **Vt.**—Aiken *v.* Bridgman, 37 Vt. 249. **Wis.**—McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. St. Rep. 273; Lawrence *v.* Vilas, 20 Wis. 381. **Eng.**—Shipman *v.* Thompson, Willes 103, 7 Mod. 246, 125 Eng. Reprint 1078; Lambarde *v.* Older, 17 Beav. 542, 23 L. J. Ch. 18, 17 Jur. 1110, 2 Wkly. Rep. 32, 51 Eng. Reprint 1144; Hallett *v.* Hallett, L. R. 13 Ch. Div. 232, 49 L. J. Ch. N. S. 61, 41 L. T. N. S. 723, 28 Wkly. Rep. 321; Christison *v.* Bolam, L. R. 36 Ch. Div. 223, 57 L. J. Ch. N. S. 221, 57 L. T. N. S. 250, 35 Wkly. Rep. 803; Rees *v.* Watts, 11 Exch. 410, 25 L. J. Ex. 30, 1 Jur. (N. S.) 1023, 3 Wkly. Rep. 575.

[a] **One who purchases property of the estate** in the course of administration cannot, when sued by the executor or administrator for the purchase price, set off a debt due him from the decedent. **La.**—Brooks *v.* Walker, 3 La. Ann. 150. **N. Y.**—Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183. **Pa.**—Steel *v.* Steel, 12 Pa. 64. **Vt.**—Aiken *v.* Bridgman, 37 Vt. 249.

[b] **Suit on Note Given for Land.** Where an administrator sells land of the estate and takes notes payable to himself as administrator in payment of the purchase price, the maker when sued on such notes cannot set off a debt owned by him against the deceased. **Ark.**—Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341. **Ga.**—Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ind.**—Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158.

[c] **Where an administrator sues in his individual name** and for himself on a note given by the defendant for the price of goods purchased at a sale of intestate's effects, defendant is not permitted to set off a debt due by the intestate in his life time. Wolfersberger *v.* Bucher, 10 Serg. & R. (Pa.) 10.

[d] **One who buys a claim allowed against the estate** cannot use it as a set-off against the purchase price of land bought by him at an administrator's sale prior to his acquisition of the claim. Harding *v.* Shepard, 107 Ill. 264.

[e] **Surviving partners** have no better rights to set off under such circumstances than have general creditors. Consequently where a surviving partner buys from the administrator of his decedent partner the interest of the latter in the partnership proper, he cannot when sued for the purchase price set off a debt due from the decedent in his life time, even though the debt grew out of partnership matters. Welborn *v.* Coon, 57 Ind. 270.

[f] **The statutory provision** "that in suits brought by administrators and executors, debts existing against their intestates or testators, and belonging to the defendant at the time of their death, may be set off in the same manner as if the action had been brought by and in the name of the deceased . . . was only designed to be applicable in suits brought by executors and administrators for a cause of action accruing in the life-time of the testator or intestate." Woodward *v.* McGaugh, 8 Mo. 161. To same effect under a similar statute. McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. St. Rep. 273.

[g] **That a claim arising out of the transaction sued on** might be available see Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378.

54. Ketchum *v.* Miln, Selden's Notes (N. Y.) 152. See Steinmeyer *v.* Ewalt Street Bridge Co., 189 Pa. 145, 42 Atl. 132.

[a] **In an action by the administrator for freight** earned after the death of intestate, upon a contract of carriage made with the intestate, defendant is not entitled to prove a set-off, which existed against the intestate prior to the decease. Ketchum *v.* Miln, Selden's Notes (N. Y.) 152.

[b] **Action for Rent Under Lease Made by Testator.**—A note of the deceased cannot be set-off in a suit by the executor of a solvent estate to recover rent for the occupation of premises by defendant after testator's death under a lease given by testator. Nichols *v.* Dayton, 34 Conn. 65. See also Harris *v.* Taylor, 53 Conn. 500, 2

off,[55] or though the claim sought to be offset is a preferred one.[56] Some courts, however, would allow the set-off where it clearly appears that the rights of those interested in the assets of the estate would not be affected thereby.[57] The rule disallowing such set-offs has been applied in cases where the suit was brought by the plaintiff as executor or administrator,[58] as well as where he sued in his individual capacity.[59]

Equity following the law[60] will not allow such an offset[61] unless the special circumstances or peculiar equities of the case justify it.[62]

Effect of Solvency or Insolvency of Estate. — The rule holds whether the estate is solvent[63] or insolvent,[64] although in some jurisdictions[65]

Atl. 749; Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378.

55. **Ark.** — Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341. **La.**—Brooks *v.* Walker, 3 La. Ann. 150. **N. Y.** Root *v.* Taylor, 20 Johns. 137.

[a] **Promise To Allow Set-off Waived.** — Where the administrator promises a prospective purchaser of land to allow a note which the purchaser holds against the decedent to be set off if he would purchase the property, the purchaser waives the right to the set-off where he executes the note without any condition or reservation therein as to the right of set-off and without making any claim thereto. Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158.

56. See Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378.

57. **Cal.**—People *v.* California Safe Deposit, etc. Co., 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299. **Ill.** Harding *v.* Shepard, 107 Ill. 264. **Ky.** Dickinson *v.* Chism's Admrs., 2 Mon. 144.

58. Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158. But see Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183.

59. **N. Y.**—Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183. **Pa.**—Wolfersberger *v.* Bucher, 10 Serg. & R. 10. **Vt.**—Aiken *v.* Bridgman, 37 Vt. 249.

[a] **Upon new contracts made by the executor or administrator,** which never existed in favor of the decedent, but growing out of contracts and dealings with the former alone, the action is properly brought in the name of the individual and a debt against the decedent cannot be made the subject of a counterclaim. Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183.

[b] **Where an administratrix of A's administrator sues on a note** given to the administrator in payment for goods and chattels of A's estate, the defendant cannot set off a debt which A owed him in his lifetime. Newhall *v.* Turney, 14 Ill. 338.

60. See *supra*, I, G.

61. **Ga.**—Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ill.**—Harding *v.* Shepard, 107 Ill. 264. **N. Y.**—Dale *v.* Cooke, 4 Johns. Ch. 11.

62. See **Ga.**—Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ill.**—Harding *v.* Shepard, 107 Ill. 264. **Ky.** Cummings *v.* Bradford, 14 Ky. L. Rep. 527. **N. C.**—Ransom *v.* McClees, 64 N. C. 17.

See generally *supra*, I, G. See also Jester *v.* Knotts (Del.), 57 Atl. 1094.

[a] **That the claim is a stale one** does not give the party any right to have it set off in equity. Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158.

[b] **That insolvency of the administrator** and his securities, if properly alleged, might justify the set-off, see Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677.

63. Nichols *v.* Dayton, 34 Conn. 65; Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158.

64. Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183.

[a] **The estate was insolvent** in the following cases: **Ala.**—Rapier *v.* Holland, Minor 176. **Ark.**—Bizzell *v.* Stone, 12 Ark. 378. **N. Y.**—Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183. **N. C.**—Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709; Brandon *v.* Allison, 66 N. C. 532.

65. Steinmeyer *v.* Ewalt Street Bridge Co., 189 Pa. 145, 42 Atl. 132.

such a set-off is permitted where the estate is solvent, and a similar rule is supported by dicta in some cases.[66]

Reasons for Rule. — The reasons for disallowing debts and claims against the decedent to be offset in actions by the executor or administrator upon causes of action originating after decedent's death are that the element of mutuality is lacking since the debts are not due to and from the same person in the same right,[67] and to permit offsets in such suits would also interfere with the course of administration,[68] and pos-

[a] "**It is a well settled rule,** supported by reason and authority, that in an action by the administrator of a solvent estate the defendant may set off against the claim of the plaintiff a debt due by the decedent when the suit was brought. In such a case no valid reason appears for compelling the defendant to pay what he does not owe and look to his debtor's estate for the repayment of it." Hicks *v.* National Bank, 168 Pa. 638, 32 Atl. 63.

[b] **Where an executor of a solvent estate sues to recover dividends** which became due after the testator's death, the defendant corporation may set off a debt due it from the testator. Steinmeyer *v.* Ewalt Street Bridge Co., 189 Pa. 145, 42 Atl. 132.

66. See McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. St. Rep. 273.

67. **Cal.**—People *v.* California Safe Deposit, etc. Co., 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299. **Conn.** Harris *v.* Taylor, 53 Conn. 500, 2 Atl. 749; Nichols *v.* Dayton, 34 Conn. 65. **Ga.**—Crawford *v.* Beal, Dudley 204. **Ill.**—Newhall *v.* Turney, 14 Ill. 338. **Ind.**—Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158. **Miss.**—Bales *v.* Hyman, 57 Miss. 330. **Mo.**—Woodward *v.* McGaugh, 8 Mo. 161. **N. Y.**—Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183; Merritt *v.* Seaman, 6 N. Y. 168. **N. C.**—Barnard's Admr. *v.* Jordan's Admr., 25 N. C. 268. **Pa.**—Steel *v.* Steel, 12 Pa. 64. **Vt.**—Aiken *v.* Bridgman, 37 Vt. 249. **Eng.**—Rees *v.* Watts, 11 Exch. 410, 25 L. J. Ex. 30, 1 Jur. (N. S.) 1023, 3 Wkly. Rep. 575.

[a] "**If the debt has been created since the death** of the testator it must have been created to the representative, and there can be no doubt; for in such case there can be no mutuality of indebtedness." Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

68. **Ark.**—Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341; Bizzell *v.* Stone, 12 Ark. 378. **Ga.**—Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677. **Ill.**—Newhall *v.* Turney, 14 Ill. 338. **Ind.**—Dayhuff *v.* Dayhuff's Admr., 27 Ind. 158.

[a] **Should defendant file the debt with plaintiff as a demand** against the estate of decedent, defendant could recover thereon only a due proportion of the funds available for the payment of the class of claims to which it belongs. **Ia.**—Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378. **N. Y.**—Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183. **Vt.**—Aiken *v.* Bridgman, 37 Vt. 249. **Wis.**—McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. St. Rep. 273.

[b] **If defendant's offset is sustained,** he will, to that extent, receive full payment upon his claim, when it might be that in fact he would be entitled only to a dividend upon it. Aiken *v.* Bridgman, 37 Vt. 249.

[c] "**It would enable the debtor of an insolvent estate** to obtain an unjust advantage. He might, in such case, purchase demands against the estate at a discount, and obtain credit for their full amount on a note given for property purchased at the administrator's sale. Such a course would be in express violation of the statute, which requires the assets of an insolvent estate to be distributed pro rata among the creditors." Newhall *v.* Turney, 14 Ill. 338, 341.

[d] **Would Defeat the Statute in Respect to Presenting Claims.**—"Again, to allow the administrator to bind the estate by the appropriation of the debts due to the estate, not due from the defendant to the intestate in his life-time, to be applied to the satisfaction of a debt due the defendant upon a contract made with the intestate, would open the door for avoiding the statute, which requires that all such claims against the estate must be presented to and allowed by com-

sibly defeat or postpone the payment of other creditors of the same class,[69] or even of a preferred class,[70] thus giving the defendant creditor a preference to which he is not entitled.[71]

(2.) *Debts and Claims Due From Executor or Administrator in Representative Capacity.* — Where the executor or administrator sues upon a cause of action in favor of the estate, arising after the death of the testator or intestate the defendant may set up a claim against the plaintiff in his representative right,[72] and a charge upon the estate for funeral expenses is in such case available to defendant.[73]

(3.) *Debts or Claims Due From Executor or Administrator Individually.* Where an executor or administrator sues in his representative right and capacity, the defendant is not entitled at law to interpose by way of cross-demand a debt or claim which he holds against the plaintiff in his individual capacity.[74] The debts in such case are not due in the

missioners appointed by the county court or by the judge of the court." McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. Rep. 273.

[e] **Where plaintiff sued in his individual capacity** for the price of land of the estate sold by him the court in disallowing a set-off of a debt due from the decedent noted two objections to allowing defendant's claim. 1. "The form of the action limits the right of offset to the claims of the defendant against the plaintiff in his individual or personal, and not in his representative character." 2. "A defendant is not allowed to set off a debt due to him from the plaintiff's testator against a debt which accrued to the plaintiff in his representative capacity, after the testator's death; for this would be altering the due course of the distribution of assets, and the defendant might thus be indirectly paid before creditors of a higher degree." Aiken *v.* Bridgman, 37 Vt. 249.

69. Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341.

70. Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341; Aiken *v.* Bridgman, 37 Vt. 249.

71. Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183.

72. **Ind.**—Ferris *v.* Mullan, 56 Ind. 164. **N. H.**—Mathewson *v.* Strafford Bank, 45 N. H. 104. **N. Y.**—Griggs *v.* Renault Selling Branch, 179 App. Div. 845, 167 N. Y. Supp. 355. **Tex.** Traders Nat. Bank *v.* Cresson, 75 Tex. 298, 12 S. W. 819.

[a] **Set-off of Debt for Attorney's Services.**—Where an administrator of an estate of an insolvent decedent, sues an attorney to recover money collected by the latter for such decedent, the defendant may set off the value of services rendered for such administrator, in the settlement of the estate, but cannot set off the value of services rendered by him for the decedent. Ferris *v.* Mullan, 56 Ind. 164. But see L'Engle *v.* L'Engle, 19 Fla. 714.

[b] **Where an administrator sues to recover a deposit** made by decedent upon the purchase price of an automobile, alleging a breach of the contract accruing after decedent's death, defendant may counterclaim for breach by plaintiff after decedent's death of a modified contract made between plaintiff and decedent relating to the same matter. Griggs *v.* Renault Selling Branch, 179 App. Div. 845, 167 N. Y. Supp. 355.

73. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

[a] **Funeral expenses are not to be treated as a debt against the estate,** but as a charge upon the estate, the same as the necessary expenses of administration. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

[b] **Mutuality of demands** exists in such case. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

[c] **The objection that the distribution of assets** of the estate will be interfered with is not available, since funeral expenses are preferred to all other debts. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

74. Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874; Hood *v.* Hayward, 124 N. Y. 1, 26 N. E. 331; Sperb *v.*

same right,[75] and to allow such a set-off would interfere with the due course of administration.[76] Circumstances and conditions of an equitable nature might justify equity in allowing such cross-demand,[77] as for example the insolvency of the plaintiff.[78]

(B.) Upon Causes of Action Originating in Decedent's Lifetime. — (1.) *Debts and Claims Due From Deceased as Cross-Demands.* — Where an executor or administrator sues upon a cause of action arising in the decedent's lifetime, the defendant may avail himself by way of offset of a debt or claim existing against the decedent,[79] and belonging to the defendant at the time of decedent's death and which might have been used as an offset had the suit been brought by the deceased.[80]

McCoun, 110 N. Y. 605, 18 N. E. 441, 1 L. R. A. 490; Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273, 8 Civ. Proc. 183; Weeks *v.* O'Brien, 25 App. Div. 206, 49 N. Y. Supp. 344, 27 Civ. Proc. 86; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Supp. 650.

[a] **Where an executor sues as such on a note,** the defendant may set off debts due from the plaintiff individually where he pleads and proves that plaintiff owned the note individually. Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874; Carr *v.* Askew, 94 N. C. 194.

[b] **Services performed for an administrator** for the estate which he represents cannot be set off in a suit by the administrator in his representative capacity upon a note given to the administrator in his representative capacity for moneys of the estate lent by him as administrator to the defendant. L'Engle *v.* L'Engle, 19 Fla. 714.

75. L'Engle *v.* L'Engle, 19 Fla. 714.

76. L'Engle *v.* L'Engle, 19 Fla. 714.

77. Carr *v.* Askew, 94 N. C. 194.

78. Carr *v.* Askew, 94 N. C. 194.

[a] **As Retainer in Nature of Set-Off.**—Where the plaintiff administrator is insolvent, and part of the recovery will belong to him, defendant may set up a claim due from plaintiff individually as a "retainer in the nature of a set-off, which is founded upon the equitable principle that it would be unjust and against conscience to allow the plaintiff, if insolvent, to receive a large sum of money from the defendant, in a portion of which she was interested, without having that interest, whatever it may be, subjected to the claim of the defendant, if established." Carr *v.* Askew, 94 N. C. 194, 213.

79. See *infra*, this note.

[a] "**If a creditor claims a balance** in his favor, and it is so found, we see no reason why a judgment may not pass against the executor or administrator for such balance, to be paid as other debts against the intestate, out of assets to be discovered and inventoried, and this, to avoid an unnecessary suit." The foregoing language was used in respect to a set-off of a claim in excess of plaintiff's demand and which had not been presented for allowance within the period prescribed by statute. Peacock *v.* Haven, 22 Ill. 23.

80. **Ill.**—Peacock *v.* Haven, 22 Ill. 23. **Ind.**—Convery *v.* Langdon, 66 Ind. 311; Schoonover *v.* Quick, 17 Ind. 196. **Me.**—Morrison *v.* Jewell, 34 Me. 146. **Mass.**—Jarvis *v.* Rogers, 15 Mass. 389. **N. H.**—Mathewson *v.* Strafford Bank, 45 N. H. 104; Kimball *v.* Bellows, 13 N. H. 58. **N. Y.**—Isham *v.* Davidson, 52 N. Y. 237; Griggs *v.* Renault Selling Branch, 179 App. Div. 845, 167 N. Y. Supp. 355. **N. C.**—Brandon *v.* Allison, 66 N. C. 532. **Pa.**—Steinmeyer *v.* Ewalt St. Bridge Co., 189 Pa. 145, 42 Atl. 132.

See Woodward *v.* McGaugh, 8 Mo. 161.

[a] **Rule Declared By Express Statute.**—Woodward *v.* McGaugh, 8 Mo. 161; McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. Rep. 273.

[b] **Suit on note** given by defendant to deceased. Peacock *v.* Haven, 22 Ill. 23; Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 467, 30 Am. Rep. 319; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

[c] **Decedent's Bank Deposit in Representative's Name.**—A bank's right to set off decedent's note against a bank deposit claimed by his executrix

A claim existing in decedent's lifetime but not mature at his death, though not permitted to be used by some courts,[81] has, where it matured prior to the commencement of the action, generally been allowed as an offset,[82] at least in so far as it extinguishes the demand sued on.[83]

(2.) *Debts and Claims Due From the Executor or Administrator Individually.* The rule requiring mutuality of cross-demands[84] prevents a defendant when sued by an executor or administrator upon a cause of action existing in favor of the decedent in his lifetime from asserting by way of cross-demand causes of action which he has against the plaintiff personally.[85]

(C.) Actions as Trustee for Next of Kin. — Where an administrator sues as trustee of the next of kin to recover for wrongful death of deceased, a claim against deceased is not available as a counterclaim,[86] for in such case the action is not brought for the benefit of the estate.[87]

(III.) Actions Against Executors or Administrators. — In actions against an executor or administrator upon a personal liability, he may set-off or counterclaim his individual demands against the plaintiff.[88] He

is not affected by the fact that the executrix caused such deposit to be transferred to her individual account. Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689.

[d] **In a suit by an executrix to foreclose a mortgage,** executed by defendant to plaintiff's testator and given to secure a promise in the nature of an annuity, which by its terms was made to depend upon the testator's death and was payable to his personal representative after his death, the defendant is not entitled to counterclaim for rent due him from the testator at the time of his death. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

[e] **Where the heirs or distributees** are sued by the personal representative, they cannot set off their share of the estate which has not yet been ordered paid. Irving *v.* De Kay, 10 Paige (N. Y.) 319; Guthrie *v.* Guthrie's Admrs., 17 Tex. 541.

81. Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 467, 474, 30 Am. Rep. 319.

[a] **A note not due till after death** of intestate cannot be used as an offset in a suit by the administratrix on a demand owned by the intestate in his lifetime. Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 467, 30 Am. Rep. 319.

82. **Cal.**—Ainsworth *v.* Bank of California, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686. **Ind.**—Convery *v.* Langdon, 66 Ind. 311. **Mass.**—McDonald *v.* Webster, 2 Mass. 498; Bigelow *v.* Folger, 2 Metc. 255. **N. H.**—Mathewson *v.* Strafford Bank, 45 N. H. 104. **Pa.**—Bosler's Admrs. *v.* Exchange Bank, 4 Pa. 32, 45 Am. Dec. 665.

83. Ainsworth *v.* Bank of California, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 686.

84. Lawson *v.* Fischer, 5 Ark. 52.

85. Lawson *v.* Fischer, 5 Ark. 52; Carter *v.* Tippins, 113 Ga. 636, 38 S. E. 946.

[a] **Where the administrator is substituted as plaintiff,** in an action commenced by his intestate, the administrator's individual debts to defendant cannot be set-off. Lawson *v.* Fischer, 5 Ark. 52.

86. Craig *v.* Chicago, St. P. M. & O. Ry. Co., 97 Neb. 586, 150 N. W. 648.

87. Craig *v.* Chicago, St. P. M. & O. Ry. Co., 97 Neb. 586, 150 N. W. 648.

[a] **In an action brought by the administrator** of one killed by a collision of her team with a train to recover for the wrongful death, the company cannot counterclaim for injury to its rolling stock by the negligent act of the driver of the vehicle. Craig *v.* Chicago, St. P. M. & O. Ry. Co., 97 Neb. 586, 150 N. W. 648.

88. See *infra*, this note.

[a] **Where an attorney sues an executrix personally** to recover a sum

cannot, however, plead claims owing from the plaintiff to him in his representative capacity.[89] In an action against an executor or administrator upon an obligation of the decedent, he cannot set-off or counterclaim his individual debts or claims,[90] nor can he plead as offsets demands arising out of contracts or transactions between plaintiff and himself as personal representative.[91] Where an heir sues to recover his share of the estate, the administrator may set-off an obligation of such heir to the estate.[92]

4. Against the State or United States. — The rule that the state or government cannot without its consent or statutory authorization be sued in its own courts[92a] prevents in general the assertion of independent cross-demands against them,[92b] and, while the right to interpose against the state or government cross-demands arising out of the transaction or cause of action sued on is recognized, it is only to the extent that such cross-demands defeat or extinguish the claim or demand sued on.[92c] Where the statutes permit the state to be sued in certain cases,[92d] they would to that extent authorize the assertion of a cross-demand against it. But such statutes, and those expressly permitting, within certain limitations the pleading of a set-off against the state,[92e] are strictly construed,[92f] and the party must clearly bring himself within

of money which the court had allowed as attorney's fees, and which sum by such order was taken out of the estate and placed in the hands of the defendant for the benefit of the attorney, the defendant may counterclaim a promissory note held by her against the attorney. Vaughn *v.* Walsh, 122 Wis. 486, 100 N. W. 840.

89. **Ga.**—Davis *v.* Hadden, 115 Ga. 466, 41 S. E. 608. **Mo.**—Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68. **Pa.** Hunter *v.* Henning, 259 Pa. 347, 103 Atl. 61.

90. Cummins' Admrs. *v.* Williams' Heirs, 5 J. J. Marsh. (Ky.) 384.

91. **Del.**—Smith *v.* Edwards, 1 Houst. 427. **N. Y.**—Dale *v.* Cooke, 4 Johns. Ch. 11. **Eng.**—Mardall *v.* Thellusson, 6 El. & Bl. 976, 3 Jur. N. S. 314, 5 Wkly. Rep. 25, 88 E. C. L. 976, 119 Eng. Reprint 1127.

92. Brown's Admr. *v.* Mattingly, 91 Ky. 275, 15 S. W. 353; Procter *v.* Newhall, 17 Mass. 81.

92a. See the titles "**States and Territories;**" "**United States.**" And see 1 STANDARD PROC. 415, 432.

92b. **Ala.**—White *v.* Governor, 18 Ala. 767. **Ky.**—Com. *v.* Rodes, 5 Mon. 318. **La.**—State *v.* Bradley, 37 La. Ann. 623; State *v.* Leckie, 14 La. Ann. 636. **Md.**—State *v.* Baltimore & O. R. Co., 34 Md. 344. **Mich.**—Aplin *v.* Grand Traverse County, 73 Mich. 182, 41 N. W. 223, 16 Am. St. Rep. 576. **Miss.** Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **N. C.**—Battle *v.* Thompson, 65 N. C. 406. **Pa.**—Com. *v.* Matlack, 4 Dall. 303, 1 L. ed. 843. **S. C.** Treasurers *v.* Cleary, 3 Rich. L. 372. **Tenn.**—Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712. **Tex.**—Chevallier's Admr. *v.* State, 10 Tex. 315; Borden *v.* Houston, 2 Tex. 594; Bates *v.* Republic, 2 Tex. 616.

See *supra*, V, D, 3.

[a] **A bill in chancery to procure a set-off against the state** cannot be maintained by the drawer of a bill of exchange, accepted by the drawees for his accommodation and by the drawer delivered to the state in payment of a debt owed by him to it. Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

92c. **U. S.**—The Siren, 7 Wall. 152, 19 L. ed. 129. **Miss.**—Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. **Tenn.** Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

See *infra*, XII, B.

92d. See the titles "**States and Territories;**" "**United States.**"

92e. **Ark.**—Biscoe *v.* State, 19 Ark. 559. **Fla.**—Frier *v.* State, 11 Fla. 300. **Tenn.**—Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

92f. Biscoe *v.* State, 19 Ark. 559; Frier *v.* State, 11 Fla. 300.

the statutory provisions.[92g] A statute authorizing the creditor merely to establish his claim against the state by a judgment or decree, and reserving to the legislature the final determination of whether the appropriation shall be made does not permit a set-off to be pleaded against the state.[92h]

VIII. PLEADING CROSS-DEMAND. — A. RIGHT TO PLEAD. **1. In General.** — There are no other barriers to the interposition of set-offs and counterclaims than those established by statute,[93] and where the offset is of such a nature as the law authorizes defendant to plead, the court is without power to deny the exercise of the right.[94] Express authorization for pleading set-offs and counterclaims appears in the provisions of the various statutes regulating the sufficiency of answers,[95] and by them defendant is, moreover, empowered to set forth as many defenses and counterclaims as he may have,[96] whether legal or equitable or both.[97] A cross-demand may be pleaded[98] with

92g. Biscoe *v.* State, 19 Ark. 559; Frier *v.* State, 11 Fla. 300.

[a] **Where the debt or claim must be exhibited to the auditor** before it can under the statute be allowed as a set-off against the state, a failure to comply with the statute in that respect will defeat the set-off. Biscoe *v.* State, 19 Ark. 559.

92h. Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

93. H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707.

94. Cal.—Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369. **Ind.**—Crecelius *v.* Mann, 84 Ind. 147. **Md.**—Spencer *v.* Almoney, 56 Md. 551. **N. H.**—Concord *v.* Pillsbury, 33 N. H. 310. **N. Y.**—H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707. **Ohio.**—Allen *v.* Shackelton, 15 Ohio St. 145. **Ore.**—Everding & Farrell *v.* Gebhardt Lumber Co., 86 Ore. 239, 168 Pac. 304.

95. See the statutes.

[a] **The following provision is typical** of the statutory clauses authorizing the averment of facts in avoidance of plaintiff's cause of action: "A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." Casner *v.* Hoskins, 64 Ore. 254, 128 Pac. 841, 130 Pac. 55.

96. Minn.—Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1. **N. Y.**—H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707. **Okla.**—Caldwell *v.* Stevens, 167 Pac. 610; Long *v.* Bagwell, 38 Okla. 312, 133 Pac. 50. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

[a] **The code provisions are in general as follows:** "The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and referred to the cause of action which they are intended to answer, in such manner that they may be intelligibly distinguished." Casner *v.* Hoskins, 64 Ore. 254, 128 Pac. 841, 130 Pac. 55.

Joinder of defenses, see 2 STANDARD PROC. 24; 5 STANDARD PROC. 243.

97. J. H. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231.

98. Davis *v.* Seattle Nat. Bk., 19 Wash. 65, 52 Pac. 526.

Compare 2 STANDARD PROC. 24; 5 STANDARD PROC. 243.

Contra, Hoover Chemical Co. *v.* Humphrey, 107 Miss. 810, 66 So. 214; Shewalter *v.* Ford, 34 Miss. 417; Dolph *v.* Barney, 5 Ore. 191. But see Mississippi and Oregon cases cited *infra,* this note.

[a] **Counterclaim and General Denial.**—Davis *v.* Seattle Nat. Bk., 19 Wash. 65, 52 Pac. 562.

[b] **Reconvention and General Issue.**—A plea in reconvention does not prevent defendant from relying on the general issue. Morris *v.* Housley (Tex.), 34 S. W. 659.

[c] **Set-off and General Denial.**—Pike *v.* King, 16 Iowa 49.

[d] **Statute expressly permits** (1) a denial in toto of plaintiff's claim and a counterclaim (Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74

the general denial or general issue, or with a separate defense,[99] but the two should be separately stated.[1] But inconsistent causes of action which could not be joined in a declaration or complaint[2] cannot be pleaded together as cross-demands.[3]

2. Right of Foreign Corporations. — The right of foreign corporations which have failed to comply with state laws regulating them, depends largely on the provisions of such laws as to their right to sue or defend under such circumstances.[4] A provision that no action may be maintained by them would prevent the interposition of an otherwise proper independent cross-demand,[5] but not one based on the same transaction,[6] though a provision that "no recovery may be had" has been held to forbid the defensive use of even the latter sort of counterclaim.[7]

B. Necessity of Pleading. — **1. In General.** — It is always proper and perhaps advisable to specially plead a cross-demand,[8] but as will be seen, certain cross-demands are in some states available under the general issue or the general issue with notice.[9] Defendant should, where the law so requires,[10] set forth in his plea or answer or give notice of the matter upon which he bases his counter-demand,[11] and his

Ore. 126, 144 Pac. 396), or (2) the general issue and a set-off. Weil Bros. *v.* Wittjen, 116 Miss. 514, 77 So. 308.

99. **U. S.**—Heisen *v.* Churchill, 179 Fed. 828, 103 C. C. A. 320. **Mo.**—Acme Harvesting Mach. Co. *v.* Gasperson, 168 Mo. App. 558, 153 S. W. 1069. **N. Y.** Putnam *v.* Interior Metal Mfg. Co., 154 App. Div. 248, 154 N. Y. Supp. 464. **Wis.**—J. H. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231.

[a] **Same Facts in Bar.**—The same facts pleaded as a counterclaim may be pleaded in bar of the action. Berg *v.* Bates, 153 App. Div. 12, 137 N. Y. Supp. 1032.

1. See *infra*, VIII, D.

2. See the title "**Joinder of Actions.**"

3. Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477. See 14 Standard Proc. 671.

4. See 5 Standard Proc. 727, 734.

5. American Ink Co. *v.* Riegel Sack Co., 79 Misc. 421, 140 N. Y. Supp. 107.

6. Alsing Co. *v.* New England Quartz & S. Co., 66 App. Div. 473, 73 N. Y. Supp. 347 (*affirming* 174 N. Y. 536, 66 N. E. 1110); American Ink Co. *v.* Riegel Sack Co., 79 Misc. 421, 140 N. Y. Supp. 107.

7. American Ink Co. *v.* Riegel Sack Co., 79 Misc. 421, 140 N. Y. Supp. 107.

[a] **The language of the Tax Law of New York**, §181, is more comprehensive than that of §15 of the General Corporation Laws, requiring a certificate to do business in the state. The latter prevents any foreign corporation that has not complied with its provisions from maintaining "any action in this state on any contract made by it in this state" while the former in addition to precluding the corporation from maintaining actions, also provides that no recovery may be had by such corporation in an action. American Ink Co. *v.* Riegel Sack Co., 79 Misc. 421, 140 N. Y. Supp. 107.

8. **Ark.**—Daniel *v.* Guy, 19 Ark. 121; McLure *v.* Hart, 19 Ark. 119. **Ga.** Campbell *v.* Trunnell, 67 Ga. 518. **Ill.** McCarthy *v.* Neu, 91 Ill. 127.

9. See *infra*, VIII, B, 3 and 4.

10. See *infra*, VIII, B, 2 to 4.

11. **U. S.**—Portland Wood Pipe Co. *v.* Slick Bros. Const. Co., 222 Fed. 528. **Ala.**—Bixby-Theisen Co. *v.* Evans, 186 Ala. 507, 65 So. 81; George *v.* Roberts, 186 Ala. 521, 65 So. 345; H. H. Hitt Lumb. Co. *v.* McCormack, 13 Ala. App. 453, 68 So. 696. **Ark.**—Tatum *v.* Mohr, 21 Ark. 349; McLure *v.* Hart, 19 Ark. 119. **Cal.**—*In re* Couts' Est., 100 Cal. 400, 34 Pac. 865; Cleary *v.* Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187. **Ga.**—Walker *v.* Kingston Supply Co., 18 Ga. App. 447, 89 S. E. 533. **Ill.**—Chicago Mill & Lumber Co. *v.* Townsend, 203 Ill. App. 457. **Ind.**

failure so to do will render unavailable his claim or demand whether it be by way of set-off,[12] counterclaim,[13] or recoupment.[14] No evidence thereof should in such case be admitted,[15] nor can any judgment thereon be entered.[16]

2. Counterclaim. — The rule in respect to counterclaim[17] is quite

Warring *v.* Hill, 89 Ind. 497. **Ia.**—Union Nat. Bank *v.* Carr, 49 Iowa 359. **Minn.** Anderson *v.* Wilson, 132 Minn. 364, 157 N. W. 582. **Miss.**—S. M. Weld & Co. *v.* Austin, 107 Miss. 279, 65 So. 247; Curry *v.* Kurtz, 33 Miss. 24. **Mo.** Phillips *v.* Todd (Mo. App.), 180 S. W. 1039. **Mont.**—Meredith *v.* Bitter Root Irr. Co., 49 Mont. 204, 141 Pac. 643. **N. Y.**—Title Guarantee & Trust Co. *v.* Pam, 155 N. Y. Supp. 333. **N. C.** Steamboat Co. *v.* Transportation Co., 166 N. C. 582, 82 S. E. 956; Trotter *v.* Swain, 90 N. C. 455.

Manner of alleging the cross-demand, see *infra,* VIII, B, I.

12. Ala.—Davison *v.* Dennis, 176 Ala. 435, 58 So. 401. **Colo.**—Wilmore *v.* Kalberer, 61 Colo. 136, 156 Pac. 593. **Ga.**—Kahrs *v.* Kahrs, 115 Ga. 288, 41 S. E. 649; Walker *v.* Kingston Supply Co., 18 Ga. App. 447, 89 S. E. 533. **Ill.**—Chicago Mill & Lumber Co. *v* Townsend, 203 Ill. App. 457. **Miss.** S. M. Weld & Co. *v.* Austin, 107 Miss. 279, 65 So. 247.

See *infra,* VIII, B, 3.

13. U. S.—Portland Wood Pipe Co. *v.* Slick Bros. Const. Co., 222 Fed. 528; Marconi W. T. Co. *v.* National E. S. Co., 206 Fed. 295. **Cal.**—Stoddard *v.* Treadwell, 26 Cal. 294; Hicks *v.* Green, 9 Cal. 74; Haberly *v.* Haberly, 27 Cal. App. 139, 149 Pac. 53. **Colo.**—Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209. **Ind.**—Simons *v.* Kosciusko Building, Loan & Savings Assn., 180 Ind. 335, 103 N. E. 2; Brown *v.* College Corner & R. Gravel Road Co., 56 Ind. 110. **Ia.**—Tullis *v.* H. S. Chase & Co., 162 Iowa 264, 144 N. W. 17. **Minn.**—Anderson *v.* Willson, 132 Minn. 364, 157 N. W. 582. **Mo.**—Phillips *v.* Todd (Mo. App.), 180 S. W. 1039; L. J. Smith Const. Co. *v.* Mullins, 198 Mo. App. 501, 201 S. W. 602. **N. Y.**—Title Guarantee & Trust Co. *v.* Pam, 155 N. Y. 333. **N. C.** Steamboat Co. *v.* Transportation Co., 166 N. C. 582, 82 S. E. 956.

See *infra,* VIII, B, 2.

[a] **General Equity Rule Mandatory.**—The general equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) providing that "the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit" is mandatory. Portland Wood Pipe Co. *v.* Slick Bros. Const. Co., 222 Fed. 528.

[b] **But in the court of claims** an omission to plead counterclaims is not fatal to the rendition of such judgment as the facts demand. Benjamin R. Husk *v.* United States, 46 Ct. Cl. (U. S.) 35. See also Wisconsin Central Railroad *v.* United States, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. ed. 399, 32 Ct. Cl. 611.

14. Bixby-Theisen *v.* Evans, 186 Ala. 507, 65 So. 81; Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59; H. H. Hitt Lumb. Co. *v.* McCormack, 13 Ala. App. 453, 68 So. 696. See *infra,* VIII, B, 4.

15. See *infra,* VIII, L, 5.

16. S. M. Weld & Co. *v.* Austin, 107 Miss. 279, 65 So. 247.

17. Ark.—Quinn *v.* Sewell, 50 Ark. 380, 8 S. W. 132. **Cal.**—Perkins *v.* West Coast Lumber Co., 48 Pac. 982; *In re* Couts' Est., 100 Cal. 400, 34 Pac. 865; Quinn *v.* Smith, 49 Cal. 163; Hicks *v.* Green, 9 Cal. 74; Bernard *v.* Mullot, 1 Cal. 368; Haberly *v.* Haberly, 27 Cal. App. 139, 149 Pac. 53. **Colo.** Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209. **Ind.**—Brown *v.* College Corner & R. Gravel Road Co., 56 Ind. 110. **Ia.**—Zion Church Evangelical Assn. *v.* Parker, 114 Iowa 1, 86 N. W. 60. **Kan.**—Marley *v.* Smith, 4 Kan. 183. **Mo.**—Neosho City Water Co. *v.* Neosho, 136 Mo. 498, 38 S. W. 89; L. J. Smith Const. Co. *v.* Mullins, 198 Mo. App. 501, 201 S. W. 602; Jansen *v.* Dolan, 157 Mo. App. 32, 137 S. W. 27; Strother *v.* McMullen Lumber Co., 110 Mo. App. 552, 85 S. W. 650; Sayers *v.* Craven, 107 Mo. App. 407, 81 S. W. 473; Spink *v.* Mueller, 77 Mo. App. 85. **Neb.**—Waller *v.* Deranleau, 4 Neb. (Unof.) 497, 94 N. W. 1038. **N. M.** State *ex rel.* Garcia *v.* Board of Comrs.,

general that it must be specially pleaded, and is not admissible under a general denial.[18]

3. Set-off. — Set-off is under statutes available under the general issue,[19] or under the general issue with notice.[20] In most jurisdictions, however, a set-off cannot be shown under the general issue alone,[21] or under a general denial,[22] and under a number of statutes it must be pleaded.[23]

22 N. M. 562, 166 Pac. 906. **N. Y.** Beers *v.* Waterbury, 8 Bosw. 396; Nelson *v.* Wellington, 5 Bosw. 178; Foulks *v.* White, 51 Hun 644, 4 N. Y. Supp. 95, 21 N. Y. St. 970. **N. D.**—Hogen *v.* Klaho, 13 N. D. 319, 100 N. W. 847. **Ore.**—Crawford *v.* Hutchinson, 38 Ore. 578, 65 Pac. 84. **S. C.**—McGee *v.* Wells, 37 S. C. 365, 16 S. E. 29; Humbert *v.* Brisbane, 25 S. C. 506. **S. D.**—Harrison *v.* State Banking, etc. Co., 15 S. D. 304, 89 N. W. 477. **Tex.** Davidson *v.* Edgar, 5 Tex. 492; Stagg's Heirs *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Henderson *v.* Johnson, 22 Tex. Civ. App. 381, 55 S. W. 35. **Wis.**—Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752; Kenyon *v.* Kenyon, 72 Wis. 234, 39 N. W. 361.

See *supra*, VIII, B, 1.

In justice's court, see 18 STANDARD PROC. 40.

18. Haberly *v.* Haberly, 27 Cal. App. 139, 149 Pac. 53. And see cases in preceding note.

19. See *infra*, this note.

[a] **Under the English statutes of set-off** the defendant might plead the debt in bar or give it in evidence under the general issue, see Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

20. **Ark.**—Hill *v.* Austin, 19 Ark. 230. **Conn.**—Merrill *v.* Everett, 38 Conn. 40. **Ill.**—Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Cox *v.* Jordan, 86 Ill. 560; Patterson *v.* Steele, 36 Ill. 272; Cary *v.* Niblo, 155 Ill. App. 338.

21. **U. S.**—Deneale *v.* Young, 2 Cranch C. C. 418, 7 Fed. Cas. No. 3,786. **Ala.**—Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; Odum *v.* Rutledge, etc. R. Co., 94 Ala. 488, 10 So. 222; Kannady *v.* Lambert, 37 Ala. 57. **Conn.**—Merrill *v.* Everett, 38 Conn. 40. **Ind.**—Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Brown *v.* College Corner & R. Gravel Road Co., 56 Ind. 110; Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643. **Kan.**—Marley *v.* Smith, 4 Kan. 183. **Mich.**—Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284; Shaw *v.* Bradley, 59 Mich. 199, 26 N. W. 331; Donovan *v.* Halsey F. Engine Co., 58 Mich. 38, 24 N. W. 819. **Wis.**—Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

See *supra*, VIII, B, 1.

22. Walker *v.* Kingston Supply Co., 18 Ga. App. 447, 89 S. E. 533.

23. **U. S.**—Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524. **Ala.**—Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; Odum *v.* Rutledge, etc. R. Co., 94 Ala. 488, 10 So. 222; Kannady *v.* Lambert, 37 Ala. 57. **Fla.**—Lucas *v.* Wade, 43 Fla. 419, 31 So. 231. **Ga.**—Kahrs *v.* Kahrs, 115 Ga. 288, 41 S. E. 649; Walker *v.* Kingston Supply Co., 18 Ga. App. 447, 89 S. E. 533. **Me.**—Wilson *v.* Russ, 20 Me. 421. **Mass.**—Skinner *v.* King, 4 Allen 498; Rider *v.* Ocean Ins. Co., 20 Pick. 259; Clark *v.* Leach, 10 Mass. 51. **Mich.**—Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284; Ferguson *v.* Milliken, 42 Mich. 441, 4 N. W. 185. **Mo.**—Oldham *v.* Henderson, 4 Mo. 295. **N. J.**—Sawyer *v.* Van Deren, 74 N. J. L. 673, 66 Atl. 396. **N. M.** State *ex rel.* Garcia *v.* Board of Comrs., 22 N. M. 562, 166 Pac. 906. **N. C.** Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699. **Pa.**—Glamorgan Iron Co. *v.* Rhule, 53 Pa. 93; Thorn *v.* Heugh, 1 Phila. 322, 5 Clark 169, 9 Leg. Int. 46; Berko *v.* Kemper Construction Co., 65 Pa. Super. 589; Loeser *v.* Erie City Rag Warehouse, 10 Pa. Super. 540. **Tenn.**—Scatchard *v.* Memphis Towing B. & D. Co., 102 Tenn. 282, 52 S. W. 153. **Vt.**—Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321. **Va.** Richmond City & S. P. Ry. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148; Botetourt *v.* Burger, 86 Va. 530, 10 S. E. 264. **W. Va.**—Hoover-Dimeling Lumber Co. *v.* Neill, 77 W. Va. 470, 87 S. E. 855; Philippi Planing Mill Co. *v.* Cross, 75 W. Va. 303, 83 S. E. 1004. **Eng.**—Graham *v.* Partridge, 1 M. &

4. Recoupment. — Recoupment, save as required by statute,[24] need not be pleaded,[25] it being available under the general issue,[26] or under the general issue with notice.[27] In some states the general issue alone

W. 395, 5 D. P. C. 108, 1 Tyr. & G. 754, 5 L. J. Ex. 160.

[a] **In justice's court** a set-off must be specially pleaded. Wright *v.* Potter, 38 Ind. 61. But see 18 STANDARD PROC. 41.

24. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Groc. Co., 77 So. 748; Bixby-Theisen *v.* Evans, 186 Ala. 507, 65 So. 81; George *v.* Roberts, 186 Ala. 521, 65 So. 345; Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59; H. H. Hitt Lumb. Co. *v.* McCormack, 13 Ala. App. 453, 68 So. 696. **Ind.**—Estep *v.* Morton, 6 Ind. 489. **N. H.**—Simonds *v.* Cross, 63 N. H. 123. **N. Y.**—Barber *v.* Rose, 5 Hill 76; Crane *v.* Hardman, 4 E. D. Smith 448. **Ohio.**—Upton & Co. *v.* Julian & Co., 7 Ohio St. 95; The Wellsville *v.* Geisse, 3 Ohio St. 333.

25. Shuman *v.* Shuman, 79 W. Va. 445, 91 S. E. 264.

[a] **Pleading Recoupment a Novelty.**—"If it is considered as a plea of recoupment it is a novelty, as our settled practice is, not to plead, but to give notice of the claim of recoupment as to certain specified matters." Voigtmann *v.* Wilmington Trust & Bldg. Corp., 7 Penne. (Del.) 265, 78 Atl. 920.

26. **Del.**—Stone *v.* Rafter, 1 Har. & J. 364. **Ill.**—Tully *v.* Excelsior Iron Works, 115 Ill. 544, 5 N. E. 83; Wadhams *v.* Swan, 109 Ill. 46; Waterman *v.* Clark, 76 Ill. 428; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Higgins *v.* Lee, 16 Ill. 495; Peirce *v.* Sholtey, 190 Ill. App. 341; Register Gazette Co. *v.* Larash, 109 Ill. App. 236; Lloyd *v.* Manufacturers & M. Warehouse Co., 102 Ill. App. 551. **Ky.**—Tevebaugh *v.* Reed, 5 Mon. 179. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1; Sullivan *v.* Boswell, 122 Md. 539, 89 Atl. 940; Rawlings *v.* Nash, 117 Md. 393, 83 Atl. 646; Doggett *v.* Tatham, 116 Md. 147, 81 Atl. 376; Lee *v.* Rutledge, 51 Md. 311. **Vt.** Gregory *v.* Tomlinson, 68 Vt. 410, 35 Atl. 350; Wilson *v.* Greensboro, 54 Vt. 533; Keyes *v.* Western Vermont Slate Co., 34 Vt. 81; Allen *v.* Hooker, 25 Vt. 137. **Va.**—Columbia Acc. Assn. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

[a] **In Justice's Court.**—Bancroft *v.* Peters, 4 Mich. 619.

[b] **Damages arising out of the transaction** which is the subject of plaintiff's action may be recouped under the general issue. Waterman *v.* Clark, 76 Ill. 428; Peirce *v.* Sholtey, 190 Ill. App. 341.

[c] **In a suit for attorney's fees,** the defendant may under the general issue, recoup damages occasioned by carelessness of plaintiff. Peirce *v.* Sholtey, 190 Ill. App. 341.

[d] **Under a plea of set-off filed with the general issue** a recoupment may be available though the matter pleaded as set-off is not a proper subject of set-off. Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1.

27. **Ark.**—Tatum *v.* Mohr, 21 Ark. 349; McLure *v.* Hart, 19 Ark. 119. **Del.**—See Voigtmann *v.* Wilmington Trust Bldg. Corp., 7 Penne. 265, 78 Atl. 920. **Mich.**—Manistee Nav. Co. *v.* Filer, 185 Mich. 302, 151 N. W. 1025; Stewart *v.* Terwilliger, 177 Mich. 313, 143 N. W. 17, Ann. Cas. 1915C, 808; Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Kerr *v.* Bennett, 109 Mich. 546, 67 N. W. 564; Ritter *v.* Daniels, 47 Mich. 617, 11 N. W. 409; McHardy *v.* Wadsworth, 8 Mich. 349. **W. Va.** Shuman *v.* Shuman, 79 W. Va. 445, 91 S. E. 264; Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161; Franklin *v.* Lilly Lumber Co., 66 W. Va. 164, 66 S. E. 225; Sterling Organ Co. *v.* House, 25 W. Va. 64.

[a] **Special Plea as Notice.**—A special plea setting up a recoupment, though not necessary, should be regarded as notice. Shuman *v.* Shuman, 79 W. Va. 445, 91 S. E. 264.

[b] **A notice of recoupment is sufficient** if it informs the claimants what is relied on by way of recoupment, and shows that these matters relate to or grow out of the subject of the action. Voigtmann *v.* Wilmington Trust Bldg. Corporation, 7 Penne. (Del.) 265, 78 Atl. 920.

is not sufficient to admit evidence of recoupment.[28]

Under a plea of payment, evidence cannot be received of recoupment[29] unless such plea is accompanied by notice of the recoupment.[30]

5. Judgment as Merger or Bar Where Cross-Demand Not Pleaded. Whether the judgment in the action merges or bars the subsequent assertion of a cross-demand not pleaded or proved is elsewhere discussed.[31]

C. TIME TO PLEAD.[32] — Cross-demands should be filed within the time prescribed by statute or rule of court in the particular jurisdiction.[33] Defendant's failure in this respect may prevent him from asserting his claim[34] unless the court permits him to plead it out of time.[35]

D. STATING SEPARATELY. — Plaintiff is entitled to have the defendant set forth separately the facts claimed to constitute a counterclaim and the facts claimed to constitute a defense,[36] even though the

28. **Ala.** — **Bixby-Theisen Co.** *v.* Evans, 186 Ala. 507, 65 So. 81; George *v.* Roberts, 186 Ala. 521, 65 So. 345; Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59. **Ark.**—Tatum *v.* Mohr, 21 Ark. 349. **Cal.**—Cleary *v.* Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187. **Ind.**—Brown *v.* College Corner & R. Gravel Road Co., 56 Ind. 110. **N. H.**—Simonds *v.* Cross, 63 N. H. 123.

See cases in preceding note.

[a] **Error to strike special pleas on demurrer** on the ground that the matter of set-off or recoupment therein alleged could be adduced under the general issue. George *v.* Roberts, 186 Ala. 521, 65 So. 345.

29. Berry *v.* Diamond, 19 Ark. 262.

30. Henderson *v.* Lewis, 9 Serg. & R. (Pa.) 379, 11 Am. Dec. 733; Northampton Bank *v.* Balliet, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297.

31. See 15 STANDARD PROC. 550; 18 STANDARD PROC. 41.

32. See generally the title "**Time To Plead.**"

33. **U. S.**—Janney *v.* Baggot, 1 Cranch C. C. 503, 13 Fed. Cas. No. 7,210. **Ala.** Frishkorn *v.* Ogden, 77 So. 970; Locke *v.* Locke, 57 Ala. 473. **Ill.**—Clause *v.* Bullock Printing Press Co., 118 Ill. 612, 9 N. E. 201. **Ia.**—Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 886; Lord *v.* Ellis, 9 Iowa 301. **Kan.**—Marley *v.* Smith, 4 Kan. 183. **Me.**—Otis *v.* Adams, 41 Me. 258. **Mass.**—Cartwright *v.* Clark, 4 Metc. 104. **N. Y.**—Acer *v.* Hotchkiss, 97 N. Y. 395; Muldoon *v.* Blackwell, 84 N. Y. 646. **Vt.**—Swift *v.* Harriman, 30 Vt. 607.

34. **U. S.**—Janney *v.* Baggot, 1 Cranch C. C. 503, 13 Fed. Cas. No. 7,210. **Ill.** Clause *v.* Bullock Printing Press Co., 118 Ill. 612, 9 N. E. 201. **Ia.**—Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 883. **Kan.**—Marley *v.* Smith, 4 Kan. 183. **Mass.**—Adams *v.* Butts, 16 Pick. 343.

[a] **In appellate court,** the defendant cannot for the first time set up a cross-demand. Locke *v.* Locke, 57 Ala. 473; Acer *v.* Hotchkiss, 97 N. Y. 395; Muldoon *v.* Blackwell, 84 N. Y. 646.

35. **Ala.**—Frishkorn *v.* Ogden, 77 So. 970. **R. I.**—Jodoin *v.* Archambault, 35 R. I. 316, 86 Atl. 907. **Vt.**—Swift *v.* Harriman, 30 Vt. 607.

[a] **During the trial,** defendant may with the court's permission file a plea of set-off. Frishkorn *v.* Ogden (Ala. App.), 77 So. 970.

[b] **The defendant may amend** his answer during trial to set up a counterclaim. Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369. See 20 STANDARD PROC. 373.

36. **Ind.**—Campbell *v.* Routt, 42 Ind. 410. **Ia.**—Pike *v.* King, 16 Iowa 49. **N. Y.**—Loew *v.* McInerney, 159 App. Div. 513, 144 N. Y. Supp. 546; Walker *v.* James J. Matchett Co., 167 N. Y. Supp. 600.

See 2 STANDARD PROC. 61.

[a] **In the same count,** defendant cannot plead a defense in bar and a counterclaim. Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288.

[b] **The code provides** that the an-

defendant may claim that the same facts constitute both.[37] Where several causes of counterclaim are alleged they should be separately stated.[38]

E. Designation of Pleading. — 1. **Counterclaim.** — a. *Necessity for.* — The defendant must indicate his design of treating and relying upon this particular portion of his answer as a counterclaim.[39] Such a requirement is essential to protect a plaintiff from being misled by an answer,[40] and to prevent him from unconsciously admitting the counterclaim thus lurking under the cover of a supposed defense, by failure to reply to it.[41]

b. *Manner of.* — While the use of no particular form of words is necessary in thus designating the character of defendant's pleading as a counterclaim,[42] it should be done in some express and definite manner.[43] It must be so distinguished by the formal language employed

swer must contain a general specific denial and a statement of any new matter constituting a defense or counterclaim in ordinary and concise language and that defendant may set forth as many defenses or counterclaims, or both, as he has and that each defense or counterclaim must be separately stated and numbered. Walker *v.* James J. Matchett Co., 167 N. Y. Supp. 600.

Joinder of defenses and cross-demands, see *supra,* VIII, A, 1.

37. Walker *v.* James J. Matchett Co., 167 N. Y. Supp. 600.

38. Pitzel *v.* Maier Brewing Co., 20 Cal. App. 737, 130 Pac. 705, 706.

39. **Cal.**—Cohn *v.* Kelly, 132 Cal. 468, 64 Pac. 709; Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314; Brannan *v.* Paty, 58 Cal. 330; McAbee *v.* Randall, 41 Cal. 136; Williams *v.* Parker, 30 Cal. App. 71, 157 Pac. 550. **Ia.**—Union Nat. Bank *v.* Carr, 49 Iowa 359. **Ky.** Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628; Hutchings *v.* Moore, 4 Metc. 110; Russell *v.* Phillips, 15 Ky. L. Rep. 76, 22 S. W. 220. **Minn.**—Gasner *v.* Stapf, 130 Minn. 50, 152 N. W. 865. **N. Y.**—Deeves & Son *v.* Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395; Bates *v.* Rosekrans, 37 N. Y. 409, 4 Abb. Pr. (N. S.) 276; Wilder *v.* Boynton, 63 Barb. 547; Gruhn *v.* Eppig, 175 App. Div. 787, 161 N. Y. Supp. 629; Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152; Dessar *v.* Gunther, 162 N. Y. Supp. 794. **S. C.**—Sullivan *v.* Byrne, 10 S. C. 122. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Voechtling *v.* Grau, 55 Wis. 312, 13 N. W. 230; Stowell *v.* Eldred, 39 Wis. 614; McConihe *v.* Hollister, 19 Wis. 269.

[a] **Where facts are pleaded as a set-off by name,** and no affirmative relief is asked, they cannot be called a counterclaim. Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152.

[b] "**Commencing with the publication of this opinion,** no averments in a pleading will be treated as constituting a counterclaim unless they are so designated in the answer, and it contains a proper prayer for judgment. This establishes a rule easily followed, and which we trust will prevent any misunderstanding in the future between counsel and the court as to whether a pleading does or does not constitute a counterclaim." State *v.* Coughran, 19 S. D. 271. 103 N. W. 31.

40. Acer *v.* Hotchkiss. 97 N. Y. 395, 408.

41. Acer *v.* Hotchkiss, 97 N. Y 395, 408; Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784.

42. Burrall *v.* De Groot, 5 Duer 379; Clough *v.* Murray, 19 Abb. Pr. 97; Gunn *v.* Madigan, 28 Wis. 158.

[a] "**No particular form of words** is necessary to make a pleading a counterclaim; and if the party had, in any reasonable language, intimated that he intended to make a personal claim in his own favor against the plaintiff, it would have been sufficient." Bates *v.* Rosekrans, 37 N. Y. 409.

43. **Ky.**—Hutchings *v.* Moore, 4 Metc. 110. **N. Y.**—Burrall *v.* De Groot, 5 Duer 379; Clough *v.* Murray, 19 Abb. Pr. 97. **Wis.**—Gunn *v.* Madigan, 28

that the plaintiff and the court may recognize it at once as a counterclaim, and not as a simple defense.[44] The most satisfactory form of giving that information is by a statement that the pleading is a counterclaim,[45] or by concluding it with a prayer for a judgment granting the desired relief,[46] and the better practice would be to use both these characteristic marks.[47]

c. *Effect of Failure To Designate.* — If defendant fails to properly denominate his pleading a counterclaim, or otherwise properly indicate its character, it will not be available to him as a counterclaim,[48] but will be treated as a defense merely,[49] particularly where he calls it such,[50] since defendant is generally bound by his own denomination of his answer.[51] Where, however, the plaintiff is not misled by de-

Wis. 158, 165; McConihe *v.* Hollister, 19 Wis. 269.

44. McConihe *v.* Hollister, 19 Wis. 269.

45. **Farrell** *v.* Burbank, 57 Minn. 395, 59 N. W. 485; Townsend *v.* Minneapolis Cold-Storage & F. Co., 46 Minn. 121, 48 N. W. 682; Broughton *v.* Sherman, 21 Minn. 431; Bates *v.* Rosekrans, 37 N. Y. 409, 4 Abb. Pr. (N. S.) 276.

46. **Cal.**—Brannan *v.* Paty, 58 Cal. 330. **Ind.**—Jones *v.* Hathaway, 77 Ind. 14; Stockton *v.* Stockton, 73 Ind. 510; Sidener *v.* Davis, 69 Ind. 336. **Ia.** Union Nat. Bank *v.* Carr, 49 Iowa 359. **Minn.**—Farrell *v.* Burbank, 57 Minn. 395, 59 N. W. 485; Townsend *v.* Minneapolis Cold Storage & F. Co., 46 Minn. 121, 48 N. W. 682; Griffin *v.* Jorgenson, 22 Minn. 92. **N. Y.**—Bates *v.* Rosekrans, 37 N. Y. 409, 4 Abb. Pr. (N. S.) 276; Clough *v.* Murray, 19 Abb. Pr. 97; Metropolitan Trust Co. *v.* Tonawanda, etc. R. Co., 18 Abb. N. C. 368, 43 Hun 521, 7 N. Y. St. 90; Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266. **N. C.** Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734. **Tex.**—Ware's Admr. *v.* Bennett, 18 Tex. 794. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Stowell *v.* Eldred, 39 Wis. 614.

47. **Cal.**—Brannan *v.* Paty, 58 Cal. 330. **N. Y.**—Bates *v.* Rosekrans, 37 N. Y. 409, 4 Abb. Pr. (N. S.) 276. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Stowell *v.* Eldred, 39 Wis. 614.

48. **Cal.**—Cohn *v.* Kelly, 132 Cal. 468, 64 Pac. 709; Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314; Brannan *v.* Paty, 58 Cal. 330; Williams *v.* Parker, 30 Cal. App. 71, 157 Pac. 550. **Ky.** Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628; Russell *v.* Phillips, 15 Ky. L. Rep. 76, 22 S. W. 220. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Voechtling *v.* Grau, 55 Wis. 312, 13 N. W. 230; Stowell *v.* Eldred, 39 Wis. 614; Gunn *v.* Madigan, 28 Wis. 158; Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

49. **Minn.**—Townsend *v.* Minneapolis Cold Storage & F. Co., 46 Minn. 121, 48 N. W. 682. **N. Y.**—Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511; Burke *v.* Thorne, 44 Barb. 363; Burrall *v.* De Groot, 5 Duer 379; Gruhn *v.* Eppig, 175 App. Div. 787, 161 N. Y. Supp. 629. **Wis.**—Gunn *v.* Madigan, 28 Wis. 158, 165; McConihe *v.* Hollister, 19 Wis. 269.

[a] **Without replying thereto, the** plaintiff may contest the matter pleaded. American Guild *v.* Damon, 186 N. Y. 360, 78 N. E. 1081; Acer *v.* Hotchkiss, 97 N. Y. 395, 408.

50. Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066.

[a] **But as between co-defendants** in a partnership suit, matter pleaded as defense has been allowed as a pleading in the nature of a countercaim or set-off, not as a defense to the plaintiff's cause of action but as presenting matter which should be considered in settling the equities between the parties growing out of the property to be partitioned. Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066.

51. **Mont.**—Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943. **N. Y.**—Acer *v.* Hotchkiss, 97 N. Y. 395; Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511; Simmons *v.* Kayser, 11 Jones & S. 131. **Wis.**—Resch *v.* Senn, 31 Wis. 138.

fendant's failure to designate his pleading a counterclaim,[52] or by an erroneous designation,[53] and he in fact treats the pleading as such,[54] as for example by replying to it as required by statute,[55] the omission or error is not fatal.

2. Set-off. — Defendant, pleading matter as a set-off, should by appropriate statements indicate his intention to rely on it as such,[56] but an erroneous designation in this respect will not be fatal where plaintiff is not misled.[57]

3. Recoupment. — An answer which sets up a valid recoupment is not subject to demurrer though it is denominated a counterclaim.[58]

F. DESIGNATING CAUSE OF ACTION TO WHICH PLEADED. — The code requires that in pleading a counterclaim the particular cause of action to which the counterclaim is pleaded should be specified.[59]

G. ADMITTING PLAINTIFF'S CAUSE OF ACTION. — Except where it may be deemed inconsistent and therefore not permissible to do so,[60]

52. Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647; Broadway-Thirty-Fifth St. Realty Corp. *v.* Hilton, 166 N. Y. Supp. 1068.

53. Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647.

[a] **Designated Set-off Instead of Counterclaim.**—The fact that defendant designates his cross-demand a set-off instead of a counterclaim will not prevent defendant from introducing evidence to sustain his counterclaim, where plaintiff is not misled, but instead replies without setting up any defense to the counterclaim. Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647.

[b] **A subdivision of an answer that prays for judgment** will be considered a counterclaim in spite of an introduction, "for a sixth and further answer herein and by way of an affirmative plea, these defendants further allege as follows." East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266.

[c] **A pleading designated a cross-complaint** considered a counterclaim. Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805.

54. Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647; Nutter *v.* Johnson, 80 Ky. 426; Cason *v.* Cason, 79 Ky. 558.

55. Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647; Irvin *v.* Smith, 60 Wis. 172, 18 N. W. 722; Voechtling *v.* Grau, 55 Wis. 312, 13 N. W. 230; Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. 213.

56. **Ala.**—Goodwin *v.* McGehee, 15 Ala. 232. **Mass.**—Talcott *v.* Smith, 142 Mass. 542, 8 N. E. 413. **Mo.**—Blodgett *v.* Greene, 27 Mo. 525. **Ohio.**—Smith *v.* Weed Sewing Machine Co., 26 Ohio St. 562. **Va.**—New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351.

57. Goodwin *v.* McGehee, 15 Ala. 232.

[a] **Designated Counterclaim Instead of Set-Off.**—Where the caption of the answer describes the pleading as an "answer and counterclaim" instead of an "answer and set-off," the matter pleaded as counterclaim should not be stricken out, though it constitutes a set-off instead of a counterclaim. Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628.

58. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190.

59. A. D. Kneuper Specialty Co. *v.* Kneuper, 170 App. Div. 555, 157 N. Y. Supp. 395; Harris *v.* Warren-Smith Hardware Co., 44 Okla. 477, 144 Pac. 1050.

[a] **Plaintiff cannot complain** of defendant's failure to specify the particular cause of action to which the counterclaim is pleaded where he has jumbled together three or four alleged causes of action in a single count. A. D. Kneuper Specialty Co. *v.* Kneuper, 170 App. Div. 555, 157 N. Y. Supp. 395.

60. See *supra*, VIII, A, 1, and Hoover Commercial Co. *v.* Humphrey, 107 Miss. 810, 66 So. 214 (*distinguished* in Weil Bros. *v.* Wittjen, 116 Miss.

it is proper for defendant to both deny the plaintiff's claim in toto and plead a cross-demand.[61] Where no other defense is made, an express admission of plaintiff's claim, though proper,[62] need not accompany a cross-demand.[63] A plea of set-off seeking an affirmative judgment for the excess, should, it seems, offer to allow the plaintiff his damages.[64]

H. JURISDICTION. — The necessity of a counterclaim showing jurisdiction[65] is governed by the general rules elsewhere treated.

I. ALLEGING THE CAUSE OF ACTION CONSTITUTING THE CROSS-DEMAND. — **1. General Principals of Pleading Applicable.** — a. *In General.* — In so far as the answer contains a counterclaim or set-off its allegations and those of the complaint or petition must conform to the same requirements.[66] Defendant becomes in such cases an actor pro tanto and his pleading is to that extent governed by the same rules as control the pleading of a cause of action generally.[67]

b. *Material Facts To Be Pleaded.* — The defendant should set forth the material facts[68] constituting his cross-demand so as to fully apprise

514, 77 So. 308); Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396.

61. See *supra*, VIII, A, 1.

62. Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369, better practice.

63. Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369.

64. McIlvrid *v.* Murphy, 190 Ill. App. 515.

65. See McGill *v.* Sorensen, 209 Fed. 876, and 6 STANDARD PROC. 674.

[a] **A counterclaim based on patent infringement** should show jurisdiction in the particular United States district court to entertain it; it should allege an infringement in such district and also that the complainant has a regular place of business therein. McGill *v.* Sorensen, 209 Fed. 876.

Jurisdiction of cross-demand, see *supra*, IV, B.

66. See generally the titles "**Declaration and Complaint;**" "**Bills and Answers.**"

67. See *infra*, VIII, —, 1 and 2.

68. **Ala.**—Sledge *v.* Swift, 53 Ala. 110; Lang *v.* Waters' Admr., 47 Ala. 624. **Ariz.**—United States *v.* Tidball, 3 Ariz. 384, 29 Pac. 385. **Conn.**—Shupe *v.* Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339. **Ill.**—Pusey *v.* Peck, 67 Ill. 98; Witter *v.* McNiel, 4 Ill. 433. **Ind.**—Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Cooper *v.* Jackson, 71 Ind. 244; Cole *v.* Wright, 70 Ind. 179; Norris *v.* Tharp, 65 Ind. 47; Gilpin *v.* Wilson, 53 Ind. 443; Ward *v.* Bennett, 20 Ind. 440; Fugit *v.* Ewing, 9 Ind. 345. **Kan.**—Anthony *v.* Stinson, 4 Kan. 211. **Ky.**—Louisville & N. R. Co. *v.* Thompson, 18 B. Mon. 735. **La.**—Wilcoxon *v.* Buford's Heirs, 10 La. 183. **Md.** Lee *v.* Rutledge, 51 Md. 311. **Mich.** Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674. **Miss.**—Andre *v.* Morrow, 65 Miss. 315, 3 So. 659, 7 Am. St. Rep. 658. **Mo.**—Reppy *v.* Reppy, 46 Mo. 571; Green *v.* Willard Improved Barrel Co., 1 Mo. App. 202. **Neb.**—Eldridge *v.* Hargreaves, 30 Neb. 638, 46 N. W. 923. **N. H.**—Robinson *v.* Gilman, 43 N. H. 485. **N. Y.**—Bernheimer *v.* Willis, 11 Hun 16; Van Valen *v.* Lapham, 5 Duer 689; Wilder *v.* Boynton, 63 Barb. 547; Brown *v.* Buckingham, 11 Abb. Pr. 387, 21 How. Pr. 190; Fox *v.* Turner, 49 Hun 610, 2 N. Y. Supp. 164, 17 N. Y. St. 666. **N. C.**—Wilson *v.* Hughes, 94 N. C. 182. **N. D.**—Heebner *v.* Shepard, 5 N. D. 56, 63 N. W. 892; First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473; Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Needham *v.* Pratt, 40 Ohio St. 186; Allen *v.* Shackelton, 15 Ohio St. 145. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **Va.**—Watkins *v.* Hopkins, 13 Gratt. (54 Va.) 743. **Wash.** Boston Tow Boat Co. *v.* John J. Sesnon Co., 64 Wash. 375, 116 Pac. 1083; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380.

See generally the titles "**Declaration**

the plaintiff of the nature and extent of his claim.[69]

c. *Definiteness and Certainty.* — Precision and certainty of allegation are demanded, in pleading a set-off, counterclaim or other cross-demand,[70] the same particularity, in fact, is required as would be

and Complaint;'' ''Bills and Answers.''.

Cause of action must be stated, see *infra,* VIII, I, 2.

[a] **Where defendant waives a tort** and counterclaims upon the implied promise he need only as in other cases under the code set out the ultimate facts relied upon; the fiction of a promise is not a necessary averment. If the items of account are pleaded or attached to the pleading, the defendant need only aver that the plaintiff had and received the sums of money mentioned to the used and benefit of defendant. Garnett & Allen Paper Co *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736.

69. **Conn.**—Merrill *v.* Everett, 38 Conn. 40. **Mich.**—Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300; McKevitte *v.* Feige, 57 Mich. 374, 24 N. W. 109. **N. Y.**—Ashley *v.* Marshall, 29 N. Y. 494; Harrington *v.* Ensign, 11 Wend. 554. **N. C.**—American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **Pa.**—Order of Unity *v.* McCann, 57 Pa. Super. 61; Appleby *v.* Barrett, 28 Pa. Super. 349; Loeser *v.* Erie City Rag Warehouse, 10 Pa. Super. 540. **W. Va.**—Powell *v.* Love, 36 W. Va. 96, 14 S. E. 405.

70. **Ala.**—Sledge *v.* Swift, 53 Ala. 110. **Ark.**—Robinson *v.* Mace, 16 Ark. 97. **Cal.**—Bernard *v.* Mullot, 1 Cal. 368. **Ga.**—Jones *v.* Americus Automobile Co., 15 Ga. App. 453, 83 S. E. 642. **Ind.**—Smith *v.* Baxter, 13 Ind. 151; Stockton *v.* Graves, 10 Ind. 294. **Ia.** Sample *v.* Griffith, 5 Iowa 376. **Kan.** Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476. **Ky.**—Roebuck *v.* Tennis, 5 Mon. 82; Coleman *v.* Coleman's Exrs., 3 Bibb. 14. **La.**—Bayley *v.* Stacey, 30 La. Ann. 1210. **Me.**—Boyd *v.* Bartlett, 54 Me. 496; Gragg *v.* Frye, 32 Me. 283. **Mass.**—Skinner *v.* King, 4 Allen 498. **Mich.**—Keystone Mfg. Co. *v.* Forsyth, 115 Mich. 51, 72 N. W. 1109; McKevitte *v.* Feige, 57 Mich. 374, 24 N. W. 109. **Miss.**—Curry *v.* Kurtz, 33 Miss. 24. **Mo.**—McAdow *v.* Ross, 53 Mo. 199. **N. H.**—Concord *v.* Pillsbury, 33 N. H. 310. **N. Y.** Ashley *v.* Marshall, 29 N. Y. 494; Currie *v.* Cowles, 6 Bosw. 452; Merritt *v.* Millard, 5 Bosw. 645; Roldan *v.* Power, 14 Misc. 480, 35 N. Y. Supp. 697, 70 N. Y. St. 432. **N. C.**—American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **Pa.**—First Nat. Bank *v.* Tustin, 246 Pa. 151, 92 Atl. 119; Baker *v.* Tustin, 245 Pa. 499, 91 Atl. 891; Lewis *v.* Culbertson, 11 Serg. & R. 48, 14 Am. Dec. 607; Irwin *v.* Potter, 3 Watts 271. **Tenn.**—Elsey *v.* Stamps, 10 Lea 709; Harris *v.* Snider, 9 Humph. 743.

[a] **The codes require** ''a statement of any new matter constituting a . . . counterclaim, in ordinary and concise language without repetition.'' Stevenson *v.* Devins, 158 App. Div. 616, 143 N. Y. Supp. 916.

[b] **The defendant is the actor** in respect to such a claim ''and the obligation is upon him to aver his set-off in terms incapable of being misunderstood.'' Baker *v.* Tustin, 245 Pa. 499, 91 Atl. 891.

[c] **Drawing Out Plea of Set-off.** §4 of rule 8 (Rules of the Superior Court) provide that ''a plea of set-off shall, if required, be drawn out, and shall state the matters of set-off with reasonable certainty. All counterclaims by way of recoupment shall be filed with the plea, and set forth with like reasonable certainty.'' Voigtmann *v.* Wilmington Trust B. Corp., 7 Penne. (Del.) 265, 78 Atl. 920.

[d] **Certainty Required in Notice of Set-Off or Recoupment.—Ala.**—Perrine *v.* Warren, 3 Stew. 151. **Conn.**—Merrill *v.* Everett, 38 Conn. 40. **Ind.** Stockton *v.* Graves, 10 Ind. 294. **Ky.** Morrison's Exr. *v.* Hart, Hardin 150. **Me.**—Boyd *v.* Bartlett, 54 Me. 496; Gragg *v.* Frye, 32 Me. 283. **Mich.** Keystone Mfg. Co. *v.* Forsyth, 115 Mich. 51, 72 N. W. 1109; Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674; Delaware & H. Canal Co. *v.* Roberts, 72 Mich. 49, 40 N. W. 53; McKevitte

necessary in a complaint based upon the same cause of action.[71] And, as in declarations and complaints generally, the pleader should avoid vague, general and indefinite allegations,[72] legal conclusions[73] and surplusage.[74]

v. Feige, 57 Mich. 374, 24 N. W. 109; Roethke *v.* Philip Best Brewing Co., 33 Mich. 340; McHardy *v.* Wadsworth, 8 Mich. 349. **N. H.**—Concord *v.* Pillsbury, 33 N. H. 310. **Pa.**—Beatty *v.* Smith, 4 Yeates 102; Lewis *v.* Culbertson, 11 Serg. & R. 48, 14 Am. Dec. 607. **W. Va.**—Powell *v.* Love, 36 W. Va. 96, 14 S. E. 405.

71. Ala.—Perrine *v.* Warren, 3 Stew. 151. **Cal.**—Bernard *v.* Mullot, 1 Cal. 368. **Ind.**—Stockton *v.* Graves, 10 Ind. 294. **Me.**—Gragg *v.* Frye, 32 Me. 283. **N. Y.**—Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177. **N. C.**—American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396; Watson *v.* McLench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416; Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552. **Pa.**—First Nat. Bank *v.* Tustin, 246 Pa. 151, 92 Atl. 119; Baker *v.* Tustin, 245 Pa. 499, 91 Atl. 891; Reilly *v.* White, 234 Pa. 115, 82 Atl. 1107; Law *v.* Waldron, 230 Pa. 458, 79 Atl. 647, Ann. Cas. 1912A, 467; Berko *v.* Kemper Construction Co., 65 Pa. Super. 589; A. G. Breitweiser Lumber Co. *v.* Crick, 55 Pa. Super. 72; Loeser *v.* Erie City Rag Warehouse, 10 Pa. Super. 540. **Eng.**—Semenza *v.* Brinsley, 18 C. B. N. S. 467, 114 E. C. L. 467, 34 L. J. C. P. 161, 12 L. T. N. S. 265, 13 Wkly. Rep. 634, 144 Eng. Reprint 526.

See generally the title "**Certainty in Pleading,**" and 6 STANDARD PROC. 689.

[a] "**A counterclaim should be alleged with clearness and precision;** its nature, and the consideration supporting it; when, how, and where it arose, should be stated with reasonable certainty. This the statute requires, and moreover, it is necessary to just and intelligent procedure. The counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with the same precision as if alleged in the complaint." Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695.

[b] **But that a plea of set-off need not be as certain** and formal as a declaration, see Lewis *v.* Culbertson, 11 Serg. & R. (Pa.) 48, 14 Am. Dec. 607; Irwin *v.* Potter, 3 Watts (Pa.) 271; Perrine *v.* Warren, 3 Stew. (Pa.) 151.

72. Ga.—Jones *v.* Americus Automobile Co., 15 Ga. App. 453, 83 S. E. 642; Sutton *v.* Hurley, 12 Ga. App. 312, 77 S. E. 218. **N. C.**—American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210; American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **Pa.**—Baker *v.* Tustin, 245 Pa. 499, 91 Atl. 891; Berko *v.* Kemper Construction Co., 65 Pa. Super. 589; Loeser *v.* Erie City Rag Warehouse, 10 Pa. Super. 540. **Wash.**—Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332.

[a] **Pleading fraud in general language** not sufficient, providing proper objection made. Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332.

73. Ala.—Hooper *v.* Armstrong, 69 Ala. 343. **Ind.**—Gilpin *v.* Wilson, 53 Ind. 443. **Minn.**—Hitchcock *v.* Turnbull, 44 Minn. 475, 47 N. W. 153; Mealey *v.* Nickerson, 44 Minn. 430, 46 N. W. 911. **Miss.**—Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70. **Mo.**—Fulkerson *v.* Davenport, 70 Mo. 541. **Neb.**—Peck *v.* Trumbull, 12 Neb. 133, 10 N. W. 572. **N. Y.**—Brown *v.* Buckingham, 11 Abb. Pr. 387, 21 How. Pr. 190; Binghamton Trust Co. *v.* Clark, 32 App. Div. 151, 52 N. Y. Supp. 941, 28 Civ. Proc. 1; Turner *v.* Fulcher, 165 N. Y. Supp. 282. **Ore.** Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. C.**—Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845.

See 6 STANDARD PROC. 691, and generally the title "**Conclusions of Law.**"

[a] **A statement that a certain amount is due** from plaintiffs to defendants on a note is a mere conclusion of law. Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396.

74. Conn.—Merrill *v.* Everett, 38

d. *Reference to Other Pleadings.* — The counterclaim must be complete in itself,[75] and omissions of necessary allegations cannot be supplied by reference to other parts of the answer or the complaint[76] unless they are incorporated by reiteration, appropriate reference or otherwise in the cross-demand.[77]

e. *Effect of Formal Irregularities.* — Mere irregularities of form will not vitiate the pleading provided sufficient facts appear to constitute a legal demand against the plaintiff.[78]

2. Must Allege a Cause of Action. — a. *In General.* — A cross-demand is in a sense an independent action against the plaintiff,[79] and in pleading it the defendant must set forth all the elements of a good cause of action,[80] that is to say, it must contain the same averments which would make it a good complaint if the claim sought to

Conn. 40. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Wilkerson *v.* Farnham, 82 Mo. 672. **N. Y.** Mattoon *v.* Baker, 24 How. Pr. 329; Allaire Works *v.* Guion, 10 Barb. 55; Pecke *v.* Hydraulic Const. Co., 23 App. Div. 393, 48 N. Y. Supp. 225; Meissner *v.* Brennan, 21 Civ. Proc. 36, 15 N. Y. Supp. 671, 39 N. Y. St. 443.

See generally the title "**Surplusage and Scandal.**"

75. **Cal.**—Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805. **N. Y.** Douglass *v.* Phoenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Cragin *v.* Lovell, 88 N. Y. 258, 2 Civ. Proc. 128; United States Expansion Bolt Co. *v.* Marmorstein, 181 App. Div. 790, 169 N. Y. Supp. 244; Fletcher *v.* MacGinniss, 168 App. Div. 225, 153 N. Y. Supp. 581; Goldberg *v.* Wood, 45 Misc. 327, 90 N. Y. Supp. 427; Blaut *v.* Blaut, 41 Misc. 572, 85 N. Y. Supp. 146; Roldan *v.* Power, 14 Misc. 480, 35 N. Y. Supp. 697, 70 N. Y. St. 432; Pierce *v.* Massman, 168 N. Y. Supp. 1029. **Ore.**—Chance *v.* Carter, 81 Ore. 229, 158 Pac. 947.

76. **Ind.**—Conaway *v.* Carpenter, 58 Ind. 477. **Neb.**—Eldridge *v.* Hargreaves, 30 Neb. 638, 46 N. W. 923. **N. Y.** Cragin *v.* Lovell, 88 N. Y. 258, 2 Civ. Proc. 128; United States Expansion Bolt Co. *v.* Marmorstein, 181 App. Div. 790, 169 N. Y. Supp. 244; Roldan *v.* Power, 14 Misc. 480, 35 N. Y. Supp. 697, 70 N. Y. St. 432; Boyd *v.* McDonald, 58 Hun 609, 12 N. Y. Supp. 356, 35 N. Y. St. 484. **N. D.**—First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **Ohio.**—Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785.

77. Pierce *v.* Massman, 168 N. Y. Supp. 1029; Casner *v.* Hoskins, 64 Ore. 254, 128 Pac. 841, 130 Pac. 55. See 6 STANDARD PROC. 709.

[a] **Incorporation by Reference to Allegations in Complaint.—Ala.**—Castleman *v.* Jeffries, 60 Ala. 380. **Neb.** Eldridge *v.* Hargreaves, 30 Neb. 638, 46 N. W. 923. **N. Y.**—Graham *v.* Dunnigan, 6 Duer 629, 4 Abb. Pr. 426.

[b] **Reference to Exhibits.** — **Ill.** Howe *v.* Frazer, 117 Ill. 191, 7 N. E. 481. **Ind.**—Campbell *v.* Routt, 42 Ind. 410; Fugit *v.* Ewing, 9 Ind. 345. **Ia.** Nosler *v.* Hunt, 18 Iowa 212. **N. Y.** Cragin *v.* Lovell, 88 N. Y. 258, 2 Civ. Proc. 128. See the title "**Exhibits.**"

78. **Cal.**—Wallace *v.* Bear River Water & M. Co., 18 Cal. 461. **Ky.** Horine *v.* Moore, 14 B. Mon. 311. **Minn.** Talty *v.* Torling, 79 Minn. 386, 82 N. W. 632. **Mo.**—Brady *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503. **N. Y.**—Bates *v.* Rosekrans, 37 N. Y. 409, 4 Abb. Pr. (N. S.) 276; Ashley *v.* Marshall, 29 N. Y. 494; Harrower *v.* Heath, 19 Barb. 331. **N. C.**—Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734; Dempsey *v.* Rhodes, 93 N. C. 120; Garrett *v.* Love, 89 N. C. 205. **N. D.**—Jensen *v.* Northwestern Underwriters' Assn., 35 N. D. 223, 159 N. W. 611. **Ohio.**—Wiswell *v.* First Cong. Church, 14 Ohio St. 31; Hill *v.* Butler, 6 Ohio St. 207, 216. **Eng.** Legge *v.* Harlock, 12 Adol. & El. (N. S.) 1015, 64 E. C. L. 1013, 18 L. J. Q. B. 45, 116 Eng. Reprint 1151.

79. See *supra*, VII, C, 1.

80. **Ala.**—Morris *v.* Scott, 73 So. 395; McLendon *v.* Rubenstein, 180 Ala. 615, 61 So. 902; Lawton *v.* Ricketts,

be counter-demanded were a suit brought thereon in the first instance,[81] or if an equitable set-off is sought, facts which if presented

104 Ala. 430, 16 So. 59; O'Brien *v.* Anniston Pipe-Works, 93 Ala. 582, 9 So. 415; Castleman *v.* Jeffries, 60 Ala. 380; Crawford *v.* Simonton, 7 Port. 110. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Ark.**—Robinson *v.* Mace, 16 Ark. 97. **Cal.**—Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805; Clay *v.* Carroll, 67 Cal. 19, 6 Pac. 874; Quinn *v.* Smith, 49 Cal. 163. **Ga.**—Walker *v.* Crummey, 18 Ga. App. 414, 89 S. E. 539. **Idaho.**—Thompson *v.* Cox, 31 Idaho 153, 169 Pac. 929. **Ind.**—Indiana Mut. Bldg. & L. Assn. *v.* Crawley, 151 Ind. 413, 51 N. E. 466, Jones *v.* Hathaway, 77 Ind. 14; Bump *v.* McGrannahan, 61 Ind. App. 136, 111 N. E. 640; Judy *v.* Woods, 51 Ind. App. 325, 99 N. E. 792; Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643. **Ia.**—Bertholf *v.* Fisk, 166 N. W. 713. **Kan.** Allen *v.* Douglass, 29 Kan. 412; Wright *v.* Bacheller, 16 Kan. 259. **Ky.** Pickrell & Craig Co. *v.* Castleman-Blakemore Co., 177 Ky. 635, 197 S. W. 1066; Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641; Combs *v.* Frick Co., 162 Ky. 42, 171 S. W. 999; Prichard's Exx. *v.* Peace, 98 Ky. 99, 32 S. W. 296. **La.**—Teal *v.* Lyons, 30 La. Ann. 1140. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Sylte *v.* Nelson, 26 Minn. 105, 1 N. W. 811; Reed *v.* Newton, 22 Minn. 541. **Mo.**—McPherson *v.* Meek, 30 Mo. 345; Fallon *v.* Stahl, 17 Mo. App. 475. **Mont.**—Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Wehn *v.* Fall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397; Peck *v.* Trumbull, 12 Neb. 133, 10 N. W. 572; Dale *v.* Hunneman, 12 Neb. 221, 10 N. W. 711. **N. Y.**—Morris *v.* Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Walker *v.* American C. Ins. Co., 143 N. Y. 167, 38 N. E. 106; Chambers *v.* Lewis, 28 N. Y. 454, 16 Abb. Pr. 433; Prouty *v.* Eaton, 41 Barb. 409; Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; Hatzel *v.* Hoffman House, 2 App. Div. 120, 37 N. Y. Supp. 598, 73 N. Y. St. 295; Security Mortgage Co. *v.* Kallis, 102 Miss. 693, 169 N. Y. Supp. 566; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267; De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Supp. 358, 29 Civ. Proc. 250; East Lake Lumber Co. *v.* Van Gorder, 169 N. Y. Supp. 266; Turner *v.* Fulcher, 165 N. Y. Supp. 282; Buffalo Wholesale Hardware Co. *v.* Hodgeboom, 152 N. Y. Supp. 900. **N. C.** American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210; American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695; Garrett *v.* Love, 89 N. C. 205; Barbee *v.* Green, 86 N. C. 158. **N. D.**—Jensen *v.* Northwestern Underwriters' Assn., 35 N. D. 223, 159 N. W. 611. **Okla.**—Barteldes Seed Co. *v.* Mitchell, 157 Pac. 935. **Ore.**—Meadow Valley Land Co. *v.* Manerud, 81 Ore. 303, 159 Pac. 559; Chance *v.* Carter, 81 Ore. 229, 158 Pac. 947; Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396; Watson *v.* McLench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416; Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552. **S. D.** Moreley *v.* Cole, 38 S. D. 564, 162 N. W. 367. **Wis.**—Studebaker Corporation *v.* Gollmar, 159 Wis. 336, 150 N. W. 442; Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Resch *v.* Senn, 31 Wis. 138.

Material facts must be pleaded, see *supra*, VIII, I, 1, b.

81. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Groc. Co., 77 So. 748; Morris *v.* Scott, 73 So. 395; Bixby-Theisen *v.* Evans, 186 Ala. 507, 65 So. 81; Berlin Machine Works *v.* Ewart Lumber Co., 184 Ala. 272, 63 So. 567; Carolina Portland Cement Co. *v.* Alabama Const. Co., 162 Ala. 380, 50 So. 332; Ansley *v.* Bank of Piedmont, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59; Crawford *v.* Simonton, 7 Port. 110. **Ark.**—Robinson *v.* Mace, 16 Ark. 97. **Cal.**—Clay *v.* Carroll, 67 Cal. 19, 6 Pac. 874. **Ill.**—Breen *v.* Sullivan, 5 Ill. App. 449. **Ind.**—Stockton *v.* Graves, 10 Ind. 294. **Kan.**—Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476. **Ky.**—Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641; Coleman *v.* Coleman's Exrs., 3 Bibb. 14. **Minn.** Wilson *v.* Fairchild, 45 Minn. 203, 47 N. W. 642. **Miss.**—Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec.

in a bill in equity would authorize the court to grant the relief sought.[82]

b. *Conditions Precedent.* — Where there exist conditions precedent to the cause of action upon which the cross-demand is based,[83] the pleading must show that they have been performed.[84]

c. *Nature of Debt or Demand.* — It is just as essential in pleading a set-off or counterclaim as it is in setting forth an independent cause of action to state the nature and character[85] of the debt or claim upon

70. **Mo.**—Brady *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503. **Neb.**—Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. **N. M.**—Staab *v.* Garcia y Ortiz, 3 N. M. 53, 1 Pac. 857. **N. Y.** Benkard *v.* Babcock, 17 Abb. Pr. 421, 27 How. Pr. 391, 2 Robt. 175; Merritt *v.* Millard, 5 Bosw. 645; Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177. **N. C.**—Faucette *v.* Ludden, 117 N. C. 170, 23 S. E. 73; Hurst, M. & Co. *v.* Everett, 91 N. C. 399; Devries & Co. *v.* Warren, 82 N. C. 356. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396. **S. C.**—Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192. **S. D.**—McKinney *v.* Sundback, 3 S. D. 106, 52 N. W. 322. **Tex.**—Coleman *v.* Bunce, 37 Tex. 171.

[a] **"Ready, Willing and Able."** A plea of recoupment based on breach of contract to deliver flour is subject to demurrer when it fails to aver that the defendant was ready, willing and able to receive and pay for the flour on arrival. J. C. Lysle Milling Co. *v.* North Alabama Groc. Co. (Ala.), 77 So. 748.

[b] **Set-off on Book Account.**—A statute authorizing a defendant who has a demand on book against the plaintiff to file a declaration in offset, contemplates a declaration on book account and not a declaration in the form of an account. Tobias *v.* McGregor, 19 Vt. 113.

Certainty necessary, see *supra* VIII, I, 1, c.

82. **Minn.**—Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543. **N. Y.**—Dale *v.* Cooke, 4 Johns. Ch. 11. **N. D.**—Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133.

Pleading equitable cause of action generally, see the title **"Bills and Answers."**

[a] **The grounds for equitable interposition** must be pleaded. Swift *v.* Ogleby & Smith, 8 Ga. App. 540, 70 S. E. 97.

[b] **If non-residence is relied on** to warrant equitable intervention, it must be pleaded. Swift *v.* Oglesby & Smith, 8 Ga. App. 540, 70 S. E. 97.

83. See *supra,* VII, C, 6, d, (IV).

84. Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064; Buffalo Wholesale Hardware Co. *v.* Hodgeboom, 152 N. Y. Supp. 900. See generally the title **"Suits and Actions."**

Averment of performance of contract, see 11 STANDARD PROC. 998.

[a] **Giving of notice of breach of warranty,** where that is a condition precedent to a cause of action for damages for breach of warranty should be alleged. Buffalo Wholesale Hardware Co. *v.* Hodgeboom, 152 N. Y. Supp. 900.

[b] **That defendant returned or offered to return goods** bought need not be alleged in a counterclaim for breach of warranty of the goods. Pease Oil Co. *v.* Monroe County Oil Co., 78 Misc. 285, 138 N. Y. Supp. 177. See generally the title **"Sales."**

[c] **Demand upon bank for deposits** should be alleged as a part of defendant's cross-demand for conversion of the deposits. Citizens' Nat. Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064.

85. **Ala.**—Bullard Car Door Equipment Co. *v.* Oak Leaf Coal Co., 8 Ala. App. 642, 62 So. 317. **Ill.**—Pusey *v.* Peck, 67 Ill. 98. **Ind.**—Ward *v.* Bennett, 20 Ind. 440. **N. C.**—American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **N. D.**—First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **Ore.**—Watson *v.* McLench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416; Le Clare *v.* Thibault, 41 Ore. 601, 69 Pac. 552. **Pa.**—Order of Unity *v.* McCann, 57 Pa. Super. 61.

See generally the title **"Declaration and Complaint"** and numerous titles dealing with particular causes of action.

which the pleader relies, and how it arose.[86] If a contractual demand is sought to be set up the facts pleaded must show a valid binding agreement,[87] the terms thereof,[88] and plaintiff's failure to perform the same.[89] It is likewise necessary to show that defendant has performed the terms and conditions of the contract[90] by averring that he has complied with all conditions which were prior to or concurrent with his right to demand performance by the plaintiff.[91] It must appear that damages alleged as recoupment would naturally result from the acts complained of.[92]

d. *Amount of Claim.* — The amount of the set-off or counterclaim should be alleged,[93] and to entitle defendant to an affirmative judg-

[a] **Merely alleging that plaintiff is indebted** to the defendant without alleging further the character and kind of indebtedness is not sufficient. American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210.

[b] **Where liability for rent** is asserted as a counterclaim, privity of estate or of contract should be alleged. Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. See generally the title "**Landlord and Tenant.**"

86. **Ala.**—Berlin Mach. Works *v.* Ewart Lumber Co., 184 Ala. 272, 63 So. 567. **Ga.**—Jones *v.* Americus Automobile Co., 15 Ga. App. 453, 83 S. E. 642. **N. C.**—American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210. **Va.**—New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351.

87. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190; Order of Unity *v.* McCann, 57 Pa. Super. 61.

As to the manner of pleading contracts, see generally the title "**Implied and Express Agreements,**" and such titles as "**Assumpsit,**" "**Debt,**" and other titles dealing with particular sorts of contracts.

[a] **A consideration** for the agreement relied on (1) must be pleaded. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190. See 11 STANDARD PROC. 986. (2) Where failure of consideration for the contract upon which the counterclaim is based, is shown by the facts pleaded, the force of the counterclaim is thereby destroyed. Jensen *v.* Northwestern Underwriters' Assn., 35 N. D. 223, 159 N. W. 611.

[b] **An omission to aver who executed the note** set up as a counterclaim, is fatal to the counterclaim. Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396.

88. Order of Unity *v.* McCann, 57 Pa. Super. 61. See 11 STANDARD PROC. 981, 992, et seq.

[a] **In alleging a wrongful discharge** as the basis of a counterclaim, the defendant must aver the conditions of the contract of employment, the services performed, and a fixed term of employment. Order of Unity *v.* McCann, 57 Pa. Super. 61. See generally the title "**Master and Servant.**"

89. Mills *v.* Lantrip, 170 Ky. 81, 185 S. W. 514. See 11 STANDARD PROC. 1006.

90. Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805; United States Expansion Bolt Co. *v.* Marmorstein, 181 App. Div. 790, 169 N. Y. Supp. 244. See 11 STANDARD PROC. 998.

91. Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805.

How performance is alleged, see 11 STANDARD PROC. 998, et seq.

[a] **But where mutual promises or covenants are independent** performance of one need not be alleged in a counterclaim on the other. Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805. See 11 STANDARD PROC. 1004, note 90.

92. McGuire *v.* Gerstley, 204 U. S. 489, 27 Sup. Ct. 332, 51 L. ed. 581.

93. **Ill.**—Witter *v.* McNiel, 4 Ill. 433. **N. C.**—American Nat. Bank *v.* Northcutt, 169 N. C. 219, 85 S. E. 210. **W. Va.**—Philippi Planing Mill Co. *v.* Cross, 75 W. Va. 303, 83 S. E. 1004.

Averment of damages, see 11 STANDARD PROC. 1009; 13 STANDARD PROC. 360, et seq.

[a] **A plea of set-off is not defective** because it fails to assert by way of cross-demand a right to a sum suffi-

ment the pleading must show that the amount due the defendant exceeds the sum claimed as a debt or damages by the plaintiff.[94]

3. Proper Subject Matter of Cross-Demand. — a. *In General.* The pleading must disclose a proper subject of cross-demand of the kind it purports to allege,[95] and if the right to assert the particular cross-demand depends on statute, defendant's claim must be brought by his averments within the provisions of the statute.[96]

b. *Due and Subsisting Demand.* — That the debt or claim sought to be interposed fulfills the requirement that it be a matured and existing cause of action,[97] must appear from the facts averred by defendant;[98] and defendant asserting a cross-demand which must exist

cient to cancel, rather than to toll, the recovery sought by plaintiff. Copeland *v.* Union Nursery Co., 187 Ala. 148, 65 So. 834; Tutwiler *v.* McCarty, 121 Ala. 356, 25 So. 828.

94. McIlvrid *v.* Murphy, 190 Ill. App. 515.

95. **Ala.**—McRight *v.* Farned, 76 So. 975; Sledge *v.* Swift, 53 Ala. 110. **Ga.**—Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17. **N. Y.**—Pierce *v.* Massman, 168 N. Y. Supp. 1029.

Subject of cross-demand, see *supra* VII, C, 2.

96. **Ala.**—Clearman *v.* Cobbs, 197 Ala. 546, 73 So. 83; Copeland *v.* Union Nursery Co., 187 Ala. 148, 65 So. 834. **Ariz.**—Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Cal.**—Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805; Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820; Moyle *v.* Porter, 51 Cal. 639. **Ind.**—Gilpin *v.* Wilson, 53 Ind. 443; McMahan *v.* Spinning, 51 Ind. 187. **Kan.**—Kansas Loan & Inv. Co. *v.* Hutto, 48 Kan. 166, 29 Pac. 558. **Ky.** Pickrell & Craig Co. *v.* Castleman-Blakemore Co., 177 Ky. 635, 197 S. W. 1066. **Mich.**—Keystone Mfg. Co. *v.* Forsyth, 115 Mich. 51, 72 N. W. 1109. **Minn.**—Jones *v.* Swank, 54 Minn. 259, 55 N. W. 1126. **Mo.**—Ritchie *v.* Hayward, 71 Mo. 560; Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314. **Neb.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123; Burge *v.* Gandy, 41 Neb. 149, 59 N. W. 359. **N. Y.**—Chamboret *v.* Cagney, 10 Abb. Pr. (N. S.) 31, 41 How. Pr. 125, 2 Sweeny 378; Lehmair *v.* Griswold, 8 Jones & S. 100; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Haupt *v.* Ames, 26 App. Div. 550, 50 N. Y. Supp. 495; Eckert *v.* Gallien, 24 Misc. 485, 53 N. Y. Supp. 879; Green *v.* Parsons, 47 Hun 631, 14 N. Y. St. 97; Hinkley *v.* Troy, etc. R. Co., 42 Hun 281, 4 N. Y. St. 793; Pierce *v.* Massman, 168 N. Y. Supp. 1029. **N. C.** Davison *v.* West Oxford Land Co., 121 N. C. 146, 28 S. E. 266; Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256; Trotter *v.* Swain, 90 N. C. 455; Devries & Co. *v.* Warren, 82 N. C. 356. **N. D.**—Clark *v.* Sullivan, 2 N. D. 103, 49 N. W. 416, 13 L. R. A. 233. **Ohio.** Allen *v.* Shackelton, 15 Ohio St. 145. **Okla.**—Caldwell *v.* Stevens, 167 Pac. 610. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 74 Ore. 126, 144 Pac. 396; Sears *v.* Martin, 22 Ore. 311, 29 Pac. 890; Burrage *v.* Bonanza Gold & Q. Min. Co., 12 Ore. 169, 6 Pac. 766. **Tex.**—Carothers *v.* Thorp, 21 Tex. 358; Westbrook *v.* Missouri-Texas Land & Irrigation Co. (Tex. Civ. App.), 195 S. W. 1154. **Va.**—New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351; Watkins *v.* Hopkins' Exr., 13 Gratt. (54 Va.) 743. **Wis.**—Studebaker Corporation *v.* Gollmar, 159 Wis. 336, 150 N. W. 442; Sprout *v.* Crowley, 30 Wis. 187.

[a] **Arising Out of Contract Set Forth in Complaint.**—In relying upon a counterclaim arising out of the contract set forth in the complaint, the defendant must allege facts sufficient to show that the contract mentioned in his counterclaim is the same one set forth in the complaint. Merely alleging a contract of the same date as the one plaintiff pleads is not sufficient. Pierce *v.* Massman, 168 N. Y. Supp. 1029.

[b] **That the set-off is based upon a contract distinct** from that or those under which plaintiff claims must appear. New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351.

97. See *supra,* VII, C, 6.

98. **Ala.**—McRight *v.* Farned, 76 So.

at the commencement of the action[99] is required to allege facts sufficient to bring his claim within the rule.[1]

c. *Unliquidated Damages as Set-Off.* — Unliquidated damages cannot in general be pleaded as a set-off[2] unless there exist equitable reasons for allowing it. It is incumbent upon the defendant in such case to plead facts showing the inadequacy of the legal remedy,[3] and that he is prevented from collecting his demand by an independent action in the usual way.[4] Where the law allows a set-off of unliquidated damages growing out of plaintiff's claim,[5] the averments of defendant's plea or answer must disclose the fact that his demand for unliquidated damages arose out of the contract or transaction set forth in the complaint.[6]

4. Showing Mutuality. — Mutuality, being a requisite of cross-demands,[7] the party relying on a set-off or counterclaim must state facts showing the mutuality of the claims.[8] It must clearly appear from the averments that the cause of action, which is the basis of the cross-demand, exists in favor of the party asserting it,[9] and against the plaintiff who is sought to be charged therewith.[10]

975; Hooper *v.* Armstrong, 69 Ala. 343. **Ark.**—Robinson *v.* Mace, 16 Ark. 97. **Idaho.**—Swanholm *v.* Reeser, 2 Idaho 1167, 31 Pac. 804. **Ill.**—McCord *v.* Crooker, 83 Ill. 556; Lemon *v.* Stevenson, 36 Ill. 49. **Ind.**—Shearman *v.* Fellows, 5 Blackf. 459; Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643. **Kan.** Mallory *v.* Leiby, 1 Kan. 97. **Md.** Dilley *v.* Roman, 17 Md. 337. **N. Y.** Martin *v.* Kunzmuller, 37 N. Y. 396; Myers *v.* Davis, 22 N. Y. 489. **N. C.** Puffer & Sons Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; Reynolds *v.* Smathers, 87 N. C. 24; Hogan *v.* Kirkland, 64 N. C. 250.

99. See *supra*, VII, C, 6, c.

1. **Ala.**—McRight *v.* Farned, 76 So. 975; Morris *v.* Scott, 73 So. 395; Sledge *v.* Swift, 53 Ala. 110. **Cal.**—Del Monte Ranch Dairy *v.* Bernardo, 174 Cal. 757, 164 Pac. 628; Gannon *v.* Dougherty, 41 Cal. 661. **Conn.**—Henry *v.* Butler, 32 Conn. 140. **Idaho.**—McGuire *v.* Lamb, 2 Idaho 378, 17 Pac. 749. **Ia.**—Rumsey & Co. *v.* Robinson, 58 Iowa 225, 12 N. W. 243. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128. **Mo.**—Brady *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503. **N. H.**—Varney *v.* Brewster, 14 N. H. 49. **N. Y.**—Ashley *v.* Marshall, 29 N. Y. 494; Rice *v.* O'Connor, 10 Abb. Pr. 362; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537; Pecke *v.* Hydraulic Const. Co., 23 App. Div. 393, 48 N. Y. Supp. 225; Pierce *v.* Massman, 168 N. Y. Supp. 1029. **N. C.** Brumble *v.* Brown, 71 N. C. 513. **Tenn.** Harris *v.* Snider, 9 Humph. 743. **Wis.** Sprout *v.* Crowley, 30 Wis. 187.

[a] **In pleading counterclaim** under subdivision 2, of sec. 501 of the Code of Civil Procedure, the facts must show that the counterclaim was in existence at the commencement of the action. Pierce *v.* Massman, 168 N. Y. Supp. 1029.

2. See *supra*, VII, C, 7.

3. Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641.

4. Cross *v.* Snyder's Admx., 164 Ky. 370, 175 S. W. 641.

5. See *supra*, VII, C, 7, b.

6. Cary *v.* Niblo, 155 Ill. App. 338.

7. See *supra*, VII, D, 1.

8. **Cal.**—Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. **Ga.** Janes *v.* City of Cedartown, 14 Ga. App. 72, 80 S. E. 339. **Ind.**—Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303. **Mass.**—Brooks *v.* Stackpole, 168 Mass. 537, 47 N. E. 419; Lovell *v.* Nelson, 11 Allen 101, 87 Am. Dec. 706.

9. Walker *v.* Crummey, 18 Ga. App. 414, 89 S. E. 539.

[a] **Alleging Assignment.**—Where defendant pleads a set-off alleged to be due to her husband, she should allege an assignment thereof to her. Walker *v.* Crummey, 18 Ga. App. 414, 89 S. E. 539.

10. **Ark.**—Robinson *v.* Mace, 16 Ark.

J. PRAYER. — A counterclaim should contain a prayer for judgment,[11] particularly where affirmative relief is sought.[12] And the same is true of a plea of set-off seeking a judgment for the excess.[13] Where the defendant seeks to use his counterclaim defensively only, no prayer for affirmative relief is required.[14] The character of the plea or answer as a counterclaim may appear from the prayer for judgment therein contained.[15]

Alternative relief may be asked for in a counterclaim.[16]

K. HOW SUFFICIENCY OF THE PLEADING TESTED. — The sufficiency of defendant's pleading as setting up a cross-demand is to be tested by its allegations,[17] and not by the name which the pleader gives it.[18] The mere fact that defendant designates matter pleaded a counter-

97. **Cal.**—Wallace *v.* Bear River W. & M. Co., 18 Cal. 461. **Ind.**—Shearman *v.* Fellows, 5 Blackf. 459. **Ky.**—Horine *v.* Moore, 14 B. Mon. 311. **Md.**—Dilley *v.* Roman, 17 Md. 337. **Tex.**—Bullock *v.* Dunbar, 17 Tex. 243. **Wash.**—Boston Tow Boat Co. *v.* John J. Sesnon Co., 64 Wash. 375, 116 Pac. 1083.

11. **N. Y.**—Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152. **S. D.** Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784; State *v.* Coughran, 19 S. D. 271, 103 N. W. 31. **Tex.**—Westbrook *v.* Missouri-Texas, etc. Co. (Tex. Civ. App.), 195 S. W. 1154.

[a] **But if defendant pleads the facts** entitling him to a counterclaim he will not be deprived thereof by his failure to demand the offset. Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391.

[b] **Failure to demand that expenditures** made by defendant while in possession of premises be offset against damages claimed in ejectment for the premises, does not defeat the counterclaim where the facts are pleaded. Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391.

[c] **A demand for dismissal of complaint** and for costs does not constitute a prayer for affirmative judgment. Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784.

12. **N. Y.**—Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152. **N. D.** Emerson *v.* Brantingham Co. *v.* Brennan, 35 N. D. 94, 159 N. W. 710. **S. D.** Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784.

[a] **Though termed a counterclaim** a plea may be considered merely one in recoupment, where no prayer for affirmative relief is contained therein, and facts in mitigation of damages are set out. Emerson-Brantingham Co. *v.* Brennan, 35 N. D. 94, 159 N. W. 710.

13. McIlvrid *v.* Murphy, 190 Ill. App. 515.

14. **Cal.**—Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369. **N. D.**—Emerson *v.* Brantingham Co. *v.* Brennan, 35 N. D. 94, 159 N. W. 710. **Wis.**—Jones *v.* Keefe, 159 Wis. 584, 150 N. W. 954.

[a] **That no formal demand for judgment** appears in defendant's pleadings, does not prevent the allowance of a recoupment sufficiently disclosed upon a liberal construction of the answer. Jones *v.* Keefe, 159 Wis. 584, 150 N. W. 954.

15. See *supra*, VIII, E, 1, b.

16. Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391.

17. **Cal.**—Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805. **Ky.**—Sparr *v.* Fulton Nat. Bank, 179 Ky. 755, 201 S. W. 310; Howard *v.* Jones, 147 Ky. 303, 143 S. W. 1058; True *v.* Triplett, 4 Metc. 57. **N. Y.** Broadway-Thirty-Fifth St. Realty Corp. *v.* Hilton, 166 N. Y. Supp. 1068. **N. D.**—Emerson-Brantingham Co. *v.* Brennan, 35 N. D. 94, 15 N. W. 710. **Ore.**—Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190.

18. McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267; Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190.

[a] **An answer called in the caption a counterclaim and cross-petition,** which states no facts to sustain a judgment against the plaintiff, cannot be amended as a counterclaim after the plaintiff has dismissed his action without prejudice. Howard *v.* Jones, 147 Ky. 303, 143 S. W. 1058.

claim[19] or set-off[20] does not make it such, especially where no affirmative relief is asked.[21]

L. OBJECTIONS TO PLEADING. — **1. In General.** — The sufficiency of a plea or answer as setting up a counterclaim, recoupment or set-off, may be challenged by demurrer[22] or motion[23] to the extent that those remedies are available against a complaint or declaration.

2. Time To Object. — Whatever objections plaintiff may desire to interpose to defendant's cross-demand should be made in due time,[24] otherwise they will be deemed waived.[25] Objections have sometimes[26]

19. McElroy *v.* Floral Park Villa Co., 176 App. Div. 106, 162 N. Y. Supp. 467; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267.

20. Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152.

21. Goodman *v.* Benjamin Rutchik, 171 N. Y. Supp. 152.

22. See generally the title "**Demurrer,**" and see *infra,* VIII, L, 3.

23. See the title "**Motions,**" and see *infra,* VIII, L, 4.

24. Cal.—Placerville Gold Mining Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748. **Ill.**—Rothschild *v.* Bruscke, 131 Ill. 265, 23 N. E. 419. **Ind.**—Talmage *v.* Bierhause, 103 Ind. 270, 2 N. E. 716. **Kan.** Feidler *v.* Motz, 42 Kan. 519, 22 Pac. 561. **Ky.**—Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874. **Minn.**—Talty *v.* Torling, 79 Minn. 386, 82 N. W. 632; Lace *v.* Fixen, 39 Minn. 46, 38 N. W. 762; Mississippi & R. R. B. Co. *v.* Prince, 34 Minn. 71, 24 N. W. 344; Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632. **N. Y.**—Vann *v.* Rouse, 94 N. Y. 401; Westervelt *v.* Ackley, 62 N. Y. 505; Bell *v.* Davis, 8 Barb. 210. **N. C.** Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734. **Tex.**—Gillett *v.* Moody (Tex. Civ. App.), 54 S. W. 35. **Wash.**—Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332. **Wis.**—Akerly *v.* Vilas, 21 Wis. 377; Connors *v.* Taylor, 13 Wis. 230.

25. U. S.—Partridge *v.* Phoenix Mut. L. Ins. Co., 15 Wall. 573, 21 L. ed. 229. **Cal.**—Del Monte Ranch Dairy *v.* Bernardo, 174 Cal. 757, 164 Pac. 628; Placerville Gold Mining Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748. **Ky.** Nutter *v.* Johnson, 80 Ky. 426; Cason *v.* Cason, 79 Ky. 558. **N. Y.**—Dessar *v.* Gunther, 162 N. Y. Supp. 794. **Wash.** Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332. **Wis.**—Irvin *v.* Smith, 60 Wis. 172, 18 N. W. 722; Voechting *v.* Grau, 55 Wis. 312, 13 N. W. 230.

[a] **Failure to denominate the counterclaim** waived by lack of timely objection. Dessar *v.* Gunther, 162 N. Y. Supp. 794.

[b] **Non-Joinder.**—That a necessary party defendant to a counterclaim is omitted is waived unless raised by demurrer or reply. Harrah State Bank *v.* School Dist., 47 Okla. 593, 149 Pac. 1190. See the title "**Parties.**"

[c] **Failure to specify the particular cause of action** to which the counterclaim is pleaded is waived by failure to object. A. D. Kneuper Specialty Co. *v.* Kneuper, 171 App. Div. 555, 157 N. Y. Supp. 395.

[d] **Surplusage.**—Right to object that the answer alleging recoupment sets up superfluous matter is waived by lack of timely objection. Streeter *v.* Streeter, 43 Ill. 155.

[e] **Lack of certainty** in the averments of the cause of action constituting the cross-demand, waived. Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476; Currie *v.* Cowles, 6 Bosw. (N. Y.) 452.

[f] **By demurring to an answer** alleging a set-off, plaintiff waives his right to object that such pleading is not designated in its caption as a set-off. Kelly *v.* Talbott, 19 Ky. L. Rep. 632, 41 S. W. 439.

26. Cal.—Placerville Gold Mining Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748; McDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. **Ind.**—Boil *v.* Simms, 60 Ind. 162; Campbell *v.* Routt, 42 Ind. 410. **Mass.**—Tracey *v.* Grant, 137 Mass. 181. **Mo.**—Brady's Admr. *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503. **Neb.** Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. D.**—First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **S. C.**—Byrd *v.* Charles, 3 S. C. 352. **Wis.**—Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Orton *v.* Noonan, 30 Wis. 611; Akerly *v.* Vilas, 21 Wis. 377.

been considered, and sometimes disregarded,[27] when made for the first time at the trial. Except perhaps as to matters touching the jurisdiction of the court,[28] the plaintiff cannot attack the cross-demand for the first time after judgment,[29] or in the appellate court.[30]

3. Demurrer. — a. *In General.* — Subject to the rules elsewhere discussed,[31] the sufficiency of defendant's plea or answer as stating a cross-demand may be questioned by demurrer,[32] and upon such de-

27. **Ill.**—Rothschild *v.* Bruscke, 131 Ill. 265, 23 N. E. 419. **Ky.**—Lee *v.* Russell, 18 Ky. L. Rep. 951, 38 S. W. 874. **Minn.**—Talty *v.* Torling, 79 Minn. 386, 82 N. W. 632; Warner *v.* Foote, 40 Minn. 176, 41 N. W. 935. **N. Y.** Ludington *v.* Slauson, 6 Jones & S. 81; Ayres *v.* O'Farrell, 4 Robt. 668; Thomas *v.* Loaners' Bank, 6 Jones & S. 466. **Tex.**—Wentworth *v.* King (Tex. Civ. App.), 49 S. W. 696. **Wash.** Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332. **Wis.**—Connors *v.* Taylor, 13 Wis. 230.

[a] **General Allegations of Fraud.** A party who fails to demur to general allegations of fraud, in counterclaim or to move to have them made more definite and certain, is not entitled to have evidence thereof excluded at the trial. Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332.

[b] **That the demand is not a proper subject** of counterclaim is waived by replying and going to issue thereon. Boyd *v.* Day, 3 Bush (Ky.) 617.

28. Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064. See 17 STANDARD PROC. 900.

29. Feidler *v.* Motz, 42 Kan. 519, 22 Pac. 561.

30. **U. S.**—Partridge *v.* Phoenix Mut. Life Ins. Co., 15 Wall. 573, 21 L. ed. 229. **Cal.**—Placerville Gold Mining Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748. **N. Y.**—Vann *v.* Rouse, 94 N. Y. 401; Westervelt *v.* Ackley, 62 N. Y. 505; Barber *v.* Rose, 5 Hill 76. **Wis.**—Akerly *v.* Vilas, 21 Wis. 377.

[a] **Failure to denominate counterclaim** is not available on appeal. Acer *v.* Hotchkiss, 97 N. Y. 395; Van Brunt *v.* Day, 81 N. Y. 251, 8 Abb. N. C. 336; Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. 213.

[b] **Where the cross-demand though improper, is treated as proper by the parties** throughout the proceedings in the lower court, objection thereto may not be made in the appellate court. Placerville Gold Mining Co. *v.* Beal, 168 Cal. 682, 144 Pac. 748.

31. See the title "**Demurrer**" and *infra*, VIII, L, 3, b.

32. **U. S.**—Ecorse Transp. Co. *v.* Earhart, 96 Fed. 925. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Grocery Co., 77 So. 748; McRight *v.* Farned (Ala.), 76 So. 975; Copeland *v.* Union Nursery Co., 187 Ala. 148, 65 So. 834; McLendon *v.* Rubenstein, 180 Ala. 615, 61 So. 902. **Ariz.**—Arizona Eastern R. Co. *v.* Stewart, 17 Ariz. 227, 149 Pac. 753; Dowdy *v.* Calvi, 14 Ariz. 148, 125 Pac. 873. **Cal.**—Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805; Clark *v.* Kelley, 163 Cal. 207, 124 Pac. 846; Pitzel *v.* Maier Brewing Co., 20 Cal. App. 737, 130 Pac. 705. **Del.**—Voigtmann *v.* Wilmington Trust Bldg. Corp., 7 Penne. 265, 78 Atl. 920. **Ga.**—Fambrough *v.* De Vane, 138 Ga. 47, 74 S. E. 762. **Ill.**—Rothschild *v.* Bruscke, 131 Ill. 265, 23 N. E. 419; Graff *v.* Kahn, 18 Ill. App. 485. **Ind.** Talmage *v.* Bierhause, 103 Ind. 270, 2 N. E. 716; Bump *v.* McGrannahan, 61 Ind. App. 136, 111 N. E. 640; Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571. **Ia.**—Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310; Muir *v.* Miller, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032. **Kan.**—Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537. **Ky.**—Pickrell & Craig Co. *v.* Castleman-Blakemore Co., 177 Ky. 635, 197 S. W. 1066; Mills *v.* Lantrip, 170 Ky. 81, 185 S. W. 514. **Md.**—Dilley *v.* Roman, 17 Md. 337. **Mass.**—Montague *v.* Boston, etc. Iron Works, 97 Mass. 502; Grew *v.* Burditt, 9 Pick. 265. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128; Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1; McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Jones *v.* Swank, 54 Minn. 259, 55 N. W. 1126; Mealey *v.* Nickerson, 44 Minn. 430, 46 N. W. 911; Lace *v.* Fixen, 39 Minn. 46, 38 N. W. 762. **Mo.**—Cutler *v.* Cook, 77 Mo. 388; Kinney *v.* Miller, 25 Mo. 576. **Neb.**—Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. M.**—Leyser *v.* Rindskopf, 3 N. M. 382, 5 Pac. 540; United States *v.* Howland, 1 N. M. 550. **N. Y.**—Boreel

murrer, the cross-demand is treated as a separate pleading.[33] As in other cases,[34] the demurrer admits all the material facts well pleaded,[35] and if the pleading is good in part, a general demurrer to the whole will be overruled.[36]

b. *Grounds.* — The grounds of demurrer, in so far as they are regulated by statute, must of necessity depend largely on the statute.[37] It is ground for general demurrer that the pleading does not show a proper subject of set-off, counterclaim or recoupment[38] within the

v. Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Cragin *v.* Lovell, 88 N. Y. 258, 2 Civ. Proc. 128; Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537; Schaefer *v.* Empire Lithographing Co., 28 App. Div. 469, 51 N. Y. Supp. 104; Haberle-Crystal S. Brewing *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251; Pierce *v.* Massman, 168 N. Y. Supp. 1029. **N. C.**—American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209; General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288; Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888; Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256. **N. D.**—Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354; First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **Okla.**—Barteldes Seed Co. *v.* Mitchell, 157 Pac. 935. **Ore.** Krausse *v.* Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Wait *v.* Wheeler & W. Mfg. Co., 23 Ore. 297, 31 Pac. 661; Sears *v.* Martin, 22 Ore. 311, 29 Pac. 890. **S. C.**—Farmers' Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422; Liles *v.* Harris-Grimes Co., 76 S. E. 115. **S. D.**—Edward C. Plume Co. *v.* Voedish Jewelry Co., 39 S. D. 222, 164 N. W. 59; Moreley *v.* Cole, 38 S. D. 564, 162 N. W. 367; Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51. **Tex.** Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927; McCormick *v.* Schtrenck (Tex. Civ. App.), 130 S. W. 720. **Wash.** Russell *v.* Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341; Caine *v.* Seattle, & N. R. Co., 12 Wash. 590, 41 Pac. 904; Phillips *v.* Port Townsend Lodge No. 6, 8 Wash. 529, 36 Pac. 476. **W. Va.**—Choen *v.* Guthrie, 15 W. Va. 100. **Wis.**—Washburn Land Co. *v.* White River Lumber Co., 165 Wis. 112, 161 N. W. 547; Dietrich *v.* Koch, 35 Wis. 618.

[a] **Demurrer Ore Tenus.**—A motion to strike out part of answer setting up cross-demand may be treated as a demurrer ore tenus. Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314; American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209.

33. Andre *v.* Morrow, 65 Miss. 315, 3 So. 659, 7 Am. St. Rep. 658; Douglass *v.* Phoenix Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Golberg *v.* Wood, 45 Misc. 327, 90 N. Y. Supp. 427; Blaut *v.* Blaut, 41 Misc. 572, 85 N. Y. Supp. 146; Pierce *v.* Massman, 168 N. Y. Supp. 1029.

34. See 6 STANDARD PROC. 943.

35. Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70; Myers *v.* Estell, 47 Miss. 4; Pecke *v.* Hydraulic Const. Co., 23 App. Div. 393, 48 N. Y. Supp. 225; Romaine *v.* Brewster, 6 Misc. 531, 27 N. Y. Supp. 138, 58 N. Y. St. 17.

[a] **As Affecting Allegation of Tender.**—Where a counterclaim setting up refusal and failure to deliver goods under a contract after due demand is made therefor, is demurred to, the demurrer admits these allegations, and thus shows such refusal to perform as dispenses with an allegation in the counterclaim of tender of the purchase price. Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537.

36. Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1.

[a] **Where two separate counterclaims** are set up but not separately stated and one of them only is a proper counterclaim, a general demurrer thereto will not be sustained. Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1.

37. See the statutes and 6 STANDARD PROC. 891, 915.

38. **Cal.**—Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820; Moyle *v.* Porter,

limitations of the rules hereinbefore discussed as to the subject matter[39] and the pleading[40] of such cross-demands, as that it violates the rule as to mutuality of the claims,[41] or as to the necessity of the cross-demand being a cause of action in defendant at the commencement of the suit.[42] It is not ground for demurrer, however, that the action is not one in which a set-off is pleadable,[43] or states only a partial defense.[44] Assuming that the pleading exhibits a proper subject matter and treating it merely from the standpoint of its sufficiency as a pleading of the claim or demand, the availability and use of a demurrer would in general be governed by the same rules which would be applied were the claim being made the basis of an independent

51 Cal. 639. **Ga.**—Fambrough *v.* De Vane, 138 Ga. 47, 74 S. E. 762. **Ind.** Thompson *v.* Toohey, 71 Ind. 296; Gilpin *v.* Wilson, 53 Ind. 443; McMahan *v.* Spinning, 51 Ind. 187. **Ia.**—Rice *v.* Friend Bros. Co., 179 Iowa 355, 161 N. W. 310; Muir *v.* Miller, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032. **Kan.** Miller *v.* Thayer, 96 Kan. 278, 150 Pac. 537; Kansas Loan & Inv. Co. *v.* Hutto, 48 Kan. 166, 29 Pac. 558. **Minn.**—Wild Rice Lumber Co. *v.* Benson, 114 Minn. 92, 130 N. W. 1; McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Lace *v.* Fixen, 39 Minn. 46, 38 N. W. 762. **Mo.**—Cutler *v.* Cook, 77 Mo. 388; Ritchie *v.* Hayward, 71 Mo. 560. **Neb.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123. **N. Y.** Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Kelly *v.* Struth, 164 App. Div. 705, 150 N. Y. Supp. 391; Scognamillo *v.* Passarelli, 157 App. Div. 428, 142 N. Y. Supp. 382; Baum *v.* Sporborg, 146 App. Div. 537, 131 N. Y. Supp. 267; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537; Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251. **N. C.**—Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888; Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256. **N. D.**—First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **S. D.**—Advance Thresher Co. *v.* Klein, 28 S. D. 177, 133 N. W. 51. **Tex.**—Carothers *v.* Thorp, 21 Tex. 358; Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927. **Wash.** Russell *v.* Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341; Phillips *v.* Port Townsend Lodge No. 6, 8 Wash. 529, 36 Pac. 476. **Wis.**—Dietrich *v.* Koch, 35 Wis. 618; Sprout *v.* Crowley, 30 Wis. 187.

See 6 STANDARD PROC. 915, 916.

[a] **An answer pleading an independent tort** as a set-off against a tort, is demurrable. McCormick *v.* Schtrenck (Tex. Civ. App.), 130 S. W. 720.

[b] **Defeating Plaintiff's Claim.** A demurrer lies to a counterclaim which does not tend to defeat plaintiff's cause of action. Stolitzky *v.* Linscheid, 150 App. Div. 253, 134 N. Y. Supp. 805; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537.

39. See *supra*, VII, C, 2.

40. See *supra*, VIII.

41. **Cal.**—Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. **Ind.** Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672. **Mass.**—Brooks *v.* Stackpole, 168 Mass. 537, 47 N. E. 419. **Mont.**—Collier *v.* Ervin, 3 Mont. 142. **N. Y.**—Richards *v.* Reed, 6 Misc. 217, 26 N. Y. Supp. 540, 56 N. Y. St. 539.

[a] **Separate Debt Against Joint One.**—Demurrer will lie to a plea of set-off setting up a joint claim or liability against plaintiff "and other interested parties," not parties to the record, as against a separate debt. Ray *v.* Cartwright (Tex. Civ. App.), 180 S. W. 927.

42. Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128.

43. Boil *v.* Simms, 60 Ind. 162.

44. See *infra*, this note.

[a] **Partial Defense.**—The rule that if a defense is set up as an answer to the whole cause of action, while it is in fact only a partial one, the answer will be bad on demurrer, does not apply to an answer simply pleading a set-off, counterclaim or recoupment less than the plaintiff's demand since they are not strictly defenses. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190.

action,[45] except, perhaps, in so far as the strictness of the rules of pleading may be relaxed in the case of cross-demands.[46] Thus it is good ground of demurrer that the facts alleged by way of cross-demand are not sufficient to constitute a cause of action;[47] but the cross-demand is not obnoxious to general demurrer if any partion of it states a cause of action or defense.[48] It is also ground for demurrer if the pleading shows that the defendant has not legal capacity to recover upon the ground set up,[49] or that the court has no jurisdiction of the subject matter of the offset.[50] In some states it is ground for demurrer that several causes of counterclaim have been improperly joined,[51] or that they have not been separately stated,[52] or that there is a de-

45. See *infra*, this section, and the title "**Demurrer.**" See also titles dealing with particular matters as constituting grounds of demurrer.

Duplicity, see Jones *v.* Hathaway, 77 Ind. 14, and 7 STANDARD PROC. 944.

46. See *supra*, VIII.

47. **Ala.**—Crawford *v.* Simonton's Exrs., 7 Port. 110. **Cal.**—Fresno Canal & Irr. Co. *v.* Perrin, 170 Cal. 411, 149 Pac. 805. **Ind.**—Bump *v.* McGrannahan, 61 Ind. App. 136, 111 N. E. 640. **Kan.**—Allen *v.* Douglass, 29 Kan. 412. **Ky.**—Pickrell & Craig Co. *v.* Castleman-Blakemore Co., 177 Ky. 635, 197 S. W. 1066; Mills *v.* Lantrip, 170 Ky. 81, 185 S. W. 514; Rice *v.* Pulliam, 141 Ky. 10, 131 S. W. 1053. **Minn.**—Hackney *v.* Fetsch, 123 Minn. 447, 143 N. W. 1128. **Mo.**—Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314. **N. Y.**—Fulton County Gas & Electric Co. *v.* Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052; Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Stolitzky *v.* Linscheid, 150 App. Div. 253, 134 N. Y. Supp. 805; Baum *v.* Sporborg, 146 App. Div. 537, 131 N. Y. Supp. 267; Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537. **N. C.**—American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209. **S. C.**—Liles *v.* Harris-Grimes Co., 76 S. E. 115. **S. D.**—Edward C. Plume Co. *v.* Voedish Jewelry Co., 39 S. D. 222, 164 N. W. 59.

See 6 STANDARD PROC. 915.

Sufficiency of the pleading, see *supra*, VIII, I.

[a] **Such objection is good only when** there is a total failure to allege some matter which is essential to the relief sought and not when the allegations are simply incomplete, indefinite or statements of conclusions. Michelet *v.* Cole, 20 N. M. 357, 149 Pac. 310.

[b] **Nonpayment of debt** sought to be set-off or counterclaimed should be alleged or the pleading is bad on demurrer. Mills *v.* Lantrip, 170 Ky. 81, 185 S. W. 514.

[c] **In a justice's court** the pleading will be sufficient "if it informs the adverse party of the nature of the cause of action to bar another action for the same cause, if judgment is rendered thereon." Bump *v.* McGrannahan, 61 Ind. App. 136, 111 N. E. 640.

48. **Ind.**—Crecelius *v.* Mann, 84 Ind. 147; Shearman *v.* Fellows, 5 Blackf. 459. **Mass.**—Montague *v.* Boston, etc. Iron Works, 97 Mass. 502. **N. Y.** Mercein *v.* Smith, 2 Hill 210. **Ore.** Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190. **Wis.**—Black River Imp. Co. *v.* Holway, 85 Wis. 344, 55 N. W. 418.

49. Haberle-Crystal S. Brewing Co. *v.* Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251. See 6 STANDARD PROC. 895.

50. **Ala.**—Southern Grocery Co. *v.* Harrison, 184 Ala. 266, 63 So. 535. **N. Y.** Cragin *v.* Lovell, 88 N. Y. 258, 2 Civ. Proc. 128. **N. C.**—General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288.

See 6 STANDARD PROC. 892, 894; 17 STANDARD PROC. 901, 908.

[a] **But that demurrer cannot raise the question** of jurisdiction, see Edward C. Plume Co. *v.* Voedish Jewelry Co., 39 S. D. 222, 164 N. W. 59.

[b] **Where set-off is upon a trust agreement** a plea setting it up in an action at law is demurrable, since equity has exclusive jurisdiction of strict trusts. Southern Grocery Co. *v.* Harrison, 184 Ala. 266, 63 So. 535.

51. See 6 STANDARD PROC. 902. *Compare* Farmers' Union Mercantile Co. *v.* Anderson, 108 S. C. 66, 93 S. E. 422.

52. Pitzel *v.* Maier Brewing Co., 20 Cal. App. 737, 130 Pac. 705. See 6

fect[53] or misjoinder of parties,[54] or that the pleading is ambiguous or uncertain,[55] or that a plea of set-off is not drawn out.[56] An improper designation of a cross-demand is not ground for demurrer.[57]

c. *Grounds Must Be Stated.* — A demurrer to a set-off or other cross-demand should designate the grounds upon which it is based,[58] otherwise the court may properly disregard it,[59] and defects not pointed out in the demurrer cannot be invoked to justify the ruling of the court sustaining it.[60]

4. Motion. — A motion as a method of objection to a cross-demand is, of course, governed largely by general rules elsewhere treated as to this method of testing pleadings.[61] In some jurisdictions a motion is substituted for special demurrer as a means of attacking pleadings.[62] Thus, in some jurisdictions, plaintiff may move to make cross-demand more definite and certain.[63] So also a motion to strike is available under circumstances which would justify it in connection with other

STANDARD PROC. 904 and the title "**Several Counts.**"

53. See 6 STANDARD PROC. 898, 899. But see Drake *v.* Satterlee, 61 Hun 627, 16 N. Y. Supp. 334, 41 N. Y. St. 576.

54. See 6 STANDARD PROC. 900.

55. See 6 STANDARD PROC. 905, 906; 4 STANDARD PROC. 859.

[a] **Not Ground for General Demurrer.**—(1) **Mo.**—Garnett & Allen Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736. **N. M.** Michelet *v.* Cole, 20 N. M. 357, 149 Pac. 310. **N. Y.**—Hammond *v.* Earle, 58 How. Pr. 426. (2) Mere deficiency in technical language or logical statement will not render the counterclaim subject to general demurrer. Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537.

56. Voigtmann *v.* Wilmington Trust Bldg. Corp., 7 Penne. (Del.) 265, 78 Atl. 920; Pfrommer *v.* Taylor, 4 Boyce (Del.) 76, 85 Atl. 760.

57. See *infra*, this note.

[a] **Improper Designation.**—(1) An answer which sets up a good recoupment is not demurrable, though the pleader has improperly designated it a counterclaim. Gabel *v.* Armstrong, 88 Ore. 84, 171 Pac. 190. (2) And a plea good as a set-off may not be demurrable because entitled as a "plea of recoupment." Thomas *v.* Thomas, 146 Ala. 533, 41 So. 141.

58. **Ala.**—Copeland *v.* Union Nursery Co., 187 Ala. 148, 65 So. 834. **Del.** Voigtmann *v.* Wilmington Trust Bldg. Corp., 7 Penne. 265, 78 Atl. 920. **N. Y.** Safford *v.* Snedeker, 67 How. Pr. 264; Mercein *v.* Smith, 2 Hill 210; Eckert *v.* Gallien, 24 Misc. 485, 53 N. Y. Supp. 879; Grange *v.* Gilbert, 10 Civ. Proc. 98.

See generally the title "**Demurrer.**"

59. Safford *v.* Snedeker, 67 How. Pr. (N. Y.) 264; Mercein *v.* Smith, 2 Hill (N. Y.) 210.

60. Copeland *v.* Union Nursery Co., 187 Ala. 148, 65 So. 834.

61. See generally the title "**Motions,**" and specific titles dealing with particular matters as a ground or subject of attack by motion.

62. See 6 STANDARD PROC. 933.

63. **Mo.**—Garnett & Allen Paper Co. *v.* Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736. **N. Y.**—Fettretch *v.* McKay, 47 N. Y. 426, 11 Abb. Pr. (N. S.) 453; Hammond *v.* Earle, 58 How. Pr. 426; Walling *v.* Schwartzkopf, 12 Jones & S. 576; Rouget *v.* Haight, 57 Hun 119, 10 N. Y. Supp. 751, 32 N. Y. St. 452. **N. C.**—Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **Wash.**—Rightor *v.* Ward, 87 Wash. 621, 152 Pac. 332. **Wis.**—Schweickhart *v.* Stuewe, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

See the title "**Certainty in Pleading.**"

[a] **Motion To Divide and Number.** Plaintiff may move to have matter pleaded by defendant as a separate defense and as a counterclaim, divided and numbered, so as to set forth what part thereof is pleaded by way of defense and what part by way of counterclaim. Walker *v.* James J. Matchett Co., 167 N. Y. Supp. 600.

pleadings.[64] The latter motion has been successfully urged against a cross-demand showing want of jurisdiction in the court to entertain it,[65] or lack of mutuality,[66] or an improper subject matter,[67] or an improper case for set-off.[68] And surplusage in the cross-demand may be stricken on motion.[69]

64. **U. S.**—McGill *v.* Sorensen, 209 Fed. 876; Williams Patent Crusher & P. Co. *v.* Kinsey Mfg. Co., 205 Fed. 375. **Ark.**—Smith *v.* Price, 102 Ark. 367, 144 S. W. 206. **Colo.**—Sykes *v.* Kruse, 49 Colo. 560, 113 Pac. 1013. **Del.** Adair *v.* Newlin (Del. Ch.), 100 Atl. 792. **Fla.**—Bates *v.* Lanier, 77 So. 628. **Ga.** J. I. Case Threshing Mach. Co. *v.* Thurmond, 144 Ga. 21, 85 S. E. 1020; Weaver *v.* Tuten, 144 Ga. 8, 85 S. E. 1048; Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846; Hall *v.* J. I. Case Threshing Mach. Co., 11 Ga. App. 840, 76 S. E. 597. **Ill.**—Marrone *v.* Ehrat, 175 Ill. App. 649. **Ind.**—Boil *v.* Simms, 60 Ind. 162; Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313. **Ia.**—Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510; Exline *v.* Lowery, 46 Iowa 556. **Ky.**—Combs *v.* Frick Co., 162 Ky. 42, 171 S. W. 999. **Minn.**—Fergus Printing & P. Co. *v.* Otter Tail, 60 Minn. 212, 62 N. W. 272. **Mo.**—Kinney *v.* Miller, 25 Mo. 576; Farmers' & Mechanics' Sav. Bank *v.* Steffen (Mo. App.), 204 S. W. 32; Finney *v.* Raudabaugh, 182 Mo. App. 246, 168 S. W. 314. **Neb.**—Barr *v.* Post, 56 Neb. 698, 77 N. W. 123; Brugman *v.* Burr, 30 Neb. 406, 46 N. W. 644. **N. Y.**—Nugent *v.* Rowland, 178 App. Div. 454, 165 N. Y. Supp. 547; McElroy *v.* Floral Park Villa Co., 176 App. Div. 106, 162 N. Y. Supp. 467; Dessar *v.* Gunther, 162 N. Y. Supp. 794; Fry *v.* Bennett, 5 Sandf. 54, 1 Code R. (N. S.) 238. **N. C.**—McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513. **S. D.**—Callan *v.* Sether, 31 S. D. 80, 139 N. W. 786. **Tex.**—Dees *v.* Thompson (Tex. Civ. App.), 166 S. W. 56. **Utah.**—Brophy *v.* Ogden Rapid Transit Co., 46 Utah 426, 151 Pac. 49. **Wash.**—Russell *v.* Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380.

See generally the title "**Striking Out and Withdrawal,**" and titles dealing with particular matters as grounds for such motion such as "**Frivolous and Sham Pleadings;**" "**Surplusage and Scandal,**".

[a] **Practice of striking out unusual** in North Carolina and a motion for that relief may be considered as a demurrer ore tenus. American Nat. Bank *v.* Hill, 169 N. C. 235, 85 S. E. 209.

[b] **Striking Special Plea of Recoupment.**—Where notice only is necessary to entitle a defendant to recoup for damages for a breach of the contract on which plaintiff sues, a special plea should be treated as notice, and if sufficient should not be stricken from the record. Shuman *v.* Shuman, 79 W. Va. 445, 91 S. E. 264.

[c] **Portions of pleadings not specified in the motion** to strike out not reached thereby. Russell *v.* Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341.

[d] **Five days' notice** or such further time as the court may allow. Bates *v.* Lanier (Fla.), 77 So. 628.

65. McGill *v.* Sorensen, 209 Fed. 876.

[a] **Thus a counterclaim for patent infringement** which, though it shows an infringement in the district fails to allege that complainant has a regular place of business in the district may be stricken out on motion. McGill *v.* Sorensen, 209 Fed. 876.

66. See *infra*, this note.

[a] **Cross-demand in favor of a third person** not a party to the suit stricken out. Callan *v.* Sether, 31 S. D. 80, 139 N. W. 786.

Necessity of mutuality, see *supra*, VII, D, 1, a.

67. Smith *v.* Price, 102 Ark. 367, 144 S. W. 206.

[a] **A counterclaim for unliquidated damages** arising upon an independent contract should be stricken on motion. Copeland *v.* White, 17 Ga. App. 565, 87 S. E. 846.

[b] **Set-off of demand for unliquidated damages** stricken out. Marrone *v.* Ehrat, 175 Ill. App. 649.

68. Boil *v.* Simms, 60 Ind. 162.

69. Allaire Works *v.* Guion, 10 Barb. (N. Y.) 55. See the title "**Surplusage and Scandal.**"

5. Excluding Evidence of Cross-Demand. — When a set-off, counterclaim or recoupment is not pleaded, when that is necessary,[70] or the pleading is insufficient in substance,[71] the plaintiff may successfully exclude evidence in respect to matters embraced therein.

M. BILL OF PARTICULARS. — Plaintiff is generally entitled to a bill of particulars setting forth further particulars of the claim asserted by defendant as a cross-demand.[72]

N. AMENDMENTS. — Within the usual limitations,[73] the plea or answer may be amended so as to set up a cross-demand,[74] or to set up an amended statement of a cross-demand,[75] or to enlarge[76] or diminish[77] the amount sought to be offset. But defendant may not, as a matter of right, amend his answer to set up a new cause of action by way of cross-demand.[78]

70. **Ala.**—H. H. Hitt Lumber Co. *v.* McCormack, 13 Ala. App. 453, 68 So. 696. **Cal.**—Matter of Couts' Est., 100 Cal. 400, 34 Pac. 865; Quinn *v.* Smith, 49 Cal. 163; Hicks *v.* Green, 9 Cal. 74; Bernard *v.* Mullot, 1 Cal. 368; Haberly *v.* Haberly, 27 Cal. App. 139, 149 Pac. 53. **Mo.**—Phillips *v.* Todd (Mo. App.), 180 S. W. 1039. **Mont.** Meredith *v.* Roman, 49 Mont. 204, 141 Pac. 643.

71. **Ore.**—Hammer *v.* Campbell Automatic Safety Gas Burner Co., 75 Ore. 126, 144 Pac. 396. **S. D.**—Hoeven *v.* Morley, 36 S. D. 421, 155 N. W. 191. **Wash.**—Hyde *v.* Clausin, 82 Wash. 218, 144 Pac. 50.

See 21 STANDARD PROC. 404.

72. **N. Y.**—P. J. Duff & Sons *v.* Levin, 134 N. Y. Supp. 903. **Va.** New Idea Spreader Co. *v.* R. M. Rogers & Sons, 122 Va. 54, 94 S. E. 351. **Eng.** Kemp *v.* Goldberg, L. R. 36 Ch. Div. 505, 56 L. T. N. S. 736, 36 Wkly. Rep. 278.

See generally the title **"Bills of Particulars."**

73. See generally the titles **"Amendments and Jeofails;" "New Cause of Action or Defense."**

[a] **Terms** may be imposed as a condition to the allowance of the amendment. Vilas *v.* Mason, 25 Wis. 310.

74. **Cal.**—Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369. **Kan.**—Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260. **Wis.**—Phoenix Mut. Life Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

[a] **Counterclaim** set up in amended answer. Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369.

75. **Ga.**—Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015. **Ill.**—Falkenau *v.* Smedley, 200 Ill. App. 6. **Ky.**—Louis P. Hyman & Son *v.* H. H. Snyder Co., 159 Ky. 354, 167 S. W. 146. **Mass.** Davis *v.* Bean, 114 Mass. 358. **Mich.** Bacon *v.* Reich, 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 311. **Mo.** Wilkerson *v.* Farnham, 82 Mo. 672; Fallon *v.* Stahl, 17 Mo. App. 475. **Minn.** Gerdtzen *v.* Cockrell, 52 Minn. 501, 55 N. W. 58; Liljengren Furniture & Lumb. Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306. **N. Y.**—Brown *v.* Tuttle, 66 Barb. 169. **N. D.**—First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473. **Ore.**—Caples *v.* Morgan, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760. **Tex.**—Cunningham *v.* Wheatly, 21 Tex. 184.

76. Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260.

[a] **Repairs made to a heating system after suit brought** on an open account begun to recover for the cost of installing the system are proper items of recoupment and may be added by amendment. Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260.

77. Caples *v.* Morgan, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760.

[a] **Where defendant pleads damages in excess** of plaintiff's claim, he may amend his pleading so as to claim recoupment only against the amount demanded by plaintiff. Caples *v.* Morgan, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760.

78. **N. M.**—Candelaria *v.* Miera, 18 N. M. 107, 134 Pac. 829. **N. Y.**—Mayer *v.* Monzo, 151 App Div. 866, 137 N. Y. Supp. 616. **Wis.**—Stowell *v.* Eldred, 39 Wis. 614.

See the title **"New Cause of Action or Defense."**

IX. REPLICATION OR REPLY. — A. NECESSITY FOR. — **1. In General.** — Under the practice of some jurisdictions, no reply or replication is required to an answer,[79] or to a set-off or counterclaim set up in the answer.[80] Its allegations are deemed denied,[81] and the plaintiff may not only introduce evidence in denial of such allegations,[82] but may also prove affirmative matter as a defense to the offset.[83] The statutes in other jurisdictions require a reply to matter pleaded by way of counterclaim or set-off if the plaintiff wishes to controvert the same,[84] provided, in some states, the matter is pleaded[85] as a counter-

[a] **Amendment of counterclaim from tort to contract,** not permitted. Braithwaite *v.* Aiken, 3 N. D. 365, 56 N. W. 133. But see 20 STANDARD PROC. 351, 373.

79. See the title **"Replication and Reply."**

80. L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187; Davis *v.* Rawhide Gold Mining Co., 15 Cal. App. 108, 113 Pac. 898; Parker *v.* Parrish, 18 Ga. App. 258, 89 S. E. 381.

[a] **Where under notice of set-off** the defendant may introduce evidence thereof no reply is necessary. Coulter *v.* Repplier, 15 Pa. 208; Sexton *v.* Aultman & Co., 92 Va. 20, 22 S. E. 838; Trimyer *v.* Pollard, 5 Gratt. (46 Va.) 460.

[b] **A plea in reconvention** requires no reply in Louisiana. Lamorere *v.* Avery, 32 La. Ann. 1005; Bayley *v.* Stacey, 30 La. Ann. 1210.

81. L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187; Davis *v.* Rawhide Gold Mining Co., 15 Cal. App. 108, 113 Pac. 898.

82. L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187; Parker *v.* Parrish, 18 Ga. App. 258, 89 S. E. 381.

83. L. Scatena & Co. *v.* Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187; Davis *v.* Rawhide Gold Mining Co., 15 Cal. App. 108, 113 Pac. 898.

84. **Ark.**—Heer Dry Goods Co. *v.* Shaffer, 51 Ark. 368, 11 S. W. 517. **Colo.**—Michigan Stove Co. *v.* Pueblo Hardware Co., 51 Colo. 160, 116 Pac. 340. **Ind. Ter.**—Citizens' Bank *v.* Carey, 2 Ind. Ter. 84, 48 S. W. 1012. **Ia.**—Clute *v.* Hazleton, 51 Iowa 355, 1 N. W. 672; Union Nat. Bank *v.* Carr, 49 Iowa 359. **Minn.**—Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112; Linn *v.* Rugg, 19 Minn. 181. **Mo.** Húber Mfg. Co. *v.* Hunter, 87 Mo. App. 50. **Mont.**—Brophy *v.* Downey, 26 Mont. 252, 67 Pac. 312; Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943. **N. J.**—Estell's Exrs. *v.* Franklin, 29 N. J. L. 264. **N. Y.**—Fulton County Gas & Elec. Co. *v.* Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052; Lemon *v.* Trull, 13 How. Pr. 248; Van de Sande *v.* Hall, 13 How. Pr. 458; Klein *v.* Newelt, 168 N. Y. Supp. 625; H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707. **N. C.**—Hatcher *v.* Dabbs, 133 N. C. 239, 45 S. E. 562; McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426; Fitzgerald *v.* Shelton, 95 N. C. 519. **N. D.**—Heebner *v.* Shepard, 5 N. D. 56, 63 N. W. 892; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328. **R. I.** Hall *v.* Greene, 24 R. I. 286, 52 Atl. 1087. **S. D.**—Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784. **Utah.** Tate *v.* Rose, 35 Utah 229, 99 Pac. 1003. **Wis.**—Resch *v.* Senn, 31 Wis. 138; Jarvis *v.* Peck, 19 Wis. 74.

[a] **Time To Reply.** — The reply should be filed within the time specified by statute. Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784.

[b] **A reply after the expiration of the statutory time** for filing it, may be permitted by the court within its sound discretion and such discretion will not be disturbed unless clearly abused. Hallam *v.* Henkin, 31 S. D. 637, 141 N. W. 784.

85. Broughton *v.* Sherman, 21 Minn. 431; Ortiz *v.* Cornell, 116 N. Y. Supp. 89.

[a] **Where allegations may constitute both a defense and a counterclaim,** and they are in the answer by express nomination pleaded as a defense only, they must be treated as such, and not as a counterclaim at least where the question turns upon the want of a reply. Ortiz *v.* Cornell, 116 N. Y. Supp. 89. See also Acer *v.* Hotchkiss, 97 N. Y. 395; Equitable Life Assur. Soc. *v.* Cuyler, 75 N. Y. 511; Gilsey

claim and properly designated as such.[86]

In Justice's Court. — The necessity of replying to a cross-demand in a justice's court is treated elsewhere in this work.[87]

2. Where Denial and Counterclaim Raise Same Issues. — Where the issue tendered by the counterclaim is practically the same as that raised by the denial in the answer, no reply to the counterclaim is necessary.[88]

B. EFFECT OF FAILURE TO REPLY. — Where plaintiff is required to reply to matter alleged by defendant as a set-off or counterclaim, his failure to do so admits the allegations of the cross-demand,[89] and entitles the defendant to judgment.[90] But the defendant is not entitled to judgment on his counterclaim because no reply is served where the laws of the jurisdiction do not call for a reply,[91] or where under the circumstances a reply is not necessary,[92] as for example where the counterclaim is not properly designated as such,[93] or where the matter which has been set up as a counterclaim is in legal effect not a counterclaim.[94]

v. Keen, 104 App. Div. 427, 93 N. Y. Supp. 783.

[b] **No Affirmative Relief Prayed.** "Although the defendant pleads 'for a . . . distinct defense . . . and as a counterclaim,' no demand for affirmative relief is prayed. This will relieve the plaintiff from the necessity of replying." Leibovitz *v.* Utopia Land Co., 107 N. Y. Supp. 135. See also Acer *v.* Hotchkiss, 97 N. Y. 395.

86. American Guild *v.* Damon, 186 N. Y. 360, 78 N. E. 1081; Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647; Young *v.* Stillwater Crushed Stone Co., 153 App. Div. 453, 138 N. Y. Supp. 539; Deering *v.* New York, 51 App. Div. 402, 64 N. Y. Supp. 606. But see McCrea *v.* Hopper, 165 N. Y. 633, 59 N. E. 1125.

Necessity of designating counterclaim, see *supra,* VIII, E.

87. See 18 STANDARD PROC. 42.

88. Wade *v.* Strever, 166 N. Y. 251, 59 N. E. 825; Klein *v.* Newelt, 168 N. Y. Supp. 625.

[a] **The procedure in such case** is to first try the issue joined by the complaint and the answer, and, in so far as that issue is the same as the issue tendered by the counterclaim, no reply to the counterclaim is necessary. Wade *v.* Strever, 166 N. Y. 251, 59 N. E. 825; Klein *v.* Newelt, 168 N. Y. Supp. 625.

89. Ia.—Union Nat. Bank *v.* Carr, 49 Iowa 359; Innes & Co. *v.* Krysher, 9 Iowa 295. **Ky.**—Taylor *v.* Stowell, 4 Metc. 175. **Minn.**—Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112. **Mo.**—Gunn's Admr. *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231. **N. Y.**—Lemon *v.* Trull, 13 How. Pr. 248. See Young *v.* Stillwater Crushed Stone Co., 153 App. Div. 453, 138 N. Y. Supp. 539. **N. C.**—Davison *v.* West Oxford Land Co., 121 N. C. 146, 28 S. E. 266. **Wis.** Resch *v.* Senn, 31 Wis. 138; Moyer *v.* Gunn, 12 Wis. 385.

90. H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707. See cases in preceding note.

91. See *supra,* IX, A, 1.

92. Klein *v.* Newelt, 168 N. Y. Supp. 625.

93. American Guild *v.* Damon, 186 N. Y. 360, 78 N. E. 1081; Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647; Young *v.* Stillwater Crushed Stone Co., 153 App. Div. 453, 138 N. Y. Supp. 539. But see McCrea *v.* Hopper, 165 N. Y. 633, 59 N. E. 1125.

[a] "**Such a rule is essential** to protect the plaintiff from being misled by an answer, and to prevent the snare of a counterclaim lurking under the cover of a supposed defense, unconsciously admitted by a failure to reply." Acer *v.* Hotchkiss, 97 N. Y. 395, 408.

94. Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350; McKenzie *v.* Farrell, 4 Bosw. (N. Y.) 192; McGee *v.* Felter, 75 Misc. 349, 135 N. Y. Supp. 267.

C. WAIVER BY REPLY. — A failure to properly designate a counterclaim, such as required by statute, is waived by treating it as a counterclaim and replying thereto.[95]

D. PLEADING CROSS-DEMAND IN REPLY. — As elsewhere shown, a cross-demand may in a proper case be included in the replication or reply,[95a] where it does not amount to a departure.[95b]

X. EFFECT AND CONSEQUENCES OF PLEADING. — A. IN GENERAL. — When a cross-demand is interposed by the defendant there are in effect two causes before the court for trial in the same suit.[96] Both parties are in some sense plaintiffs and both defendants.[97] Each party claims affirmative relief against the other.[98] The plaintiff asks for judgment against the defendant for the cause of action stated in the complaint and the defendants ask for judgment against the plaintiff for the cause of action stated in the cross-demand.[99] If both causes of action are established, the one is allowed to cancel the other, and judgment is only rendered against one or the other of the parties to the extent that one demand, as established by the judgment of the court exceeds the other.[1] An affidavit of defense setting up a cross-demand is taken most strongly against the defendant,[2] for it is to be presumed that he has made it as favorable to himself as his conscience would allow.[3]

B. ADMISSIONS BY. — In pleading a set-off or counterclaim defendant does not controvert the existence of plaintiff's cause of action against him, but, except as otherwise provided by statute,[4] admits it[5] and sets up a cause of action in himself to extinguish it in whole or in part and to entitle him to an affirmative judgment for any excess.[6]

XI. TRIAL. — A. IN GENERAL. — Where a cross-demand is interposed it involves in effect the trial of two suits at the same time.[7] In other respects the trial proceeds as in other cases,[8] and the general rules governing them in respect to a jury,[9] reference,[10] issues, [11] vari-

95. Lehman *v.* Cores-Martinez Co., 171 App. Div. 852, 157 N. Y. Supp. 647.

95a. See 22 STANDARD PROC. 964.

95b. See 7 STANDARD PROC. 139.

96. Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310.

97. Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310.

98. Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310.

99. Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310.

1. Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310.

2. Baker *v.* Tustin, 245 Pa. 499, 91 Atl. 891.

3. Baker *v.* Tustin, 245 Pa. 499, 91 Atl. 891.

4. Trainor *v.* Wouman, 34 Minn. 237, 25 N. W. 401.

5. **Ill.**—Smith *v.* Bellrose, 200 Ill. App. 368; Raymond *v.* Kerker, 81 Ill. 381. **Mich.**—McHardy *v.* Wadsworth, 8 Mich. 349. **Mo.**—Jones *v.* Moore, 42 Mo. 413; Holzbauer *v.* Heine, 37 Mo. 443. **N. Y.**—Vassear *v.* Livingston, 13 N. Y. 248. **Ore.**—Dove *v.* Hayden, 5 Ore. 500.

6. See *infra*, XII, A.

7. See *supra*, I, A.

8. See the title "**Trial.**"

9. See the title "**Juries and Jurors.**"[2]

10. See the title "**References.**"

11. See 14 STANDARD PROC. 520, and the title "**Variance and Failure of Proof.**"

[a] **Where the cause of action set out in the complaint is admitted** by the counterclaim, the issue raised by the reply to the counterclaim is the sole subject of litigation. H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707.

ance,[12] province of court and jury,[13] instructions,[14] and verdict[15] apply.

B. Separate Trials. — Under the code provision authorizing the court to order one or more issues to be separately tried prior to the trial of other issues in the case,[16] a defendant, in an action at law, is entitled to a separate trial of an equitable counterclaim which he interposes.[17] Where defendant's counterclaim is for an amount in excess of that admitted to be due the plaintiff, the court has no power to order a severance of the original action and the counterclaim and proceed with the former.[18]

C. Burden of Proof. — As heretofore stated,[19] defendant setting up a cross-demand is in respect thereto virtually a plaintiff. He has, in consequence, the burden of proving such cross-demand.[20]

[b] **The pleading of a counterclaim without directly denying** the allegations of the complaint is sufficient to tender an issue upon the question whether the plaintiff is entitled to a judgment for the full amount of the claim or any part thereof upon which he has sued. Calara Valley Realty Co. *v.* Smith, 29 Cal. App. 589, 156 Pac. 369.

As to admitting plaintiff's cause of action, see *supra,* VIII, G.

12. Story *v.* Kemp, 55 Ga. 276. See the title **"Variance and Failure of Proof."**

[a] **A variance** between the allegation and the proof will be as fatal in a plea of set-off as in a declaration. Suhs *v.* Homewood Rice Land Syndicate, 128 Ark. 19, 193 S. W. 271; Rotan *v.* Nichols, 22 Ark. 244.

13. See the title **"Province of Judge and Jury."**

14. See the title **"Instructions."**

15. See the title **"Verdict."**

16. See the title **"Separate Trials."**

17. Johnson *v.* Johnson, 157 App. Div. 289, 142 N. Y. Supp. 416.

18. H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707.

[a] **The rule was applied in a suit** to recover money paid under a judgment, and which the court upon reversal had ordered repaid. Defendant in such suit admitted the cause of action, and pleaded a counterclaim in excess thereof, growing out of the same transaction. It was held that the court had no power to sever the original cause of action from that pleaded in the counterclaim, direct judgment for plaintiff for the amount claimed, and stay the prosecution of defendant's counterclaim until the defendant complied with the order of restitution. H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707.

19. See *supra,* VII, C, 1.

20. **Ala.**—Moore *v.* Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798; Krou *v.* Verkentoren, 90 Ala. 113, 7 So. 428. **Colo.**—Cooper *v.* Perry, 16 Colo. 436, 27 Pac. 946. **Conn.**—Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; New Haven Pipe Co. *v.* Work, 44 Conn. 230. **Del.**—Edge Moor Iron Co. *v.* Brown Hoisting Mach. Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858. **Ga.**—Block *v.* Happ, 144 Ga. 145, 86 S. E. 316; Falkner *v.* Behr, 75 Ga. 671; Wilson & Co. *v.* Walker, 46 Ga. 319. **Ill.**—Osgood *v.* Groseclose, 159 Ill. 511, 42 N. E. 886; Harber Bros. Co. *v.* Moffat Cycle Co., 151 Ill. 84, 37 N. E. 676; Kelly *v.* Garrett, 6 Ill. 649. **Ind.**—Henry *v.* Adams, 126 Ind. 495, 26 N. E. 186; Claflin *v.* Dawson, 58 Ind. 408; King *v.* Conn, 25 Ind. 425. **Ia.**—Callender *v.* Drabelle, 73 Iowa 317, 35 N. W. 240; Shannon *v.* Pearson, 10 Iowa 588. **Me.**—Bangs *v.* Waterville & F. Ry., etc. Co., 92 Me. 559, 43 Atl. 507. **Mass.**—Lovell *v.* Nelson, 11 Allen 101, 87 Am. Dec. 706; Dorr *v.* Fisher, 1 Cush. 271. **Mich.**—Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272; Mitchell *v.* Wells, 54 Mich. 127, 19 N. W. 777. **Minn.**—Wilson *v.* Fairchild, 45 Minn. 203, 47 N. W. 642. **Mo.**—Branson *v.* Turner, 77 Mo. 489. **Mont.**—Coquard *v.* Weinstein, 16 Mont. 312, 40 Pac. 696. **Neb.**—Ashland Land & L. S. Co. *v.* May, 51 Neb. 474, 71 N. W. 67. **Nev.**—Margaroli *v.* Milligan, 11 Nev. 96. **N. H.**—Varney *v.* Brewster, 14 N. H. 49. **N. C.**—Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695. **R. I.**—King & Sons *v.* Quidnick Co., 14 R. I. 131. **Wis.**—Hildebrand *v.* American Fine Art Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826.

XII. JUDGMENT. — A. In General. — **1. Recoupment.** — At common law a defendant could not under any circumstances recover an affirmative judgment against the plaintiff for anything other than costs,[21] and this strict rule was enforced regardless of whether the damages sought to be recovered by defendant were liquidated or unliquidated.[22] Defendant could use his cross-demand only to the extent of plaintiff's claim,[23] and could recover to the full extent of his claim only by an independent action,[24] for if he used it as a cross-demand he had to sustain a loss of the excess.[25] In recoupment, therefore, in so far as it remains unchanged by statute,[26] the defendant may show damages equal to some part or the whole of plaintiff's claim and have them deducted from that claim,[27] but cannot recover an affirmative judgment against the plaintiff.[28] Statutes in some jurisdictions, how-

[a] **That mutuality exists,** is for defendant to show. Lovell *v.* Nelson, 11 Allen (Mass.) 101, 87 Am. Dec. 706; Smith *v.* Ewer, 22 Pa. 116, 60 Am. Dec. 73.

21. See Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

[a] **"The unwillingness of the clerks of the chancery** to let two suits be tried for the price of one writ may have played its part. A defendant sued upon a contract was always at liberty to show, if he could, that the plaintiff had himself broken it. The damages which the defendant might prove he had suffered by reason of the plaintiff's breach could, however, be used only for the purpose of barring, reducing, discounting, or recouping what the plaintiff would have otherwise been entitled to recover. It made no difference whether the damages which the defendant so set up were liquidated or unliquidated." Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 456, 107 C. C. A. 524.

22. See Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

23. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376.

24. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376.

25. See State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376.

26. See *supra*, I, C.

27. **Ill.**—Holslag *v.* Morse, 188 Ill. App. 607. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1. **W. Va.**—Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

28. **U. S.**—Mason Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. ed. 1072. **Del.**—Edge Moor Iron Co. *v.* Brown Hoisting Machine Co., 6 Penne. 10, 62 Atl. 1054, 4 L. R. A. (N. S.) 858. **Ill.** Waterman *v.* Clark, 76 Ill. 428; Streeter *v.* Streeter, 43 Ill. 155; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Stow *v.* Yarwood, 14 Ill. 424; Holslag *v.* Morse, 188 Ill. App. 607; Bostrom *v.* Becker, 172 Ill. App. 410; Andrews Heating Co. *v.* Abbott, 143 Ill. App. 526. **Ind.**—Holcraft *v.* Mellott, 57 Ind. 539. **Md.**—Impervious Products Co. *v.* Gray, 127 Md. 64, 96 Atl. 1; Eureka Fertilizer Co. *v.* Baltimore C. S. & R. Co., 78 Md. 179, 27 Atl. 1035; Harman *v.* Bannon, 71 Md. 428, 18 Atl. 862; Applegarth *v.* Robertson, 65 Md. 493, 4 Atl. 896; Beall *v.* Pearre, 12 Md. 550. **Mich.** — McHardy *v.* Wadsworth, 8 Mich. 349. **Miss.**—Fowler *v.* Payne, 52 Miss. 210; Myers *v.* Estell, 47 Miss. 4. **N. H.**—Johnson *v.* White Mountain Creamery Assn., 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610. **N. Y.**—Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Sickels *v.* Pattison, 14 Wend. 257, 28 Am. Dec. 527. **Pa.**—Hunt *v.* Gilmore, 59 Pa. 450. **W. Va.**—Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161; Case Manufacturing Co. *v.* Sweeny, 47 W. Va. 638, 35 S. E. 853; Clark's Cove Guano Co. *v.* Appling, 33 W. Va. 470, 10 S. E. 809. **Wis.**—Schweickhart *v.* Stuewe, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

But see Johnson *v.* White Mt. Creamery Assn., 68 N. H. 437, 36 Atl. 13,

ever, permit a judgment in recoupment for any excess in favor of the defendant.[29]

2. **Set-Off.** — The English statutes of set-off did not permit an affirmative recovery against the plaintiff.[30] Under the statutes in this country, defendant may in set-off liquidate the whole or part of plaintiff's claim, and also have judgment for whatever excess he proves over plaintiff's demand.[31]

3. **Counterclaim.** — Where an established counterclaim is less than plaintiff's demand, the plaintiff has judgment for the residue only,[32] if it equals the plaintiff's claim, the judgment must be for the defendant,[33] and in case it exceeds what is claimed by the plaintiff, the defendant has judgment for the excess.[34]

B. WHERE CROSS-DEMAND USED DEFENSIVELY ONLY. — An affirmative judgment is not recoverable by defendant upon his cross-demand,

73 Am. St. Rep. 610.

[a] **In a suit to foreclose a mechanic's lien** brought by a contractor, the defendant cannot recover an affirmative judgment. Equity follows the law in this respect. Bostrom *v.* Becker, 172 Ill. App. 410.

29. **Ala.**—J. C. Lysle Milling Co. *v.* North Alabama Grocery Co., 77 So. 748; Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59; Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692. **Ga.**—Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811. **Va.**—Leterman *v.* Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281.

[a] **The purpose of section 3299 of the code of Virginia** is "to give precisely the same measure of relief on a plea filed under the same as could be obtained in an independent action brought for the same cause." Leterman *v.* Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281. See also Tyson *v.* Williamson, 96 Va. 636, 32 S. E. 42; Mangus *v.* McClelland, 93 Va. 786, 22 S. E. 364; Columbia Accident Assn. *v.* Rockey, 93 Va. 678, 25 S. E. 1009; American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466.

30. See *infra*, this note.

[a] **Under English Statutes.** — Under the Act of 2 George II, c. 22, as amended by Act of 8 George II, c. 24, the plaintiff took judgment for the difference where the debt due the defendant was less than the debt due the plaintiff. But if the plaintiff owed the defendant as much or more money than the defendant owed the plaintiff, the defendant was given judgment for costs. In no case could the defendant recover an affirmative judgment against the plaintiff. Hennell *v.* Fairlamb, 3 Esp. (Eng.) 104. See also Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

31. Bostrom *v.* Becker, 172 Ill. App. 410; McGuire *v.* Bransfield, 147 Ill. App. 541; Lloyd *v.* Manufacturers', etc. Co., 102 Ill. App. 551; Scudder-Gale Grocer Co. *v.* Russell, 65 Ill. App. 281; Weaver *v.* Penny, 17 Ill. App. 628; Kingman *v.* Draper, 14 Ill. App. 577; Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

32. Michigan Stove Co. *v.* Pueblo Hdw. Co., 51 Colo. 160, 116 Pac. 340; Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Straschitz *v.* Ungar, 153 N. Y. Supp. 118.

33. Seibert *v.* Dunn, 216 N. Y. 237, 110 N. E. 447; Laska *v.* Harris, 215 N. Y. 554, 109 N. E. 599.

34. **Ark.**—State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. **Ind.**—Shore *v.* Ogden, 55 Ind. App. 394, 103 N. E. 852. **Kan.**—Hodge *v.* Bishop, 96 Kan. 419, 151 Pac. 1105. **Minn.**—Townsend *v.* Minneapolis Cold-Storage F. Co., 46 Minn. 121, 48 N. W. 682; Harlan *v.* St. Paul, etc. Ry. Co., 31 Minn. 427, 18 N. W. 147; Smith *v.* Dukes, 5 Minn. 373. **Mo.**—Gordon *v.* Bruner, 49 Mo. 570; Hay *v.* Short, 49 Mo. 139. **N. Y.** A. D. Kneuper Specialty Co. *v.* Kneuper, 171 App. Div. 555, 157 N. Y. Supp. 395. **N. C.**—General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288.

[a] **In replevin** an affirmative personal judgment may be rendered on a counterclaim. Shore *v.* Ogden, 55 Ind.

in cases where it can be interposed defensively only,[35] as for example, where it consists of a claim against the assignor and is asserted against the assignee,[36] or where the cross-demand is against the state,[37] or the federal government,[38] or in certain jurisdictions where it is for unliquidated damages,[39] or based on an outlawed claim,[40] even though it was not outlawed when the action was begun.[41]

C. In Courts of Limited Jurisdiction. — Though a set-off or counterclaim may, in a particular jurisdiction, be interposed for an amount in excess of the jurisdictional amount of such court, the judgment that can be rendered thereon is limited to such jurisdictional amount.[42]

D. Costs. — 1. In General. — a. *General Rules as to Costs Applicable.* — The general principles governing the allowance and taxation of costs[43] are not affected in any material sense by the interposition of a set-off, counterclaim or recoupment. The rule still obtains that costs should be awarded the prevailing party[44] or the party, in other words, in whose favor the final judgment goes.[45]

App. 394, 103 N. E. 852.

35. **U. S.**—Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524. **Ark.**—State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. **Ind.**—Johnson *v.* Collins, 1 Blackf. 166. **Kan.**—Norton *v.* Foster, 12 Kan. 44. **Me.** — Robinson *v.* Perry, 73 Me. 168. **Md.**—Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811. **Mich.**—Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. 872. **Minn.**—Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82. **N. Y.** Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537; Brown *v.* Coleman, 55 Hun 501, 8 N. Y. Supp. 808, 30 N. Y. St. 347; Kast *v.* Kathern, 3 Denio 344. **Tenn.**—McKenzie *v.* Shaffner, 8 Baxt. 408.

36. Czerney *v.* Haas, 144 App. Div. 430, 129 N. Y. Supp. 537.

37. State *v.* Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376; People *v.* Dennison, 84 N. Y. 272; People *v.* Denison, 59 How. Pr. 157, 8 Abb. N. C. 128.

Right to cross-demand against state or federal government, see *supra,* VII, D, 4.

38. Schaumburg *v.* United States, 103 U. S. 667, 26 L. ed. 599; Reeside *v.* Walker, 11 How. 272, 13 L. ed. 693; United States *v.* Eckford, 6 Wall. 484, 18 L. ed. 920, 3 Ct. Cl. 454, 7 Ct. Cl. 18; De Groot *v.* United States, 5 Wall. 419, 18 L. ed. 700, 2 Ct. Cl. 539, 7 Ct. Cl. 2.

39. Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

[a] **Whether they grow out of the same contract** or transaction upon which plaintiff sues or a different one. Norwood Paper Co. *v.* Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524.

40. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

Right to assert outlawed cross-demand, see *supra,* VII, C, 6, d, (II).

41. Shaw *v.* Faires (Tex. Civ. App.), 165 S. W. 501.

42. Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566.

[a] **The municipal court's jurisdiction** is limited to $1000 and no counterclaim therein rendered can exceed that sum, though a counterclaim in excess thereof may be pleaded. Security Mortgage Co. *v.* Kallis, 102 Misc. 693, 169 N. Y. Supp. 566.

43. See the title "**Costs.**"

44. **Ky.**—Shannon *v.* Stratton & Terstegge, 144 Ky. 26, 137 S. W. 850. **Minn.**—Ballard Transfer & Storage Co. *v.* St. Paul City R. Co., 129 Minn. 494, 152 N. W. 868. **N. Y.**—Peck *v.* Haverstraw Water Supply Co., 142 N. Y. Supp. 765; Rohrs *v.* Rohrs, 130 N. Y. Supp. 1093. **Pa.**—McCornack *v.* Sharples, 254 Pa. 541, 99 Atl. 155.

45. **N. Y.**—Thayer *v.* Holland, 63 How. Pr. 179, 11 Daly 187. **N. C.** Smith *v.* Old Dominion Building & Loan Assn., 119 N. C. 249, 26 S. E. 41. **Ohio.**—Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512. **Tex.**—Mas-

In equity the award of costs is discretionary with the court,[46] but they are usually allowed the successful party.[47]

b. *When Plaintiff Entitled to Costs.* — The plaintiff is in general entitled to costs where he succeeds in his action,[48] though his demand or claim may be reduced by defendant's established cross-demand,[49] unless in this latter case the statute allows the costs to be apportioned.[50] Where he is thus successful in recovering part of his demand he is given costs notwithstanding the cross-demand has reduced his judgment below the limit fixed by statute for the recovery of costs,[51] or below the court's jurisdictional amount.[52]

c. *When Costs Awarded to Defendant.* — The defendant is the prevailing party within the rule as to costs where his established offset

terson *v.* F. W. Heitman & Co., 38 Tex. Civ. App. 476, 87 S. W. 227.

[a] **The statute provides** that whenever a counterclaim is pleaded the party in whose favor judgment is rendered shall recover costs. Rev. St. 1895, art. 753. See Masterson *v.* F. W. Heitmann & Co., 38 Tex. Civ. App. 476, 87 S. W. 227.

46. **Ky.**—Blair *v.* Fraley, 172 Ky. 570, 189 S. W. 886. **N. Y.**—Cottle *v.* New York, W. S. & B. R. Co., 27 App. Div. 604, 50 N. Y. Supp. 1008. **Wis.**—Brustman *v.* Dunn, 161 Wis. 306, 154 N. W. 361.

See 5 STANDARD PROC. 808, 810.

[a] **Though judgment is rendered for plaintiff** in a foreclosure suit, for the balance after deducting the amount of defendant's counterclaim for damages for fraud, the court did not abuse its discretion in denying costs to plaintiff. Brustman *v.* Dunn, 161 Wis. 306, 154 N. W. 361.

47. McCornack *v.* Sharples, 254 Pa. 541, 99 Atl. 155.

48. **Ind.**—Fuller *v.* Curtis, 100 Ind. 237, 50 Am. Rep. 786; Higman *v.* Brown, 3 Ind. 430. **Ky.**—Shannon *v.* Stratton & Terstegge, 144 Ky. 26, 137 S. W. 850; Mori *v.* Howard, 143 Ky. 480, 136 S. W. 904. **Mass.**—Gilman *v.* Burgess, 12 Mass. 206; Loud *v.* Hobart, 2 Cush. 325. **Mich.**—French *v.* Engle, 78 Mich. 216, 44 N. W. 320; Ladd *v.* Duncan, 23 Mich. 285. **N. Y.**—Peck *v.* Haverstraw Water Supply Co., 142 N. Y. Supp. 765.

[a] **Where plaintiff sues to recover property and for damages,** and is awarded recovery of the property but his claim for damages is equalized by what defendant is allowed on his counterclaim, the plaintiff is entitled to costs, since in such case the counterclaim established by the defendant does not equal plaintiff's demand, which was not only for damages but for the recovery and possession of property. Peck *v.* Haverstraw Water Supply Co., 142 N. Y. Supp. 765.

49. **Ky.**—Shannon *v.* Stratton & Terstegge, 144 Ky. 26, 137 S. W. 850; Mori *v.* Howard, 143 Ky. 480, 136 S. W. 904. **N. Y.**—Peck *v.* Haverstraw Water Supply Co., 142 N. Y. Supp. 765. **Ohio.**—Beaton *v.* Radford, 40 Ohio St. 106. **Tex.**—Masterson *v.* F. W. Heitmann & Co., 38 Tex. Civ. App. 476, 87 S. W. 227; Downey *v.* Hatter (Tex. Civ. App.), 48 S. W. 32.

50. White *v.* Ledbetter, 104 Iowa 71, 73 N. W. 610.

[a] **Equitable Apportionment.** Where defendant succeeds in his counterclaim but fails on other issues and the amount of plaintiff's recovery is reduced to the extent of the counterclaim, the costs may be apportioned equitably. Thus in such case it is proper to tax each party with one-half the costs. White *v.* Ledbetter, 104 Iowa 71, 73 N. W. 610.

51. **Ind.**—Fuller *v.* Curtis, 100 Ind. 237, 50 Am. Rep. 786. **Me.**—Hathorne *v.* Cate, 5 Greenl. 74. **Mass.**—Gilman *v.* Burgess, 12 Mass. 206; Barnard *v.* Curtis, 8 Mass. 535. **N. H.**—Bryant *v.* Bowen, 40 N. H. 157. **Ore.**—Rayburn *v.* Hurd, 19 Ore. 59, 23 Pac. 669; Mason *v.* Riner, 18 Ore. 153, 22 Pac. 532. **Pa.**—Grant *v.* Wallace, 16 Serg. & R. 253. **Tex.**—Heatherly *v.* Record, 12 Tex. 49; Cochran *v.* Kellum, 4 Tex. 120.

But see **Me.**—Foster *v.* Ordway, 26 Me. 322. **Neb.**—Moore *v.* Darrow, 11 Neb. 462, 9 N. W. 637. **Ohio.**—Butler *v.* Kneeland, 23 Ohio St. 196.

52. Odell *v.* Culbert, 9 Watts & S.

equals[53] or exceeds[54] the plaintiff's demand, though the plaintiff conclusively proves his cause of action.[55] And where the plaintiff fails to establish his right to recovery, the defendant is properly awarded costs, though he does not prove his cross-demand.[56]

2. Costs of Proving or Defeating Cross-Demand. — Where disbursements necessarily paid or incurred are allowed the prevailing party, defendant who is given judgment, recovers costs incurred in proving his set-off or counterclaim,[57] although no damages are awarded

(Pa.) 66, 42 Am. Dec. 317. See 5 STANDARD PROC 890.

53. **Ky.**—Shannon *v.* Stratton & Terstegge, 144 Ky. 26, 137 S. W. 850. **N. Y.**—Thayer *v.* Holland, 63 How. Pr. 179, 11 Daly 187; Church *v.* Miller, 46 How. Pr. 525, 2 Thomp. & C. 583; Peck *v.* Haverstraw Water Supply Co., 142 N. Y. Supp. 765. **W. Va.**—Monongahela Tie & Lumber Co. *v.* Flannigan, 77 W. Va. 162, 87 S. E. 161.

[a] **A defendant who defeats an action by a cross-demand** is as much entitled to costs as though he defeated it by any other defense. Lykins *v.* Hamrick, 144 Ky. 80, 137 S. W. 852.

[b] **If plaintiff obtains nothing** because of defendant's counterclaim or set-off, he is not regarded as the prevailing party and is not entitled to costs. Ballard Transfer & Storage Co. *v.* St. Paul City R. Co., 129 Minn. 494, 152 N. W. 868.

54. **Cal.**—Davis *v.* Hurgren, 125 Cal. 48, 57 Pac. 684. **Conn.**—Burr *v.* Ellis, 91 Conn. 657, 101 Atl. 17. **Kan.**—Perley *v.* Taylor, 21 Kan. 712. **Nev.** Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. **N. Y.**—Thayer *v.* Holland, 63 How. Pr. 179, 11 Daly 187. **N. C.** Smith *v.* Old Dominion Building & Loan Assn., 119 N. C. 249, 26 S. E. 41. **Ohio.** Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512. **Ore.**—Roberts *v.* Carland, 1 Ore. 332. **Pa.**—McCornack *v.* Sharples, 254 Pa. 541, 99 Atl. 155. **S. C.**—Holley *v.* Rabb, 12 Rich. L. 185. **Tex.**—McCormick Harvesting Mach. Co. *v.* Gilkey (Tex. Civ. App.), 23 S. W. 325. *Compare* Hall *v.* Hodge, 2 Tex. 323, statute allowing costs to plaintiff though defendant recovers excess of his claim over plaintiff's.

[a] **Counterclaim Interposed on Appeal From Justice's Court.**—When in an action for the recovery of money only, commenced in a justice's court, the plaintiff recovers a judgment in that court, and the defendant appeals the case to the court of common pleas, and there sets out in his answer, by way of counterclaim a note which was not due at the time of the trial in the justice's court, and upon trial in the court of common pleas there is a finding in his favor on the note, and for the plaintiff for a less amount on his cause of action, the defendant is entitled to a judgment in his favor for the difference and for all of his costs, in both courts. Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512.

55. Thayer *v.* Holland, 63 How. Pr. 179, 11 Daly (N. Y.) 187.

56. Benson *v.* Braun, 134 Cal. 41, 66 Pac. 1; Whitelegge *v.* De Witt, 12 Daly (N. Y.) 319.

[a] **Where one of two defendants counterclaimed** and plaintiff recovered against the other defendant only, a judgment against both defendants for costs is erroneous. Though the defendant interposing the counterclaim failed to establish it, he is not liable for costs where no recovery is had against him. Benson *v.* Braun, 134 Cal. 41, 66 Pac. 1.

57. Ballard Transfer & Storage Co. *v.* St. Paul City R. Co., 129 Minn. 494, 152 N. W. 868. See also Judd & Co. *v.* Day Bros., 50 Iowa 247; Hall *v.* Clayton, 42 Iowa 526.

[a] **Fees of two witnesses** for defendant, whose testimony went wholly to prove defendant's counterclaim and not in refutation of plaintiff's claim, were properly allowed defendant in whose favor verdict was rendered. Ballard Transfer & Storage Co. *v.* St. Paul City R. Co., 129 Minn. 494, 152 N. W. 868.

[b] **Costs of Defending Against Cross-Demand.**—Where judgment is in defendant's favor the burden of paying costs should be borne by the plaintiff, though the costs were nearly all incurred in defending against the cross-demand. Benson *v.* Braun, 134

on the counterclaim.[58] On the other hand, where plaintiff prevails in his suit, he is adjudged the costs,[59] even though most of the costs of the case are incurred in the trial of defendant's cross-demand upon which defendant is successful.[60]

3. Where Cross-Demand Affects Costs by Enlarging the Demand. Under certain statutory or charter provisions, the filing of a set-off or counterclaim may have a bearing on the amount of costs awarded in that the claim or demand alleged is enlarged by such cross-demand.[61]

4. Effect of Failure To Use Cross-Demand. — It is provided sometimes by statute that where a defendant has a claim that he can use as a set-off against the demand of the plaintiff, and fails to do so, he shall not be allowed to recover costs in any suit which he may afterwards bring on such claim,[62] but the section has no application to a demand which could not be used as a set-off in the former action,[63] such as a demand for unliquidated damages.[64]

XIII. DEFEATING EXEMPTION BY CROSS-DEMAND. — The constitutional or statutory privilege of a debtor to hold a certain amount of property exempt[65] cannot, in some states, be impaired or defeated through the instrumentality of an independent set-off or counterclaim,[66] and the reason given is that to allow such an offset

Cal. 41, 66 Pac. 1.

58. Ballard Transfer & Storage Co. *v.* St. Paul City R. Co., 129 Minn. 494, 152 N. W. 868.

59. See *supra*, XII, D, 1, b.

60. Shannon *v.* Stratton & Terstegge, 144 Ky. 26, 137 S. W. 850.

61. Burr *v.* Ellis, 91 Conn. 657, 101 Atl. 17.

[a] **Cross-Demand for More Than One Hundred Dollars in City Court.** The act creating the city court of Danbury gives its jurisdiction of cases up to $500. When the demand alleged is $100 or less, the costs are taxed, as in the justice court; when the damages or claim alleged amounts to more than $100, the costs are taxed as in the court of common pleas. Where plaintiff's action in the above city court was for less than $100 and the defendant counterclaimed a demand for more than $100, the court was justified in awarding the defendant such costs as are taxed in the court of common pleas. Burr *v.* Ellis, 91 Conn. 657, 101 Atl. 17.

62. Milner *v.* Camden Lumber Co., 74 Ark. 224, 85 S. W. 234. See Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512.

63. Milner *v.* Camden Lumber Co., 74 Ark. 224, 85 S. W. 234.

64. Milner *v.* Camden Lumber Co., 74 Ark. 224, 85 S. W. 234.

See *supra*, VII, C, 7, b, (II).

65. See the titles "**Homesteads and Exemptions;**" "**Judgments and Decrees, Enforcement of.**"

66. **Ark.**—Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114. **Ia.**—Millington *v.* Laurer, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385. **Ky.**—Mulliken *v.* Winter, 2 Duv. 256, 87 Am. Dec. 495. **Neb.**—Deering & Co. *v.* Ruffner, 32 Neb. 845, 49 N. W. 771, 29 Am. St. Rep. 473. **Nev.**—Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69. **N. C.**—Curlee *v.* Thomas, 74 N. C. 51. **Pa.**—Wilson *v.* McElroy, 32 Pa. 82; Peerless Brick Co. *v.* Philadelphia, 1 Pa. Dist. 91. **S. D.** Rindles *v.* Bordewyk, 30 S. D. 439, 139 N. W. 113; Long *v.* Collins, 15 S. D. 259, 88 N. W. 571. **Tenn.**—Collier *v.* Murphy, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698. **Tex.**—Dempsey *v.* McKennell, 2 Tex. Civ. App. 284, 23 S. W. 525.

[a] **A court of equity** will in the absence of peculiar equities follow the law and refuse to allow a set-off as against exemptions. *In re* Thall's Appeal, 119 Pa. 425, 13 Atl. 466.

[b] **Judgment Against Judgment.** (1) As against a judgment owned by a debtor and which is exempt under the law, the creditor cannot offset a judgment which he has against the debtor. **Ind.**—Junker *v.* Hustes, 113 Ind. 524, 16 N. E. 197. **Nev.**—Elder *v.*

would, in most cases, result in a palpable evasion of the exemption law[67] which was designed to protect exempt property from all manner of legal seizure.[68] Some courts, however, have refused to subordinate the right of set-off to the right of exemption from execution,[69] and where under the wording of the statute the homestead or personal property exemption can only be claimed by a defendant in execution, it cannot destroy the right of counterclaim or set-off before judgment.[70] The rule, moreover, against permitting offsets which would render nugatory the privilege of exemptions, does not prevent the application of the principle of compensation whereby mutual credits in the hands of the debtor and creditor would extinguish each other by operation of law,[71] nor can it be invoked to prevent the assertion of a valid cross-demand arising out of the contract or transaction sued on.[72]

Applications to Particular Proceedings.— If the particular property or claim of the debtor is under the exemption or homestead laws beyond the reach of attachment, garnishment, execution or other legal process, it cannot, except in the jurisdictions above mentioned, be reached by independent set-off or counterclaim asserted against the debtor in suits

Frevert, 18 Nev. 446, 5 Pac. 69. **N. C.** Curlee *v.* Thomas, 74 N. C. 51. **Pa.** Wilson *v.* McElroy, 32 Pa. 82. **S. D.** Rindles *v.* Bordewyk, 30 S. D. 439, 139 N. W. 113; Long *v.* Collins, 15 S. D. 259, 88 N. W. 571. (2) But where specific articles of property are exempt under the statute, and not their value, a judgment recovered for the value of such exempt property, converted by the judgment creditor, is not exempt and may be set-off against a judgment held by the judgment debtor against the judgment creditor in it. Temple *v.* Scott, 3 Minn. 419.

67. **Ia.**—Millington *v.* Laurer, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385. **Nev.**—Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69. **N. C.**—Curlee *v.* Thomas, 74 N. C. 51. **Pa.**—Wilson *v.* McElroy, 32 Pa. 82. **S. D.**—Rindles *v.* Bordewyk, 30 S. D. 439, 139 N. W. 113.

But see the opinion in Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494.

[a] **"To subject the plaintiff's demand to defendant's set-off** would be as much a legal seizure thereof as if a creditor had impounded it under process of garnishment on an execution or attachment. The legal effect would be the same in either case and therefore it can not be allowed." Wagner *v.* North Furniture & Carpet Co., 63 Mo. App. 206, 210.

68. Collier *v.* Murphy, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698.

[a] **The words "process of court"** as used in the constitutional provision in reference to exemptions, embrace a proceeding to set-off one judgment against another. Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114.

69. Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494; Bauer *v.* Counts, 197 Mo. App. 233, 193 S. W. 874.

[a] **Earlier Cases Overruled in Missouri.**—To the extent that they refuse to allow a set-off against debts or claims exempt from execution the decision in Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. (N. S.) 494, overrules such earlier cases to the contrary **as** Bowen *v.* Holden, 95 Mo. App. 1, 75 S. W. 686; State *v.* Hudson, 86 Mo. App. 501; Lewis *v.* Gill, 76 Mo. App. 504; Wagner *v.* North Furniture & C. Co., 63 Mo. App. 206.

70. Lynn *v.* Stanley Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877.

[a] **A counterclaim based on an independent cause of action** asserted in an action for exempt wages. Lynn *v.* Stanly Creek C. Mills, 130 N. C. 621, 41 S. E. 877.

71. See Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114; Wagner *v.* North Furniture & Carpet Co., 63 Mo. App. 206.

72. Corbally *v.* Hughes, 59 Ga. 493.

[a] **That notes sued on** are ex-

brought by him to recover possession of such exempt property,[73] or to recover for the conversion,[74] or for the purchase price[75] thereof. Nor can a creditor sued for exempt wages avail himself of a set-off which would defeat such exemption.[76]

empted does not preclude a recoupment being asserted against them. Collier *v.* Leonard, 59 Ga. 497.

73. Duff *v.* Wells, 7 Heisk. (Tenn.) 17.

[a] **To replevin** exempted property. Duff *v.* Wells, 7 Heisk. (Tenn.) 17.

74. **Ala.**—*Ex parte* Hunt, 62 Ala. 1. **Conn.**—Talbot *v.* Ellis, 32 Conn. 235. **Kan.**—Treat *v.* Wilson, 65 Kan. 729, 70 Pac. 893. **Nev.**—Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69. **Pa.**—Wilson *v.* McElroy, 32 Pa. 82. **S. C.**—Parkerson *v.* Wightman, 4 Strobh. 363. **S. D.** Rindles *v.* Bordewyk, 30 S. D. 439, 139 N. W. 113; Long *v.* Collins, 15 S. D. 259, 88 N. W. 571. **Tex.**—Craddock *v.* Goodwin, 54 Tex. 578; Stagg's Heirs *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762.

75. Mulliken *v.* Winter, 2 Duv. (Ky.) 256, 87 Am. Dec. 495.

[a] **Where the head of a family sells** a cow which under the statute is exempt the purchaser when sued for the price will not be allowed to set-off a debt which he holds against the seller. Mulliken *v.* Winter, 2 Duv. (Ky.) 256, 87 Am. Dec. 495.

76. **Neb.**—Deering & Co. *v.* Ruffner, 32 Neb. 845, 49 N. W. 771, 29 Am. St. Rep. 473. **Tenn.**—Collier *v.* Murphy, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698. **Tex.**—Dempsey *v.* McKennell, 2 Tex. Civ. App. 284, 23 S. W. 525.

But see Lynn *v.* Stanly Creek C. Mills, 130 N. C. 621, 41 S. E. 877.

[a] **An indebtedness from the employee** to the employer, which existed and was due and payable before the wages were earned, can not be set-off against them. Deering & Co. *v.* Ruffner, 32 Neb. 845, 49 N. W. 771, 29 Am. St. Rep. 473.

[b] **A judgment** cannot be set-off in an action brought by the judgment debtor for exempt wages. Collier *v.* Murphy, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698. See also Millington *v.* Laurer, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385.

[c] **The assignee of a claim for exempt wages** has the same rights as the debtor and his claim is not subject to a set-off for the amount of a judgment existing against the assignor at the time the assignment was made. Millington *v.* Laurer, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385.

SETTING ASIDE JUDGMENTS. — See **Affidavits of Merits and Defense; Bills To Impeach Judgments and Decrees; Judgments; Motions.**

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CROSS-REFERENCES:

Assumpsit;
Declaration and Complaint;
Duplicity;
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Joinder of Actions;
Money Counts;
Variance and Failure of Proof;
Verdict.

Costs on several counts, see 5 STANDARD PROC. 808.

For forms, see 9 STANDARD PROC. 436.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. SCOPE. — This article deals with counts based on the same cause of action rather than with several causes of action. The latter subject is fully treated elsewhere in this work.[1]

II. GENERAL STATEMENT. — The general rule is that the same cause of action may be stated in several counts, to meet the exigencies of proof.[2] The same rule applies to a pleading of a cause of action by way of cross-complaint.[3]

Under the Code. — It has been held, in some cases, that this practice is against the spirit of the code, and is not permitted as a general rule.[4] Furthermore, under the code rule requiring the court to disregard variances between pleading and proof which do not mislead the adverse party to his prejudice, there is not the same necessity for this mode of pleading which formerly existed.[5] But this rule is not inflexible,[6] and pleading in several counts is permissible when it becomes necessary and there is a reasonable doubt of plaintiff's ability

1. See 14 STANDARD PROC. 623.

Definition of a count, see 6 STANDARD PROC. 701.

2. **Ala.**—Alabama Great Southern R. Co. *v.* Smith, 196 Ala. 77, 71 So. 455; Andrews *v.* Flack, 88 Ala. 294, 6 So. 907. **Conn.**—Brockett *v.* Fair Haven & W. R. Co., 73 Conn. 428, 47 Atl. 763. **Ga.**—Grant *v.* Allen, 141 Ga. 106, 80 S. E. 279; Gainesville & D. Elec. R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983. **Ind.**—Batman *v.* Snoddy, 132 Ind. 480, 32 N. E. 327. **Kan.**—Edwards *v.* Hartshorn, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. (N. S.) 1050. **Md.**—Little *v.* Edwards, 69 Md. 499, 16 Atl. 134. **Mass.**—Lynn Safe Deposit & T. Co. *v.* Andrews, 180 Mass. 527, 62 N. E. 1061; Lovett *v.* Salem & S. D. R. Co., 9 Allen 557. *Compare* Overseers of the Poor of Boston *v.* Otis, 20 Pick. 38, where the court refused to permit plaintiffs to set up in a writ of right one count claiming the land involved in reliance on their own rights and another on those of their predecessors. **Mich.** Rawlinson *v.* Shaw, 117 Mich. 5, 9, 75 N. W. 138. **Mo.**—McCall *v.* Atchley, 256 Mo. 39, 164 S. W. 593; Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492; Landers *v.* Quincy, O. & K. C. R. Co., 114 Mo. App. 655, 90 S. W. 117. **N. Y.**—Vedder *v.* Leamon, 70 App. Div. 252, 75 N. Y. Supp. 413. **Okla.** Harris *v.* Warren-Smith Hdw. Co., 44 Okla. 477, 144 Pac. 1050. **Tex.**—Loftus *v.* King, 23 Tex. Civ. App. 36, 56 S. W. 109.

See 6 STANDARD PROC 706.

As to election, see *infra,* IV, B.

What may be included in a single count, see 6 STANDARD PROC. 704.

[a] **Statutes requiring an "ordinary and concise" statement of the cause of action without unnecessary repetition** do not alter this rule. Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313.

[b] **Only a single cause of action is stated** though the pleader states the facts in different ways. Williams *v.* Nelson, 45 Utah 255, 145 Pac. 39.

Assigning several breaches, see 6 STANDARD PROC. 705; 11 STANDARD PROC. 1009.

Indictments and informations—joinder of offenses in by means of separate counts, see 12 STANDARD PROC. 519, et seq.

3. Schader *v.* White, 173 Cal. 441, 160 Pac. 557.

4. Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582; Gabrielson *v.* Hague Box & Lumb. Co., 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032. See also the following cases: **Colo.**—Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486. **Conn.**—Goodrich *v.* Stanton, 71 Conn. 418, 42 Atl. 74. **Idaho.**—People *v.* Slocum, 1 Idaho 62. **Mo.**—Spurlock *v.* Missouri Pac. Ry. Co., 93 Mo. 530, 6 S. W. 349. **Wash.**—Holm *v.* Chicago, M. & P. S. R. Co., 59 Wash. 293, 109 Pac. 799.

5. Dickens *v.* New York Cent. R. Co., 13 How. Pr. (N. Y.) 228; Bishop *v.* Chicago & N. W. Ry. Co., 67 Wis. 610, 616, 31 N. W. 219.

6. Cripple Creek Min. Co. *v.* Brabant, 37 Colo. 423, 87 Pac. 794.

to safely plead in one mode only,[7] the matter being determined in the discretion of the court.[8] And according to numerous authorities a plaintiff may allege his cause of action in different forms in several counts to meet the exigencies of the proof when there are different grounds for relief, and there is some uncertainty as to which he will be able to establish at the trial.[9]

Consistency. — The several counts should differ from each other in a substantial degree,[10] and if the transaction set forth in each count is exactly the same, the pleading is bad and the surplus counts will be stricken.[11]

Illustrations. — Under the general rule, plaintiff may state his cause of action in a quantum meruit count and also in a count founded on an express contract;[12] or in a count for money had and received and

7. Cripple Creek Min. Co. *v.* Brabant, 37 Colo. 423, 87 Pac. 794. See also Willard *v.* Carrigan, 8 Ariz. 70, 74, 68 Pac. 538.

8. Blankenship *v.* Decker, 34 Mont. 292, 85 Pac. 1035.

As to necessity of election, see *infra,* IV, B.

9. **Ariz.**—Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538. **Cal.**—Tanforan *v.* Tanforan, 173 Cal. 270, 159 Pac. 709; Froeming *v.* Stockton Elec. R. Co., 171 Cal. 401, 153 Pac. 712, Ann. Cas. 1918B, 408; Estrella Vineyard Co. *v.* Butler, 125 Cal. 232, 57 Pac. 980; Wilson *v.* Smith, 61 Cal. 209; Van Lue *v.* Wahrlich Cornett Co., 12 Cal. App. 749, 108 Pac. 717. **Colo.**—Cripple Creek Min. Co. *v.* Brabant, 37 Colo. 423, 87 Pac. 794; Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313. **Idaho.**—Spotswood *v.* Morris, 10 Idaho 129, 77 Pac. 216. **Ohio.**—Murphy *v.* Quigley, 11 Ohio Cir. Dec. 638, 21 Ohio C. C. 313. **Ore.**—Harvey *v.* Southern Pac. Co., 46 Ore. 505, 80 Pac. 1061. **S. D.**—Ede *v.* Ward, 32 S. D. 351, 143 N. W. 269. **Utah.**—Williams *v.* Nelson, 45 Utah 255, 145 Pac. 39; Oberndorfer *v.* Moyer, 30 Utah 325, 84 Pac. 1102. **Wis.**—Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158; Bishop *v.* Chicago & N. W. Ry. Co., 67 Wis. 610, 31 N. W. 219.

10. Gainesville & D. Elec. R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983. See also Andrews *v.* Flack, 88 Ala. 294, 6 So 907; Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158.

[a] **Counts Need Not Be Consistent.**—See 14 STANDARD PROC. 685, note 71. Or rather, counts are not inconsistent in the legal sense, which state different grounds of liability for the same ultimate act, from which different legal reasons, dependent upon the proofs can be deduced for the liability of the defendant. Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 504, 86 Pac. 313. The counts are only inconsistent in that though a plaintiff for precautionary purposes claim the benefit of both, he can have, in the ultimate, the benefit of but one, and not that one except upon a verdict definitely and consistently finding the facts. Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158. "Inconsistency of statement between counts is merely the common-law way of providing for the exigencies of the evidence." Bouchard *v.* Central Vermont Ry. Co., 87 Vt. 399, 89 Atl. 475, L. R. A. 1915C, 33, 35.

11. Gainesville & D. Elec. R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983; Toledo W. & W. Ry. Co. *v.* Craft, 62 Ind. 390. See the title "**Striking Out and Withdrawal.**"

12. **Ariz.**—Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538. **Cal.**—Estrella Vineyard Co. *v.* Butler, 125 Cal. 232, 57 Pac. 980; Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213. **Kan.**—Wiley *v.* Locke, 81 Kan. 143, 105 Pac. 11, 24 L. R. A. (N. S.) 1117. **Okla.**—Mellon *v.* Fulton, 22 Okla. 636, 98 Pac. 911, 19 L. R. A. (N. S.) 960. **Tex.**—Jones *v.* Holtzen (Tex. Civ. App.), 141 S. W. 121; Morrison *v.* Bartlett (Tex. Civ. App.), 131 S. W. 1146; Broussard *v.* South Texas Rice Co. (Tex. Civ. App.), 120 S. W. 587. **Wash.**—Holm *v.* Chi-

in a special count;[13] or in a count upon an open account and one on an account stated.[14] Different grounds of liability may be stated.[15] So also the declaration may contain two counts, one treating the obligation as joint, and the other as several.[16]

A continuous transaction, all a part of the same cause of action, need not,[17] and should not,[18] be stated in several counts.

Negligence. — A plaintiff may set out a cause of action for damages for injuries resulting from negligence in different counts, with as many different averments of acts of negligence as he sees fit, provided they are not inconsistent.[19] And he may in one count allege an act to have been negligently done, and in another allege wilfulness.[20]

III. PLEADING. — A. GENERALLY. — A statement in the petition that the counts relate to the same cause of action is unnecessary,[21] but will not vitiate the pleading.[22]

B. SEPARATELY STATED. — Each count must be separately stated[23]

cago, M. & P. S. R. Co., 59 Wash. 293, 109 Pac. 799.

See 11 STANDARD PROC. 941.

Contra, Gabrielson *v.* Hague Box & Lumber Co., 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032.

13. Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527; Carland *v.* Western U. Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

14. Oberndorfer *v.* Moyer, 30 Utah 325, 84 Pac. 1102.

15. Luken *v.* Lake Shore & M. S. Ry. Co., 154 Ill. App. 550; Beauregard *v.* Webb Granite & Const. Co., 160 Mass. 201, 35 N. E. 555.

[a] **Breaches of common law duty and breaches of statutory duty** may and should be alleged in several counts. Creen *v.* Michigan Cent. R. Co., 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98; Bouchard *v.* Central Vermont R. Co., 87 Vt. 399, 89 Atl. 475, L. R. A. 1915C, 33.

[b] **As a warehouseman and as a carrier**, the defendant may be charged in different counts. Whitney *v.* Chicago & N. W. Ry. Co., 27 Wis. 327, 341.

16. Little *v.* Edwards, 69 Md. 499, 16 Atl. 134. *Compare* Chicago & A. R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011.

17. Grant *v.* Allen, 141 Ga. 106, 80 S. E. 279. See 6 STANDARD PROC. 704.

18. Dawson *v.* Marsh, 74 Conn. 498, 51 Atl. 529; Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125; Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

19. **Colo.**—Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 504, 86 Pac. 313. **Mich.**—Creen *v.* Michigan Cent. R. Co., 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98. **Mo.**—Austin *v.* Bluff City Shoe Co., 176 Mo. App. 546, 158 S. W. 709.

And see 20 STANDARD PROC. 311.

20. **Ala.**—Louisville & N. R. Co. *v.* Markee, 103 Ala. 160, 171, 15 So. 511, 49 Am. St. Rep. 21. **Mo.**—Waechter *v.* St. Louis & M. R. R. Co., 113 Mo. App. 270, 88 S. W. 147. **Wis.**—Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158, note.

Compare Schumpert *v.* Southern R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802 (holding under an express statute that negligence and wilfulness may be charged in a single count); Griffin *v.* Southern R. Co., 65 S. C. 122, 43 S. E. 445. See further 6 STANDARD PROC. 704.

21. Pearson *v.* Milwaukee & St. P. R. Co., 45 Iowa 497.

22. Pearson *v.* Milwaukee & St. P. R. Co., 45 Iowa 497; Massachusetts Mut. Life Ins. Co. *v.* Green, 185 Mass. 506, 70 N. E. 202.

23. **Ala.**—Friddle *v.* Braun, 180 Ala. 556, 61 So. 59. **Cal.**—White *v.* Cox, 46 Cal. 169. **Conn.**—Purdy *v.* Watts, 91 Conn. 214, 99 Atl. 496. **Ga.**—Gainesville & D. Elec. R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983; Atkinson *v.* Bullard, 14 Ga. App. 69, 80 S. E. 220. **Kan.**—Knight *v.* Dalton, 72 Kan. 131, 83 Pac. 124. **Mo.**—Darrow *v.* Briggs, 261 Mo. 244, 169 S. W. 118; Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509. **N. Y.**—Robinson *v.* Brown, 166 N. Y. 159, 59 N. E. 775;

and must proceed upon a single theory.[24]

C. Complete Within Itself. — **1. In General.** — The general rule is that each count must be sufficient and complete within itself,[25] and that defects in a second count will not be aided by averments in a preceding count.[26]

2. Aider by Reference. — In some,[27] though not all[28] jurisdictions, however, allegations in a preceding count may be incorporated by an express reference thereto. Such a reference must be clear and certain,[29] and must be express, not implied.[30]

3. Prayer for Relief. — When a complaint contains several counts

Raftery *v.* Carter, 162 App. Div. 17, 147 N. Y. Supp. 271; Wright *v.* Larkin, 154 N. Y. Supp. 961. **Okla.**—Chupco *v.* Chapman, 160 Pac. 88. **Ore.**—Harvey *v.* Southern Pac. Co., 46 Ore. 505, 80 Pac. 1061.

See 6 Standard Proc. 702.

24. Batman *v.* Snoddy, 132 Ind. 480, 32 N. E. 327; Dull *v.* Cleveland, etc. R. Co., 21 Ind. App. 571, 52 N. E. 1013.

25. **Ala.**—Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562. **Ind.** Mason *v.* Weston, 29 Ind. 561; Daly *v.* Gubbins, 35 Ind. App. 86, 73 N. E. 833. **Mich.**—McDonald *v.* Hall, 193 Mich. 50, 159 N. W. 358. **N. J.** Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241. **N. Y.**—Schlieder *v.* Wells, 114 App. Div. 417, 99 N. Y. Supp. 1000.

See 6 Standard Proc. 707.

26. **Cal.**—Bidwell *v.* Babcock, 87 Cal. 29, 25 Pac. 752. **Ga.**—Gardner *v.* Western Union Tel. Co., 14 Ga. App. 403, 81 S. E. 259. **N. J.**—Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241. **S. D.**—First Nat. Bk. *v.* D. S. B. Johnson Land Mortg. Co., 17 S. D. 522, 97 N. W. 748.

27. **Ala.**—Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562. **Cal.** Clark *v.* Berlin Realty Co., 33 Cal. App. 50, 164 Pac. 333. **Fla.**—Florida Cent. & P. R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149. **Minn.**—Realty Revenue Guaranty Co. *v.* Farm, S. & H. Pub. Co., 79 Minn. 465, 82 N. W. 857. **Mo.**—Waechter *v.* St. Louis & M. R. R. Co., 113 Mo. App. 270, 88 S. W. 147. **N. Y.**—Schlieder *v.* Wells, 114 App. Div. 417, 99 N. Y. Supp. 1000. **R. I.**—Fellows *v.* Chipman, 26 R. I. 196, 58 Atl. 663. **Wash.**—Sly *v.* Palo Alto Gold Min. Co., 28 Wash. 485, 68 Pac. 871. **Wyo.**—Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084.

See 6 Standard Proc. 709.

[a] **Where one count has been held bad on demurrer** it may not be thereafter resorted to for the purpose of aiding another count. **Ill.**—Fraternal Tribunes *v.* Hanes, 100 Ill. App. 1. **Ind.**—Clarke *v.* Featherston, 32 Ind. 142. **N. J.**—Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241, where the reference did not indicate to which of two preceding counts it referred, one of which had been held bad on demurrer.

28. Cooper *v.* Robert Portner Brew. Co., 112 Ga. 894, 38 S. E. 91; Corbey *v.* Rogers, 152 Ind. 169, 52 N. E. 748; Pennsylvania Co. *v.* Holderman, 69 Ind. 18; Mason *v.* Weston, 29 Ind. 561.

[a] **Names of parties given in full in a preceding count** need not be repeated and a preceding count may be referred to for identification of some person or thing common to both counts. Thompson *v.* Edwards, 85 Ind. 414.

29. Opdycke *v.* Easton & A. R. Co., 68 N. J. L. 12, 52 Atl. 243; Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241.

[a] **An Illustration.**—(1) A reference was to "the day aforesaid" and several different dates were theretofore set forth. The reference was held bad for uncertainty in Opdycke *v.* Easton & A. R. Co., 68 N. J. L. 12, 52 Atl. 243. (2) When but one precise date has been theretofore mentioned, such a reference is sufficient. Taylor *v.* New Jersey Title Guar. & T. Co., 70 N. J. L. 24, 56 Atl. 152.

30. Woods *v.* Armstrong, 29 Misc. 660, 62 N. Y. Supp. 759; Reiners *v.* Brandhorst, 59 How. Pr. (N. Y.) 91; Baker *v.* Louisville & N. Term. R. Co., 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474.

a separate prayer for relief should not be appended to each count,[31] but the prayer should follow the complaint as a whole,[32] whether the relief sought is of several kinds and whether referable to all or to but one or more of the several counts.[33]

IV. OBJECTIONS TO MISJOINDER OF COUNTS. — A. GENERALLY. — The rules relating to a misjoinder of causes of action[34] cannot be applied to a statement of the same cause of action in two or more different forms,[35] as, in point of fact, only one cause of action is stated.[36] And so, while such a statement in a complaint, when not permitted, is subject to a motion to strike out,[37] it is not, as a general rule, subject to a demurrer, on the ground of misjoinder,[38] although some authorities permit the use of the demurrer in such a case.[39] At common law a misjoinder of counts might be taken advantage of by a motion in arrest of judgment,[40] but where statutes have enlarged the power of amendment, a motion in arrest of judgment will not, as a rule, reach such a defect.[41] If the proof shows which cause of action the plaintiff has, the other may be withdrawn from the jury.[42]

31. Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Goodrich *v.* Stanton, 71 Conn. 418, 42 Atl. 74. See 6 STANDARD PROC. 714.

32. Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Goodrich *v.* Stanton, 71 Conn. 418, 42 Atl. 74.

33. Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

34. See 14 STANDARD PROC. 723, et seq.

35. Keens *v.* Gaslin, 24 Neb. 310, 38 N. W. 797.

36. See 14 STANDARD PROC. 647, note 84.

[a] **The Reason.**—The rules as to misjoinder of actions "can be invoked only where causes of action of different natures or classes are joined, as a cause of action in tort and also upon contract. . . . The provision has no application to a statement of the same causes of action in two or more different forms. In such case there is but one cause of action, although different forms of relief are sought." Keens *v.* Gaslin, 24 Neb. 310, 38 N. W. 797.

37. Pollock *v.* Whipple, 45 Neb. 844, 64 N. W. 210; Keens *v.* Gaslin, 24 Neb. 310, 38 N. W. 797.

38. Keens *v.* Gaslin, 24 Neb. 310, 38 N. W. 797, where the cause stated in the first count was "equitable in its nature, while that stated in the second and also in the third being legal."

39. Dalson *v.* Bradberry, 50 Ill. 82, where a count in trespass quare clausum fregit was joined with a count in trespass on the case. See 6 STANDARD PROC. 901.

40. Chicago & A. R. R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011. And see 2 STANDARD PROC. 1017.

41. Chicago & A. R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011, holding that misjoinder of counts was a "mispleading" within the meaning of a statute providing that a motion in arrest should not lie for a mispleading. This was "according to the sense and intention of our enlarged statute of amendments."

42. See *infra*, this note.

[a] **When the plaintiff pleads in different counts ordinary negligence and wilful injury** or gross negligence, the court should, upon it clearly appearing what cause of action the plaintiff has, take the other from the jury or dismiss the action in respect thereto. And if there is reasonably conflicting inferences as to whether the wrong resulted from one or the other, the whole should be submitted to the jury, with such definite instructions as to guard against the rendition of a contradictory verdict. Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158.

Motion for judgment on the pleadings is not a proper remedy in such a case.[43]

B. ELECTION BETWEEN COUNTS.[44] — **1. In General.** — When a cause of action is improperly stated in different forms in several counts where such practice is not permitted, a motion to compel the plaintiff to elect on which count he will rely is an appropriate remedy.[45] But such an election will not be required if the several counts are properly pleaded.[46] The matter of compelling an election between different causes of action improperly joined is treated elsewhere in this work.[47]

2. How Obtained. — In addition to compelling an election between counts by motion and order,[48] an election may be effected by stipulation.[49]

3. When Application Made. — A motion to compel an election by the plaintiff should be made before issue is joined on the merits,[50] but in some jurisdictions may be made at any time before[51] or at the time of trial.[52]

4. Hearing and Determination. — Whether an election shall be ordered is discretionary with the trial court.[53]

5. Cure of Error. — Any error in overruling a motion to elect is not prejudicial when the court at the close of the evidence directs a

43. Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486.

44. **Election between counts of indictment,** 12 STANDARD PROC. 670, et seq.

45. **Colo.**—Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486. **Ky.**—Alsop *v.* Central Trust Co., 100 Ky. 375, 38 S. W. 510. **Neb.**—Keens *v.* Gaslin, 24 Neb. 310, 38 N. W. 797. **Ore.**—Harvey *v.* Southern Pac. Co., 46 Ore. 505, 80 Pac. 1061.

46. **U. S.**—American Nat. Bank *v.* National Wall Paper Co., 77 Fed. 85, 23 C. C. A. 33. **Ariz.**—Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538. **Cal.** Estrella Vineyard Co. *v.* Butler, 125 Cal. 232, 57 Pac. 980; Wilson *v.* Smith, 61 Cal. 209; Van Lue *v.* Wahrlich-Cornett Co., 12 Cal. App. 749, 108 Pac. 717. **Colo.**—Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 505, 86 Pac. 313. **Conn.**—Brockett *v.* Fair Haven & W. R. Co., 73 Conn. 428, 47 Atl. 763. **Ga.**—Allred *v.* Tate, 113 Ga. 441, 39 S. E. 101. **Mo.**—Rinard *v.* Omaha, K. C. & E. Ry. Co., 164 Mo. 270, 64 S. W. 124; Waechter *v.* St. Louis & M. R. R. Co., 113 Mo. App. 270, 88 S. W. 147. **N. Y.**—Frieze *v.* Alabama Great So. R. Co., 99 App. Div. 545, 91 N. Y. Supp. 81. **Tex.** Texas Brew. Co. *v.* Walters (Tex. Civ. App.), 43 S. W. 548. **Utah.**—Oberndorfer *v.* Moyer, 30 Utah 325, 84 Pac. 1102. **Wis.**—Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158.

[a] **To require an election would render** the privilege of pleading in several counts a barren one. Remy *v.* Olds, 99 Cal. xix, 34 Pac. 216, 21 L. R. A. 645.

[b] **Requiring Election Is Prejudicial Error.**—Atterberry *v.* Wabash R. Co., 110 Mo. App. 608, 615, 85 S. W. 114.

47. 14 STANDARD PROC. 724.

48. See cases cited *supra,* this section.

49. State Bank *v.* Ensminger, 7 Blackf. (Ind.) 105.

50. Kenton Ins. Co. *v.* Osborne, 21 Ky. L. Rep. 330, 51 S. W. 306; Austin *v.* Bluff City Shoe Co., 176 Mo. App. 546, 557, 158 S. W. 709.

51. Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486; Harvey *v.* Southern Pac. Co., 46 Ore. 505, 510, 80 Pac. 1061.

52. Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486.

53. **Colo.**—Manders *v.* Craft, 3 Colo. App. 236, 32 Pac. 836. **Mass.**—Brady *v.* Ludlow Mfg. Co., 154 Mass. 468, 28 N. E. 901. **Mich.**—McLennan *v.* McDermid, 50 Mich. 379, 15 N. W. 518.

verdict on one of the counts.[54] And the court need not, in terms, sustain a motion to compel an election where, by its instructions to the jury it confines the trial to a particular count.[55]

6. Operation and Effect. — The use of evidence admissible under a count retained is not lost because it is also admissible under a count rejected.[56] Upon a new trial a plaintiff who has been compelled to elect between counts in his complaint may enter a discontinuance of the count theretofore proceeded upon and proceed upon another.[57]

V. DEFENSES TO SEVERAL COUNTS. — The defendant may plead to each count separately,[58] or interpose one plea to all the counts, when the same matter is relied upon as a defense to all the counts.[59]

A plea professing to answer the entire declaration or complaint, and which fails to answer any count thereof, is bad on demurrer.[60]

When separate pleas or defenses are filed each one should designate the count which it is intended to meet,[61] but, where the substance of the plea indicates this fact, a failure to do so is a defect of form only,[62] and plaintiff should demur thereto within the time prescribed by law or the defect will be waived.[63] A plea which declares itself to be in answer to one count, and then proceeds to answer another count, is bad on demurrer.[64]

VI. ADDING COUNT BY AMENDMENT. — As a general rule, whenever necessary at the trial, in the furtherance of justice, to make the pleadings conform to the proof, a new count may be added by amendment.[65]

Ore.—Harvey *v.* Southern Pac. Co., 46 Ore. 505, 80 Pac. 1061.

54. Austin *v.* Bluff City Shoe Co., 176 Mo. App. 546, 158 S. W. 709.

55. Lewis *v.* Utah Construction Co., 10 Idaho 214, 77 Pac. 336.

56. Aetna Indem. Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274.

57. Gott *v.* Judge of Sup. Ct., 42 Mich. 625, 4 N. W. 529.

58. Schader *v.* White, 173 Cal. 441, 160 Pac. 557; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

[a] **Cross-complaint,** right to plead in several counts, see *supra,* II.

59. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442; Snyder *v.* Witt, 99 Tenn. 618, 42 S. W. 441.

[a] "**For instance,** one plea of not guilty, when appropriate, will raise an issue on any number of counts in a declaration." Snyder *v.* Witt, 99 Tenn. 618, 42 S. W. 441. See also Astin *v.* Chicago, M. & St. P. R. Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158.

60. **Ala.**—People's Shoe Co. *v.* Skally, 196 Ala. 349, 71 So. 719; Greenville *v.* Greenville Water Wks. Co., 125 Ala. 625, 27 So. 764. **Cal.**—Wallace *v.* Bear River Water & Min. Co., 18 Cal. 461. **Ind.**—Falmouth & L. Turnpike Co. *v.* Shawhan, 107 Ind. 47, 5 N. E. 408; Root *v.* Hibben, 66 Ind. 247. **N. J.** Truax *v.* Pennsylvania R. Co., 58 N. J. L. 218, 33 Atl. 278.

61. Hindman *v.* Edgar, 24 Ore. 581, 17 Pac. 862.

62. Green *v.* Hambrick, 118 Ga. 569, 45 S. E. 420.

63. Green *v.* Hambrick, 118 Ga. 569, 45 S. E. 420.

64. Barclay *v.* Ross, 32 Ill. 211.

65. **Ala.**—Louisville & N. R. Co. *v.* Markee, 103 Ala. 160, 171, 15 So. 511, 49 Am. St. Rep. 21. **Wis.**—Haverlund *v.* Chicago, St. P. M. & O. R. Co., 143 Wis. 415, 128 N. W. 273. **Eng.**—Langford *v.* Woods, 7 Man. & G. 625, 49 E. C. L. 624, 135 Eng. Reprint 251; Cornish *v.* Abingdon, 1 F. & F. 562.

VII. VERDICT. — The form and sufficiency of the verdict where the issues are presented by several counts is fully treated elsewhere.[66]

See generally the titles "**Amendments and Jeofails;**" "**New Cause of Action or Defense.**" But *compare* Proctor *v.* Southern R. Co., 64 S. C. 494, 42 S. E. 427.

66. See the title "**Verdict.**"

SEVERANCE

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CROSS-REFERENCES:

Admiralty;	Separate Trials;
Consolidation of Actions;	Several Counts;
Joinder of Actions;	Successive Suits.

Severance in admiralty, see 1 STANDARD PROC. 527.

Severance in pleading, see 2 STANDARD PROC. 52. See also 1 STANDARD PROC. 34.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION. — A severance occurs when one action is divided into two or more separate and distinct actions.[1]

II. DISCRETION OF COURT. — Generally the granting of a severance is discretionary with the court.[2] But it has been held to be the policy of the law to discourage a multiplicity of suits.[3]

III. WHEN ALLOWED. — A. GENERALLY — Some statutes make specific provision for the severance of actions.[4]

B. AS TO PARTIES. — **1. As to Parties Plaintiff.** — Generally an action by joint obligees cannot be severed,[5] unless the defendant, either expressly or impliedly,[6] consents.[7] An exception to this rule existed at common law, where some parties had a right to proceed to establish their claim, and others necessary to be joined as plaintiffs were unwilling to proceed at all.[8] On sustaining a demurrer on the ground of misjoinder of parties plaintiff, it has been held that under the

1. Giller *v.* West, 162 Ind. 17, 69 N. E. 548; Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510.

2. **Ala.** — Palmer *v.* State (Ala. App.), 73 So. 139. **Cal.**—Caldwell *v.* Regents, 35 Cal. App. 639, 170 Pac. 666. **Fla.**—Mitchell *v.* Mason, 61 Fla. 338, 54 So. 863. **Ky.**—East Tenn. Telephone Co. *v.* Carmine, 29 Ky. L. Rep. 479, 93 S. W. 903. **Ia.**—Schwing *v.* Dunlap, 130 La. 498, 58 So. 162. **Mo.** McFarland *v.* Missouri Pac. Ry. Co., 125 Mo. 253, 28 S. W. 590; Hunt *v.* Missouri R. Co., 14 Mo. App. 160. **N. Y.**—Posner *v.* Rosenberg, 153 App. Div. 249, 137 N. Y. Supp. 1084; Hill *v.* Alvord, 19 Hun 77. **Pa.**—Citizens Gas. Co. *v.* Whitney, 232 Pa. St. 592, 81 Atl. 804. **Tenn.**—State *ex rel.* Timothy *v.* Hawse, 134 Tenn. 67, 76, 183 S. W. 510, Ann. Cas. 1917C, 1125.

[a] **If there is no need for a severance,** it should not be ordered. Hill *v.* Alvord, 19 Hun (N. Y.) 77.

[b] **If a consolidation would have been ordered,** had the plaintiff brought two separate actions, a severance will not be ordered. Posner *v.* Rosenberg, 153 App. Div. 249, 137 N. Y. Supp. 1084.

3. Parker *v.* Stephens (Tex. Civ. App.), 48 S. W. 878.

4. See the statutes and the following: Reading *v.* Beardsley, 41 Mich. 123, 1 N. W. 965; Hennessey *v.* Paulsen, 12 Misc. 384, 33 N. Y. Supp. 638, 67 N. Y. St. 343, under §1516 of Code Civ. Proc. See *infra*, III, B, 2.

5. Carrington *v.* Crocker, 37 N. Y. 336, 4 Abb. Pr. (N. S.) 335. See Punchard *v.* Delk, 77 Tex. 104, 13 S. W. 615.

Severance of a joint obligation, so as to enable separate actions for the share of each obligee, see 11 STANDARD PROC. 971.

6. Austin *v.* Walsh, 2 Mass. 401.

7. Carrington *v.* Crocker, 37 N. Y. 336, 4 Abb. Pr. (N. S.) 335.

[a] **Where the defendant pleads a release to one of two joint plaintiffs** and raises the objection of misjoinder, the court may dismiss as to the plaintiff released and proceed with the action as to the other. Carrington *v.* Crocker, 37 N. Y. 336, 4 Abb. Pr. (N. S.) 335.

8. Smith *v.* Rines, 2 Sumn. 338, 22 Fed. Cas. No. 13,100.

[a] **Summons and severance** is name of this practice. "It is indeed in the power of one or more of the persons, who have a joint right of action to commence a suit in the name of all in whom the right is: [see 20 STANDARD PROC. 937.] but, notwithstanding a plea in abatement would be thereby prevented, it would still be in the power of any one of them, by neglecting to appear, or by refusing to proceed afterwards in the suit, to render it fruitless. . . . To prevent the inconvenience and the failure of justice, which would be, if all the other persons having a joint right of action should be procluded by the negligence or collusion of one from having the effect of a suit, the law has provided, that if one of the persons, in whose name a joint action is commenced, do not appear, or do after appearance make default, the other or others may have judgment ad sequendum solum, or in other words judgment of sever-

rules laid down by the code, the court has power to order each plaintiff to file his petition upon his cause of action, and rule the defendant to answer without other process.[9]

2. As to Parties Defendant. — At common law a severance of a joint suit is never allowed as to parties defendant, so as to make several suits out of one joint suit.[10] The plaintiff cannot sever his action either as to person or amount and have several judgments rendered against several persons, or against the same person for several sums at different stages of the proceeding.[11]

Statutes in the various states have modified this rule.[12] Thus it is provided that in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.[13] So also it is provided, in effect, that if all the defendants alleged to be severally liable are served, the plaintiff may

ance." 9 Bacon's Abr., 267, 268.

9. Keary *v.* Mutual Reserve Fund Life Assn., 30 Fed. 359.

10. Smith *v.* Rines, 2 Sumn. 338, 22 Fed. Cas. No. 13,100.

[a] **In an action against joint tortfeasors,** the defendants are not entitled to separate trials. Bannon *v.* Moran, 12 Ky. L. Rep. 989; Meloon *v.* Read, 73 N. H. 153, 59 Atl. 946.

[b] **That the petition shows no joint purpose** on the part of the defendants does not entitle them to separate trials. Mulvihill *v.* Thompson, 116 Iowa 734, 87 N. W. 693.

Where some of the parties default, see 14 STANDARD PROC. 908.

11. Brewer *v.* Christian, 9 Ill. App. 57.

But the plaintiff may dismiss as to a part of the defendants without affecting the proceedings against the others. See 7 STANDARD PROC. 666.

12. See the statutes.

13. **Cal.**—Code Civ. Proc. §579; Bell *v.* Staacke, 159 Cal. 193, 196, 115 Pac. 221; Cole *v.* Roebling Const. Co., 156 Cal. 443, 447, 105 Pac. 255; Bell *v.* Adams, 150 Cal. 772, 90 Pac. 118. **N. Y.** Code Civ. Proc. §1205; Stedeker *v.* Bernard, 102 N. Y. 327, 6 N. E. 791; Hill *v.* Alvord, 19 Hun 77. **Ohio.**—Hempy *v.* Ransom, 33 Ohio St. 312; Aucker *v.* Adams, 23 Ohio St. 543; Lampkin *v.* Chisom, 10 Ohio St. 450.

See also 7 STANDARD PROC. 666, et seq.

[a] **This statute is not limited to** cases of joint and several liability, but authorizes a separate judgment when the separate liability is established on the trial although the cause of action, as alleged in the complaint, was joint only. Stedeker *v.* Bernard, 102 N. Y. 327, 6 N. E. 791.

[b] **In an action on a joint and several contract,** a severance is proper. Aucker *v.* Adams, 23 Ohio St. 543.

[c] **In a tort action,** the court may dismiss the complaint as to one or more defendants, direct a verdict as to others and submit the facts to the jury as to others. Tanzer *v.* Breen, 131 App. Div. 654, 116 N. Y. Supp. 110. See also Fowden *v.* Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178; Dominick *v.* Ecker, 3 Barb. (N. Y.) 17. See also 7 STANDARD PROC. 667.

[d] **Thus when the default of one of several defendants is entered** and a several judgment is proper, a severance may be ordered and the suit may thereafter proceed against the contesting defendants. **Cal.**—Cole *v.* Roebling Const. Co., 156 Cal. 443, 105 Pac. 225. **Ill.**—Deatherage *v.* Rohrer, 78 Ill. App. 248. **N. Y.**—Citizens' Nat. Bank *v.* Weston, 81 Hun 84, 30 N. Y. Supp. 619, 62 N. Y. St. 552. And see generally 14 STANDARD PROC. 910.

[e] **On a failure to establish a cause of action** against one of the defendants filing separate answers in a tort action, the court may order a severance, render a judgment of nonsuit as to this defendant and allow the action to proceed as to the others. Tanzer *v.* Breen, 131 App. Div. 654, 116 N. Y. Supp. 110; Dominick *v.* Ecker, 3 Barb. (N. Y.) 17.

[f] **The court has power** to continue the trial as to one of the parties,

take judgment against one or more, where he would be entitled to judgment if the action were against him alone, and that in such case, the clerk must, on plaintiff's application, enter an order of severance.[14]

It has been held that a severance is proper where there is a misjoinder of parties defendant.[15]

3. On Death of a Party. — On death of one or more defendants, jointly and severally liable, a severance may be ordered, in accordance with rules elsewhere discussed.[16]

C. As to Different Causes of Action. — A severance may be awarded sometimes as to different causes of action.[17] Where a joint action is brought by virtue of a statute authorizing a consolidation of actions, a severance may be ordered, if convenience demands.[18] And so also, some statutes authorize the court, in its discretion, to divide the action into two or more actions, when an issue of law and an issue of fact arise with respect to different causes of action, and final judgment can be taken as to one or more without prejudice to either party as to the others.[19]

As to Misjoined Causes of Action. — On sustaining a demurrer to a complaint on the ground of misjoinder of causes of action, in some jurisdictions, the court may in its discretion, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action stated.[20] But in some jurisdic-

and proceed to a trial as to the others under this statute. Bell *v.* Staacke, 159 Cal. 193, 115 Pac. 221.

[g] **A dismissal as to one of the defendants may be treated as a severance** and judgment may be rendered for him, where the cause of action is severable. Schuller *v.* Robison, 139 App. Div. 97, 123 N. Y. Supp. 881.

14. N. Y. Code Civ. Proc. §456; Pruyn *v.* Black, 21 N. Y. 300; Citizens' Nat. Bank *v.* Weston, 81 Hun 84, 30 N. Y. Supp. 619, 62 N. Y. St. 552.

[a] **Where the liability is joint,** the statute does not apply. Oneida County Bank *v.* Lewis, 23 Misc. 34, 51 N. Y. Supp. 826.

[b] **If all are not served,** statutes authorize plaintiff to proceed against those served as though they are the only defendants. See the title "**Service of Process and Papers.**" See also the title "**Supplementary Proceedings.**" And see 14 Standard Proc. 908, and 912.

15. Rice *v.* McAdams, 149 N. C. 29, 62 S. E. 774. See also Pretzfelder *v.* Merchant's Ins. Co., 116 N. C. 491, 21 S. E. 302.

16. See the title "**Revivor.**"

[a] **This Procedure Has Been Permitted in the Absence of Statute.** Seaman *v.* Slater, 18 Fed. 485.

17. See *infra*, this section.

[a] **Severance of a legal and equitable cause,** improperly joined, may be effected by demanding a jury trial of the legal cause. Jacobson *v.* Brooklyn El. R. Co., 22 Misc. 281, 48 N. Y. Supp. 1072.

As to separate trials of different issues, see the title, "**Separate Trials.**"

18. Davis *v.* Public Service Corp., 77 N. J. L. 275, 72 Atl. 82. See Weinberger *v.* Agricultural Ins. Co., 81 N. J. L. 127, 79 Atl. 542.

19. Stokes *v.* Stokes, 31 Abb. N. Cas. 464, 30 N. Y. Supp. 153, 62 N. Y. St. 39.

[a] **The motion may be made at any stage** of the action, under this statute. Stokes *v.* Stokes, 31 Abb. N. C. 464, 30 N. Y. Supp. 153, 62 N. Y. St. 39.

20. See 6 Standard Proc. 992.

[a] **Should one of the causes thus misjoined be without the jurisdiction** of the court it should be dismissed and the trial of the other should proceed. Diblee *v.* Davison, 25 Ill. 486; Pittsburg J. E. & E. R. Co. *v.* Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234.

Remedies for misjoinder of action,

tions an objection that there is a misjoinder may be raised in the first instance by a motion to separate and docket as separate actions.[21]

D. As to Part of Claim Admitted To Be Just. — Where the defendant in his pleading admits a part of the plaintiff's claim to be just, some statutes authorize the court, on plaintiff's motion, to order a severance, and enter a judgment for the part admitted.[22] This practice has been permitted in the absence of statute.[23]

IV. TIME OF APPLICATION. — Although the time in which to apply for a severance depends upon the statute and the ground upon which the application is based,[24] usually a severance may be granted any time before trial.[25]

V. PROCEEDINGS TO OBTAIN. — A motion for a severance may be made ex parte,[26] although the better practice requires that notice thereof be given.[27] On granting the application, the court, or sometimes the clerk, should make an order to that effect.[28]

see 14 Standard Proc. 723, et seq.

21. See 14 Standard Proc. 725.

22. Mont. Code Civ. Proc. §702; N. Y. Code Civ. Proc. §511; Wheeler *v.* Braender, 65 How. Pr. (N. Y.) 452; Hall *v.* Holt, 25 Hun (N. Y.) 277; Electro-Tint Engraving Co. *v.* American Handkerchief Co., 130 App. Div. 561, 115 N. Y. Supp. 34; Freudenheim *v.* Raduziner, 15 Misc. 124, 36 N. Y. Supp. 815; Vacuum Cleaner Co. *v.* Broadway-Cortlandt, 132 N. Y. Supp. 335; Dollard *v.* American Surety Co., 104 N. Y. Supp. 494.

[a] **The Statute Applies With Equal Force to Actions at Law and in Equity.**—Hall *v.* Holt, 25 Hun (N. Y.) 277.

[b] **If the admission is not unconditional,** a severance is unauthorized. Forster *v.* Devlin, 6 N. Y. Supp. 505, 25 N. Y. St. 812, 25 Jones & S. 120.

[c] **Where Counterclaim Is Pleaded.** The statute applies only to a case where the answer of the defendant, taken in its entirety, admits that a part of the plaintiff's claim is just. Thus where an answer admits a part of plaintiff's claim, but pleads a counterclaim for a greater sum than it admits to be due, a severance is not proper. Cronin *v.* Tebo, 63 Hun 190, 17 N. Y. Supp. 650, 44 N. Y. St. 277; H. Koehler & Co. *v.* Adams, 128 N. Y. Supp. 707.

[d] **Costs on Severance.**—See Waite *v.* F. J. Kaldenberg Co., 68 Hun 528, 22 N. Y. Supp. 1006, 52 N. Y. St. 595; Bradbury *v.* Winterbottom, 13 Hun (N. Y.) 536, where an offer of judgment was made.

23. Larrinaga *v.* Two Thousand Bags of Sugar, 40 Fed. 507, in admiralty. See 1 Standard Proc. 527.

24. **At any stage of the case,** the motion may be made under some statutes. See *supra,* the statutes, and III, C.

[a] **Pending a demurrer for misjoinder of causes of action,** a severance should not be ordered. Neun *v.* B. H. Bacon Co., 137 App. Div. 397, 121 N. Y. Supp. 718.

25. Ballard *v.* Perry's Admr., 28 Tex. 347.

[a] **The plaintiff need not await the trial** before applying for a judgment against one defendant and a severance as to the others, where one of the defendants admits, in his verified answer, the obligation is his individual obligation. Stedeker *v.* Bernard, 102 N. Y. 327, 6 N. E. 791.

[b] **After verdict** (1) the court may not order a severance (Griffin *v.* Head, 122 Ala. 441, 25 So. 185; Fox *v.* Muller, 31 Misc. 470, 64 N. Y. Supp. 388), unless (2) by consent of the parties. Griffin *v.* Head, 122 Ala. 441, 25 So. 185; Parker *v.* Stephens (Tex. Civ. App.), 48 S. W. 878.

[c] **A request, made for the first time on appeal,** to sever misjoined causes of action will not be granted. Langston *v.* Weil, 116 N. C. 205, 21 S. E. 111; Doughty *v.* Atlantic & N. C. R. Co., 78 N. C. 22.

Costs because of delay, see *infra,* V.

26. Shaw *v.* Coleman, 22 Jones & S. 3, 3 N. Y. St. 534.

27. Shaw *v.* Coleman, 22 Jones & S. 3, 3 N. Y. St. 534.

28. See *infra* this note.

Costs. — If there has been great delay in moving, the court, in granting the motion, may direct the payment of the costs of the action to date.[29]

VI. OBJECTIONS AND WAIVER. — The right to a severance may be waived,[30] even after an order therefor has been made.[31]

VII. EFFECT OF SEVERANCE AND SUBSEQUENT PROCEEDINGS. — After the severance of an action, each new action should be separately docketed,[32] and the names of the parties lost by the severance should be omitted from subsequent proceedings and pleadings.[33] Each action should be followed by its own appropriate judgment,[34] and may be the subject of an independent appeal.[35]

[a] **A failure to make a formal order of severance may be waived** by the parties. Stewart *v.* Ashley, 34 Mich. 183.

29. Stokes *v.* Stokes, 31 Abb. N. C. 464, 30 N. Y. Supp. 153, 62 N. Y. St. 39.

30. State *v.* Roche, 94 Ind. 372; Mathews *v.* De Laronde's Heirs, 8 Mart. (N. S.) 505.

[a] **By Acquiescing in Subsequent Proceedings.—Mich.**—Stewart *v.* Ashley, 34 Mich. 183. **N. C.**—Redfearn *v.* Austin, 88 N. C. 413. **Tex.**—Parker *v.* Stephens (Tex. Civ. App.), 48 S. W. 878.

Time for application, see *supra,* IV.

31. State *v.* Roche, 94 Ind. 372.

32. Punchard *v.* Delk, 77 Tex. 104, 13 S. W. 615.

33. Anonymous, 4 Hill (N. Y.) 19. See also Stewart *v.* Ashley, 34 Mich. 183.

34. Stokes *v.* Stokes, 31 Abb. N. C. 464, 30 N. Y. Supp. 153, 62 N. Y. St. 39.

35. Giller *v.* West, 162 Ind. 17, 69 N. E. 548.

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CROSS-REFERENCES:

Admiralty;
False Imprisonment;
Forthcoming Bonds;
Judgment and Decrees, Enforcement of;
Judicial Sales;
Juries and Jurors;
Obstructing Justice;
Officers;
Prisons and Prisoners;
Privilege;
Process;
Recognizances and Bail;
Rescue;
Returns;
Search and Seizure;
Service of Process and Papers;
Summary Proceedings;
Warrants.

For forms, see 9 STANDARD PROC. 1139.

For further references and cross-references, see the index to this work and the cross-references throughout this notice.

I. INTRODUCTORY STATEMENT. — It is not within the purpose of this article to deal with the history and nature of the office of sheriff, contable or marshal nor with questions touching upon the general duties and powers of those officers. Such matters enter into the scope of this work only in so far as they involve points of procedural law; to the extent, that is to say, that they are concerned with the service and execution of process and orders of courts. The rights and duties of officers, moreover, under particular writs are discussed in various articles throughout the work treating of attachment,[1] and other matters involving the execution of process and orders and for a discussion of which reference must be made to appropriate articles throughout the work.

II. ASSISTANTS AND SUBSTITUTES. — A. IN GENERAL. Public policy requires that there shall always be someone available who is authorized by law to perform the functions of sheriff and it has been said that strictly speaking there can be no vacancy in the office by reason of the death, removal or resignation of the incumbent.[2] The contingency was met at common law by devolving the duties of the office upon the coroner,[3] or in certain cases upon an elisor,[4] and the matter is now generally regulated by statutes[5] which provide as

1. See the title "Attachment."
2. People *ex rel.* The Attorney-General *v.* Phoenix, 6 Cal. 92.
3. See *infra*, II, B.
4. See *infra*, II, C.
5. **Idaho.**—State *v.* Corcoran, 7 Idaho 220, 61 Pac. 1034. **Kan.**—Skinner *v.* Board of Comrs., 63 Kan. 557, 66 Pac. 635. **Miss.**—Lipscomb *v.* State, 76 Miss. 223, 25 So. 158. **Mo.**—State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288. **Pa.**—Com. *v.* Mallini, 214 Pa. 50, 63 Atl. 414. **Wis.**—Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

substitutes for the sheriff the coroner,[6] elisors,[7] or some other person[8] or officer such as the constable[9] or sheriff's deputy,[10] or special sheriff.[11]

B. CORONER AS SUBSTITUTE. — **1. In General.** — At common law, when the sheriff was for some reason incompetent to act, his duties devolved upon the coroner[12] to whom, in such event, the process of

See also *infra*, II, B.

[a] **Conclusiveness of Affidavit of Prejudice.**—The court is not bound to take the affidavit of the party as conclusive proof of the prejudice alleged against the sheriff. In such case the court exercises a discretion and the appellate court will not interfere in the absence of abuse of discretion. State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; Orscheln *v.* Scott, 79 Mo. App. 534.

6. See *infra*, II, B.

7. See *infra*, II, C.

8. Russell & Co. *v.* Millett, 20 Wash. 212, 55 Pac. 44.

[a] **The statute may also authorize the appointment,** by the officer or person commanding or desiring the discharge of a particular duty, of some suitable person, where the sheriff is disqualified. Russell & Co. *v.* Millett, 20 Wash. 212, 55 Pac. 44.

[b] **But an act authorizing the appointment of a person to serve process** in place of the sheriff, does not warrant the appointment by the court of a private person to act in place of the sheriff during the trial of a case in which the sheriff is a party, even though the coroner be absent from the parish. Whitehead *v.* Brigham, 1 La. Ann. 317.

9. Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

[a] **In replevin before a justice of the peace by or against a sheriff,** the warrant and all process in the cause must be awarded to and executed by the constable of the county. Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

[b] **The Statute Is Mandatory.** Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

[c] **Where Service Made by Coroner Instead of Constable.**—If, in a replevin suit against the sheriff, before a justice of the peace, the process is served by the coroner instead of by the constable as required by statute, it is a defect going only to the jurisdiction over the defendant, and is waived by the sheriff's appearance without objection. Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

10. Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

[a] **Sheriff Living But Disqualified.** The statute empowering the deputy sheriff to act temporarily in place of his deceased principal, does not require the deputy to perform the sheriff's official duties where the latter is living but disqualified. In such case the court may properly authorize the coroner to act in place of the sheriff. Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

11. Skinner *v.* Board of Comrs., 63 Kan. 557, 66 Pac. 635.

[a] **But where the sheriff is in his office, ready upon call** to serve process when it is issued by the probate judge and the offices of the sheriff and the probate judge are in the same group of buildings and only about 150 feet apart, there is neither absence nor nonattendance of the sheriff, and the probate judge is without authority to appoint a special sheriff. Skinner *v.* Board of Comrs., 63 Kan. 557, 66 Pac. 635.

[b] **An unauthorized appointment of a special sheriff,** and the execution of process wrongfully issued to him, will not deprive the sheriff of the emoluments attached by law to his office, and he will be entitled to recover from the county the compensation fixed by law for the service of such process, if the same has not already been paid by the county to the special officer. Skinner *v.* Board of Comrs., 63 Kan. 557, 66 Pac. 635.

12. Adams *v.* Vose, 1 Gray (Mass.) 51; State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

[a] "**A coroner** is an officer of great antiquity at the common law, whose powers and duties, like those of the sheriff, were both judicial and ministerial. By virtue of his office, like the sheriff, he was a conservator of the peace; and he has always had other duties attached to his office which do not pertain to that of sheriff. But his

the court was directed instead of to the sheriff.[13] Statutes declaratory of the common law[14] provide that the coroner shall in certain cases act in place of the sheriff[15] in reference to a particular process or order,[16] or in respect to the sheriff's duties generally, until a successor is appointed or elected.[17] And where the law thus requires the coroner to

ministerial office is, and always has been, both in England and the United States, to act as the sheriff's substitute, in the execution of process, when the latter cannot act." Powell *v.* Wilson, 16 Tex. 60.

13. State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

14. Powell *v.* Wilson, 16 Tex. 59.

15. **Cal.**—People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *ex rel.* The Attorney-General *v.* Phoenix, 6 Cal. 92. **Idaho.**—State *v.* Corcoran, 7 Idaho 220, 61 Pac. 1034. **Ill.**—Reed *v.* Reber, 62 Ill. 240. **La.**—Whitehead *v.* Brigham, 1 La. Ann. 317. **Miss.**—Lipscomb *v.* State, 76 Miss. 223, 25 So. 158. **Mass.** Adams *v.* Vose, 1 Gray 51. **Mo.**—State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; Orscheln *v.* Scott, 79 Mo. App. 534. **Ohio.**—State *ex rel.* Corbin *v.* Epler, 12 Ohio St. 428. **Wash.** Russell & Co. *v.* Millett, 20 Wash. 212, 55 Pac. 44.

[a] **Constitutionality of the Law.** The law which requires the coroner, where there is no sheriff or the sheriff is disqualified, to perform certain duties ordinarily attached to the office of sheriff, is not inconsistent with the provision of the constitution which declares that no person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace. Powell *v.* Wilson, 16 Tex. 59.

[b] **Construction of Statute.**—In reference to the statute authorizing the court to require the coroner to act in place of a disqualified sheriff the Mississippi court said: "We think the provisions of §828 of the code are wise, and that the circuit judges of the state should be allowed to exercise a liberal discretion in their enforcement. . . . This main purpose of all trials cannot more efficiently be promoted than by the court seeing to it that the duties of the sheriff are not left to be performed by an interested person or one for other cause incapable or unfit to execute such duties in the particular case being tried. Of course the power conferred by the statute is a delicate one, and should not be exercised capriciously or without due consideration of the facts in the particular case, and the rights of the officer should not be needlessly violated." Lipscomb *v.* State, 76 Miss. 223, 244, 25 So. 158.

[c] **The office of coroner "is also ministerial,** when the sheriff is disqualified by reason of being interested in the suit or other cause, and in such cases the process is served by a coroner." Adams *v.* Vose, 1 Gray (Mass.) 51, 57.

[d] **Capacity in Which Coroner Acts.**—"The duties required by the statute of the coroner are duties which appertained to his office originally, as the sheriff's substitute. In their performance he is exercising the office of coroner, not of sheriff. His is the office of a substitute for the sheriff; and when the contingency happens which calls the functions of his office into exercise, he does not, properly speaking, exercise the office of sheriff; he simply exercises the functions of his own office of a substitute." Powell *v.* Wilson, 16 Tex. 60.

[e] **Effect of Provision Authorizing Sheriff to Appoint a Deputy.**—The court's right to require the coroner to perform the sheriff's duties in respect to summoning, selecting and returning jurors is not taken away by the act of May 24, 1887 (P. L. 185) authorizing the appointment by the sheriff of a chief deputy to take charge of his office and to "execute and make returns of all writs and other processes directed to the sheriff, and to perform all other duties incumbent upon the sheriff." Com. *v.* Mallini, 214 Pa. 50, 63 Atl. 414.

16. See *infra*, this subsection.

17. **Cal.**—People *ex rel.* The Attorney-General *v.* Phoenix, 6 Cal. 92. **Idaho.**—State *v.* Corcoran, 7 Idaho 220, 61 Pac. 1034. **Mo.**—State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288.

perform the sheriff's duties, they cannot, unless the coroner is for some reason incapacitated,[18] be performed by another.[19] The coroner thus acting as sheriff has the same powers and duties as the sheriff himself would have under the circumstances.[20] Among other duties which he has been authorized to perform in place of the sheriff are those relative to selecting, summoning and returning jurors,[21] or the execution and return of process.[22]

2. Conditions and Circumstances Must Warrant Coroner's Acting. It is only under certain circumstances that the coroner can perform the duties of sheriff either at common law or under the statute. And to warrant the court in directing him to act, in cases where he does not ipso facto become obligated to act for the sheriff in case of the latter's death or incapacity, there must exist facts which under the law would authorize the coroner to perform the particular duty or duties in question,[23] and if the coroner can act only as the sheriff's substitute, he

18. See *infra*, II, C.

19. State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

[a] **Summoning Jury.**—Where it is shown by affidavit that the sheriff and his deputies are prejudiced, and the court upon that ground removes the sheriff, the special venire should be directed to the coroner of the county, and the court has no authority to appoint any one else to summon the jury, unless some reason exists why the coroner should not act. State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4, see the following note.

20. Horsfall *v.* Sutherland, 31 Novia Scotia (Can.) 471.

21. **Mo.**—State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4. **Pa.** Com. *v.* Mallini, 214 Pa. 50, 63 Atl. 414. **Tex.**—Powell *v.* Wilson, 16 Tex. 59.

See generally the title "**Juries and Jurors.**"

22. Longacre *v.* State, 2 How. (Miss.) 637; Mays *v.* Forbes, 11 Tex. 284.

[a] **Criminal process upon the sheriff** may be served by the coroner. Adams *v.* Vose, 1 Gray (Miss.) 51.

[b] **Summons Upon Deputy Sheriff.** Gen. St., 1883, secs. 612, et seq, empowering the coroner to perform the duties of a sheriff in certain cases, do not authorize a coroner, upon execution issued to him to serve summons in garnishment upon a deputy sheriff. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

[c] **Where a process is partly executed by the sheriff,** the coroner may, in case the sheriff's office becomes vacant, complete the execution. Greenup *v.* Stoker, 12 Ill. 24, 52 Am. Dec. 474.

[d] **The statutes in some states require final process** to be executed by the legally authorized officer, or, in case he is disqualified, by some suitable person appointed by the court or judge. Russell & Co. *v.* Millett, 20 Wash. 212, 55 Pac. 44.

23. **Colo.**—Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471. **Pa.**—Com. *v.* Mallini, 214 Pa. 50, 63 Atl. 414. **S. C.** Richardson *v.* Croft, 1 Bailey 264. **Wis.** Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

[a] **Coroner's Right To Act Must Appear.**—Where the acts of the coroner in the performance of the sheriff's duties are relied on in support of a claim or defense, the existence of some one of the statutory conditions of his authority must be made affirmatively to appear. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

[b] **When affidavit** is made by a party to an action, his agent or attorney, that the sheriff will not, by reason of partiality, prejudice, consanguinity or interest faithfully performs his duties in the suit, the process must be directed to the coroner. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

[c] **The sheriff's continuous absence** results in a vacancy in the office and until the same is filled by election, or some other legal mode, the coroner succeeds to the office, and is required by law to discharge all the duties imposed by law upon the sheriff. Consequently he may appoint a deputy and

cannot act where there is no sheriff or where the sheriff is dead.[24]

C. Elisors. — If, at the common law, it was suggested or made to appear that the coroner was also disqualified or unable to act in place of the sheriff, then the court appointed persons of its own nomination called elisors to perform the duties,[25] and this particular power to appoint elisors has been retained and defined by the statutes of a number of states.[26] Only the court is empowered to make the appointment in some states,[27] but under some statutes the clerk, it seems, may also exercise the power.[28] It is not an unlimited and unqualified power[29]

service of process by such deputy is legal. Reed *v.* Reber, 62 Ill. 240.

[d] **Absence of the sheriff in England** puts him under an "inability" to draw a jury in his county within the terms of the statute empowering the court to appoint the coroner to perform the functions in case of the sheriff's inability to act in the matter. Com. *v.* Mallini, 214 Pa. 50, 63 Atl. 414.

[e] **Where the sheriff is in military custody** the court may properly direct the coroner to perform the duties of sheriff. State *v.* Corcoran, 7 Idaho 220, 61 Pac. 1034.

[f] **Displacement of Sheriff During Trial.**—Where it appears that the sheriff is interested in the result of a cause, and that the ends of justice would most likely be promoted by having some other person than the sheriff act in his official capacity in the case, the court may upon motion of interested parties require the coroner to act in his stead. Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

[g] **A citation in error** cannot be served by the coroner, unless it appear that there is no sheriff or that the sheriff and his deputies are for some reason disqualified. Mays *v.* Forbes, 11 Tex. 284.

[h] **The presumption where the coroner has acted** is that the facts existed which rendered it proper for him to act in the particular case. Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640.

24. Richardson *v.* Croft, 1 Bailey (S. C.) 264.

[a] **After the election of the sheriff, but prior to his receiving his commission** and entering upon the duties of his office, it cannot be said that he is properly in office, consequently the coroner cannot be substituted for him and service of process by the coroner during that interval is void. Richardson *v.* Croft, 1 Bailey (S. C.) 264.

25. See State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

[a] **Elisors were particular officers of the court** acting under its special authority. See State *v.* Crocket, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

[b] **"Now the word 'elisor'** has a 'peculiar and appropriate meaning in law,' as much as any word that can be suggested. It is not used at all in common language. No one in private or business circles would think of calling an agent or trustee an 'elisor.' It can be found rarely, if ever, in general literature. . . . Practically, it is known and used alone in law literature. And in the law its meaning is clear and unquestioned. It has always meant, and means now, a person appointed to perform certain duties pertaining to certain officers, when the latter are disqualified. He was originally confined to the duty of returning a jury in the event of such disqualifications; but in some states his duties are extended to the service of other process, but only in the event of the disqualification of some other officer." Bruner *v.* Superior Court, 92 Cal. 239, 245, 28 Pac. 341.

26. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Young, 108 Cal. 8, 41 Pac. 281; Reed *v.* Moffatt, 62 Ill. 300. And see the statutes.

27. Anonymous, 23 Wend. (N. Y.) 102.

28. Reed *v.* Moffatt, 62 Ill. 300.

[a] **Where the coroner was a party and the office of sheriff was vacant,** the clerk of the circuit court in whose office a bill was filed, was authorized to appoint an elisor to serve summons. Reed *v.* Moffatt, 62 Ill. 300.

29. Bruner *v.* Superior Court, 92 Cal. 239, 28 Pac. 341.

to be exercised at the mere will of the court,[30] but is confined to particular cases and circumstances, and the power can be exercised only within the limits thus prescribed.[31] To warrant the appointment of an elisor it must generally be made to appear that both the sheriff and coroner are disqualified or unable to act.[32] Among other duties which elisors have been delegated to perform may be mentioned the summoning of special juries,[33] service of summons,[34] service of attachments,[35] and the execution of writs of possession,[36] and of replevin.[37]

D. POSSE COMITATUS. — It is within the power of the sheriff, and in many cases it is his duty, to call upon private persons to aid him in preserving order or executing process.[38] Persons thus summoned as a

30. Bruner *v.* Superior Court, 92 Cal. 239, 28 Pac. 341.

31. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; Bruner *v.* Superior Court, 92 Cal. 239, 28 Pac. 341.

[a] **The power given by sec. 226 of the Code of Civil Procedure** to direct "the sheriff or an elisor" to summon a jury, means that an elisor shall summon in those instances in which the court is authorized to appoint an elisor under sec. 4192 of the political code. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; Bruner *v.* Superior Court, 92 Cal. 239, 28 Pac. 341.

[b] **Presumption as to Validity of Appointment.**—Where the appointment of an elisor is made by a court having competent jurisdiction, the presumption is that it was regularly and properly done. Turner *v.* Billagram, 2 Cal. 520.

32. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Young, 108 Cal. 8, 41 Pac. 281; Turner *v.* Billagram, 2 Cal. 520.

[a] **It is error** to appoint an elisor in the absence of a showing of disqualification on the part of the coroner. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830.

[b] **Coroner Member of Jury Which Disqualified Sheriff.**—The court may properly appoint an elisor, where it is admitted that the sheriff is disqualified, and it is shown that the then coroner had been a member of the coroner's jury, which disqualified him. People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495.

[c] **Where sheriff and coroner are both directly interested** in the proceeding, an elisor may be appointed. Jackson *ex dem* Eden *v.* Chew, 3 Cow. (N. Y.) 298.

33. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Young, 108 Cal. 8, 41 Pac. 281; Pacheco *v.* Hunsacker, 14 Cal. 120.

[a] **The word "proceeding"** in the statute authorizing the appointment of elisors to execute process and orders in an action or proceeding, including the formation of a jury. Bruner *v.* Superior Court, 92 Cal. 239, 28 Pac. 341.

34. Reed *v.* Moffatt, 62 Ill. 300.

35. Anonymous, 23 Wend. (N. Y.) 102.

[a] **A writ of garnishment may be served on the sheriff** by (1) a private individual who is a citizen of the county (Russell & Co. *v.* Millett, 20 Wash. 212, 55 Pac. 44), or (2) of another county. Anonymous, 23 Wend. (N. Y.) 102.

[b] **An attachment against an officer** served by an elisor. Anonymous, 23 Wend. (N. Y.) 102.

36. Jackson *ex dem* Eden *v.* Chew, 3 Cow. (N. Y.) 298.

37. Turner *v.* Billagram, 2 Cal. 520.

38. **Ala.**—Coleman *v.* State, 63 Ala. 93. **Ind.**—State *v.* Deniston, 6 Blackf. 277. **N. C.**—State *v.* Shaw, 25 N. C. 20. **Pa.**—Comfort *v.* Com., 5 Whart. 437. **S. C.**—State *v.* Hailey, 2 Strobh. L. 73. **Vt.**—McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665.

[a] **The nature of the posse comitatus** and its power is defined by the English statute 2, Henry V, ch. 8, par. 2, where it is said: "that the king's liege people not being clergymen, women, persons decrepit, or infants under the age of fifteen, being sufficient

posse comitatus must assist[39] under penalty, in some jurisdictions, of criminal prosecution for refusal to do so.[40] It is sometimes necessary to thus summon aid where the public peace is endangered,[41] and the officer may where necessary call in the assistance of others in the execution of mesne process in a criminal case[42] or final process in a civil case.[43] He is authorized, but not required, to summon a posse to aid in the execution of mesne process in a civil suit.[44]

III. EXECUTION OF PROCESS AND OTHER ACTS WHERE CHANGE IN INCUMBENCY. — It is a general rule that process running to a sheriff or other officer should be executed by the incumbent of the office. But both at common law[45] and also under the stat-

to travel, shall be assistance to such justices, upon reasonable warning, to ride with them in aid to resist riots, routs and assemblies on pain of imprisonment and to make fine and ransom to the king.'' Com. *v.* Martin, 7 Pa. Dist. 219.

39. State *v.* Deniston, 6 Blackf. (Ind.) 277; McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665.

40. State *v.* Deniston, 6 Blackf. (Ind.) 277.

41. Com. *v.* Martin, 7 Pa. Dist. 219.

[a] **Prevention of Riot.**—''If the sheriff became satisfied, after a careful examination of the situation in and about Hazleton, that the public peace was threatened, that the people were terrorized, and that there was danger of riot if the demonstrations of the men engaged in the strike were allowed to proceed, he had the right, as the chief officer of the county, to summon a *posse* to assist him in the preservation of order and in the prevention of riot, for it cannot be doubted that the duty of a sheriff is to prevent the danger of disorder as well as to suppress a riot which has become flagrant and destructive.'' Com. *v.* Martin, 7 Pa. Dist. 219.

[b] **Posse Ordered by Court.**—The statute authorizes the judge to ''order the sheriff or any constable of the county to summon a posse of not less than two nor more than ten discreet, able-bodied men between twenty-one and fifty years of age, for each piece of property threatened with injury or destruction.'' The discretion of determining whether the posse shall consist of only two men or more than two (but not more than ten) is vested in the sheriff. Hopkins County *v.* St. Bernard Coal Co., 114 Ky. 153, 70 S. W. 289.

42. Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85. See Sutton *v.* Allison, 47 N. C. 339.

[a] **In the execution of a warrant of arrest** the sheriff may order other persons to assist him, and if they should permit or assist the offenders to escape, they can be held liable. Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85.

43. Sutton *v.* Allison, 47 N. C. 339.

[a] **In executing a writ of execution** the sheriff may summon aid to assist him. Bell *v.* North, 4 Litt. (Ky.) 133.

44. Sutton *v.* Allison, 47 N. C. 339.

[a] **Thus in executing a capias ad respondendum** he need not do so. Sutton *v.* Allison, 47 N. C. 339.

[b] **He has the right** but is not bound to summon others to aid him in the execution of mesne process; but with respect to writs of execution, he not only has a right, but is bound at his peril to take with him sufficient aid to enable him to perform the commands of the writ. Bell *v.* North, 4 Litt. (Ky.) 133.

45. **Ky.**—Winslow *v.* Austin, 5 J. J. Marsh. 408. **Mass.**—O'Brien *v.* Annis, 120 Mass. 143; Capen *v.* Doty, 13 Allen 262; Welsh *v.* Joy, 13 Pick. 477. **N. J.**—Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452; State *v.* Sureties of Hardenburgh, 2 N. J. L. 355. **Eng.** Clerk *v.* Withers, 1 Salk. 322, 91 Eng. Reprint 286.

[a] **''Two reasons** are given for the rule. One is that, the execution being an entire thing, he who begins must end it. . . . The other is that, when an execution is levied on goods and chattels, the sheriff thereby acquires a special property in them which enables him to make the sale after his office has expired.'' Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

utes[46] an officer who has begun execution of process is entitled, and sometimes bound, to proceed to its completion, although he may have been removed from or have gone out of office. Nor need the outgoing sheriff turn over to his successor process which he has executed.[47] It is only, however, where the officer's duties under a writ remain incomplete at the termination of his term that he may execute it thereafter.[48]

Particular Duties. — The authority thus given the officer to proceed with the performance of duties upon which he has entered, enables him after his incumbency to complete the service or execution of writs and process in attachment[49] and execution,[50] or to make return on process which he has fully executed or commenced to execute during

[b] **The rule is not modified by Pub. St., R. I., ch. 23, §1,** which provides that every officer annually elected by the general assembly may continue to officiate until his successor is qualified to act. Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

46. **Ark.**—State *v.* Atkinson, 53 Ark. 98, 13 S. W. 415. **Cal.**—Sagely *v.* Livermore, 45 Cal. 613. **Colo.**—People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409. **Mass.**—O'Brien *v.* Annis, 120 Mass. 143. **Mich.**—Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133. **Minn.** Butler *v.* White, 25 Minn. 432.

[a] **That the statute is permissive** and not mandatory, see Butler *v.* White, 25 Minn. 432.

[b] **Rule Where Late Sheriff Unable to Act.**—It is sometimes provided that where the late sheriff is for some reason unable to act, the sheriff in office shall complete the execution of the process. See Butler *v.* White, 25 Minn. 432.

[c] **But the succeeding marshal** must, under Act of Congress, May 7th, 1800, finish the business not completed by his predecessor. Winslow *v.* Austin, 5 J. J. Marsh. (Ky.) 408.

[d] **The sureties on his bond are made liable** for any omission of his duty in executing it, to the same extent as though the duty had been performed during the term. People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409.

47. Sagely *v.* Livermore, 45 Cal. 613.

[a] **Property held under a writ of attachment** (1) need not, unless the statute provides otherwise, be surrendered to the new sheriff. **Cal.** Sagely *v.* Livermore, 45 Cal. 613. **Me.** Tukey *v.* Smith, 18 Me. 125, 36 Am. Dec. 704. **N. Y.**—McKay *v.* Harrower, 27 Barb. 463. **Tex.**—Wolf *v.* Taylor, 68 Tex. 660, 5 S. W. 855. But (2) he has no right to retain possession of the property attached for the purpose of sale under final process, even though his charges for custody are not first paid. Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

[b] **A deputy of the old sheriff** may retain goods and chattels levied upon by him after the successor of the old sheriff had qualified. Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711. See also Morton *v.* White, 16 Me. 53.

48. **Ark.**—State *v.* Atkinson, 53 Ark. 98, 13 S. W. 415. **Minn.**—Butler *v.* White, 25 Minn. 432. **Tenn.**—Fondrin *v.* Planters' Bank, 7 Humph. 447.

[a] **Where an attachment has been begun** to be executed by a sheriff who subsequently goes out of office by expiration of his term, he may complete whatever may remain to be done under the writ of attachment; but if, subsequently to his going out of office an execution is issued in the action in which the attachment issued, such execution should be delivered to and executed by the sheriff then in office. Butler *v.* White, 25 Minn. 432.

49. Butler *v.* White, 25 Minn. 432.

50. **Ala.**—Bondurant *v.* Buford, 1 Ala. 359, 35 Am. Dec. 33. **Mass.** O'Brien *v.* Annis, 120 Mass. 143. **N. J.** State *v.* Hamilton, 16 N. J. L. 153.

See 15 STANDARD PROC. 908, 910, 911. And see the title "**Service of Process and Papers.**"

[a] **A constable** may complete the service of execution after the termination of his office where he had begun it during his incumbency. O'Brien *v.* Annis, 120 Mass. 143.

his incumbency,[51] or to complete a sale of property,[52] or to receive the proceeds of a sale and distribute them according to law,[53] or to sue for the collection of the proceeds.[54]

IV. POWERS AND DUTIES OF DEPUTIES. — In all judicial matters connected with his office the sheriff must act in propria persona,[55] and also in the execution of commissions particularly directed to him,[56] but official acts merely ministerial may be performed by his under sheriff or deputy,[57] unless the terms of the statute directly or impliedly exclude the right of the deputy sheriff to serve the writ or process in question.[58]

The termination of the sheriff's incumbency terminates the authority of his deputy[59] unless the statutes require the deputy to perform the functions of sheriff until a successor qualifies.[60] It has been seen that the sheriff or constable may after the termination of his office complete certain duties which he had begun to perform during his incumbency.[61]

51. **Ill.**—Howell *v.* Albany City Ins. Co., 62 Ill. 50. **Mass.**—Welsh *v.* Joy, 13 Pick. 477. **Mich.**—Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

[a] **As to return on capias ad respondendum,** see Richards *v.* Porter, 7 Johns. (N. Y.) 137.

52. **Ala.**—Ryan *v.* Couch. 66 Ala. 244. **Ky.**—Rogers *v.* Darnaby, 4 B. Mon. 238; Ferguson *v.* Williams, 3 B. Mon. 302, 39 Am. Dec. 466. **Mass.** Welsh *v.* Joy, 13 Pick. 477. **N. J.** Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452. **N. Y.**—Aldeman *v.* Share, 7 Wend. 220. **N. C.**—Maclin *v.* Hardie, 25 N. C. 407. **R. I.**—Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

See 16 STANDARD PROC. 160.

[a] **Sale of Mortgaged Property.** A sheriff, who has begun to execute a writ for the sale of mortgaged property, is authorized to complete it, notwithstanding the expiration of his term of office pending his proceedings. Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452.

[b] **To execute a deed** to property sold. Welsh *v.* Joy, 13 Pick. (Mass.) 477.

53. Adams *v.* Adams, 4 Watts (Pa.) 160.

54. Dickson *v.* McCartney, 226 Pa. 552, 75 Atl. 735, 134 Am. St. Rep. 1078, 29 L. R. A. (N. S.) 792. See also Trustees' E. & S. Ins. Corp. *v.* Bowling, 2 Kan. App. 770, 44 Pac. 42; Underwood *v.* Jacobs, 3 McCord (S. C.) 447.

[a] **Suit by sheriff after expiration of his term** against a defaulting bidder at a sale held during his term. Dickson *v.* McCartney, 226 Pa. 552, 75 Atl. 735, 134 Am. St. Rep. 1078, 29 L. R. A. (N. S.) 792.

55. **Mass.**—Wood *v.* Ross, 11 Mass. 271. **Neb.**—Nebraska Loan & Bldg. Assn. *v.* Marshall, 51 Neb. 534, 71 N. W. 63. **Pa.**—Klopp *v.* Breitenbach, 2 Leg. Chron. 73, 6 Leg. Gaz. 87.

56. Wood *v.* Ross, 11 Mass. 271.

57. **Ky.**—Gay *v.* Caldwell, Hardin 63; Winslow *v.* Austin, 5 J. J. Marsh. 408. **La.**—State *v.* Wilson, 12 La. Ann. 189. **Md.**—Turner *v.* Holtzman, 54 Md. 148, 39 Am. Rep. 361. **Mass.** Wood *v.* Ross, 11 Mass. 271. **Neb.** Johnson *v.* Colby, 52 Neb. 327, 72 N. W. 313; Nebraska Loan & Bldg. Assn. *v.* Marshall, 51 Neb. 534, 71 N. W. 63; Post *v.* Smith, 1 Neb. (Unof.) 94, 95 N. W. 500. **N. Y.**—Jackson *ex dem* Randall *v.* Davis, 18 Johns. 7. **Tex.** Shely *v.* State, 35 Tex. Crim. 190, 32 S. W. 901. **Va.**—Wroe *v.* Harris, 2 Wash. (2 Va.) 126.

58. Wood *v.* Ross, 11 Mass. 271.

[a] **Thus a writ de homine replegiando** cannot be served by a deputy sheriff. The form of the process contains a direction to the sheriff only and from this and other circumstances it seems that the legislature intended that this process should be served by the sheriff only. Wood *v.* Ross, 11 Mass. 271.

59. Greenwood *v.* State, 17 Ark. 332.

60. **Mass.**—Opinion of the Justices, 126 Mass. 557. **Mich.**—Lamoreaux *v.* Atty. Gen., 89 Mich. 146, 50 N. W. 812. **N. Y.**—Boardman *v.* Haliday, 10 Paige 223.

61. See *supra,* III.

A like power to complete the execution of writs and process is given to the deputy.[62]

V. POWER TO EXECUTE WRITS OUTSIDE OF COUNTY.[63] The authority of a sheriff,[64] and according to some cases of a constable as well,[65] is co-extensive with the limits of the county and neither of them can legally execute process beyond their own county.[66]

VI. PROCEEDINGS AGAINST GENERALLY. — Sheriffs, constables and marshals, like other public officers generally,[67] are amenable to the process of the law. They may be compelled in certain cases to perform their prescribed duties,[68] and any negligence or default in the performance of such duties will subject them to a civil proceeding at the instance of one injured thereby,[69] and under certain circumstances to a criminal prosecution as well.[70] The injured party may have recourse to an action on the officer's official bond,[71] or on the bond of indemnity,[72] or to any summary proceeding given by statute for the purpose.[73] Unless such is the clear intention of the statute, ordinary civil actions against the officer are not excluded by any statutory proceedings which may be authorized.[74]

VII. COMPELLING PERFORMANCE OF DUTIES. — A. MANDAMUS.[75] — Except, in some jurisdictions, where there is an adequate and specific remedy by action on the officer's bond, by summary proceeding, or otherwise,[76] mandamus will lie to compel performance by

62. Neilson, Nichols & Co. *v.* Churchill, 5 Dana (Ky.) 333; Newman *v.* Beckwith, 61 N. Y. 205; Jackson *ex dem* Scofield *v.* Collins, 3 Cow. (N. Y.) 89.

63. See 15 STANDARD PROC. 760, 804.

64. **Ala.**—Jones *v.* Baxter, 146 Ala. 620, 41 So. 781, 119 Am. St. Rep. 54. **Ky.**—York *v.* Com., 82 Ky. 360. **Mich.** Baker *v.* Casey, 19 Mich. 220.

65. **Cal.**—Lafontaine *v.* Greene, 17 Cal. 294. **Ga.**—Lapsley *v.* Georgia Loan etc. Co., 99 Ga. 459, 27 S. E. 717. **Ky.** Com. *v.* Hughes, 10 B. Mon. 461. **N. C.** Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815. **Va.**—MacNeale *v.* Governor, 3 Gratt. (44 Va.) 299.

66. **Ga.**—State *v.* Harrell, Ga. Dec. 130. **Ind.**—Dederick *v.* Brandt, 16 Ind. App. 264, 44 N. E. 1010. **Kan.**—Morrell *v.* Ingle, 23 Kan. 32. **Nev.**—Washoe *v.* Humboldt, 14 Nev. 123. **S. C.**—Finley *v.* South Carolina Canal etc. Co., 2 Rich. L. 567. **Tex.**—Alred *v.* Montague, 26 Tex. 732, 84 Am. Dec. 603.

67. See the title "**Officers.**"

68. See *infra*, VII.

69. **Cal.**—Boulware *v.* Craddock, 30 Cal. 190. **Del.**—Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528, 1 Hard. 28. **Ky.**—Owings *v.* Frier, 2 A. K. Marsh. 268, 12 Am. Dec. 393. **Me.**—Jewett *v.* Patridge, 12 Me. 243, 27 Am. Dec. 173. **Mass.**—Davis *v.* Stone, 117 Mass. 486; Com. *v.* Kennard, 8 Pick. 133; Woodbury *v.* Long, 8 Pick. 543, 19 Am. Dec. 345. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829.

70. See *infra*, XIII.

71. Proceedings on official bonds, see *infra*, XII.

72. See *infra*, X.

73. **Proceedings to recover fines, penalties and amercements,** see *infra*, IX.

74. **Actions against officer,** see *infra*, XI.

75. See generally the title "**Mandamus.**"

76. See Eureka Pipe Line Co. *v.* Riggs, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995; 19 STANDARD PROC. 199, 211; 15 STANDARD PROC. 918.

Summary proceedings, see *infra*, VII, B.

Actions on official bonds, see *infra*, XII.

[a] **The remedy on the bond is not as appropriate** as mandamus because it "requires a suit regularly matured at rules, and prosecuted to judgment, and involves the hazards of execution and

a sheriff, constable or marshal of his ministerial duties,[77] such, for example, as the payment of county orders drawn on him,[78] or the appraisement of debtor's property on claim of exemption,[79] or the maintenance of an office at the county seat,[80] or the service of process,[81] or the acceptance and return into court of an affidavit of illegality,[82] or other prescribed duty.[83] The court will not, however, interfere by mandamus to control the exercise of the officer's discretion in the performance of his official functions.[84]

all the delays incident thereto. It is not as appropriate to the specific duty required, nor is it as speedy, prompt and efficacious as mandamus." Eureka Pipe Line Co. *v.* Riggs, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995.

77. **Cal.**—Quan Wo Chung *v.* Laumeister, 83 Cal. 384, 23 Pac. 320, 17 Am. St. Rep. 261; Fogarty *v.* Sparks, 22 Cal. 142. **Fla.**—Armstrong *v.* Stansel, 47 Fla. 127, 36 So. 762; State *ex rel.* Bradley *v.* Cone, 40 Fla. 409, 25 So. 279, 74 Am. St. Rep. 150. **Ga.**—Williams *v.* McArthur, 111 Ga. 28, 36 S. E. 301. **Mo.**—State *v.* Stokes, 99 Mo. App. 236, 73 S. W. 254. **Neb.**—State *v.* Holliday, 35 Neb. 327, 53 N. W. 142; State *v.* Wilson, 31 Neb. 462, 48 N. W. 147; People *v.* McClay, 2 Neb. 7. **S. C.** Matthews *v.* Nance, 49 S. C. 389, 27 S. E. 408; State *v.* Walker, 5 S. C. 263. **S. D.**—Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136. **Wash.**—State *v.* Hartman, 26 Wash. 524, 67 Pac. 223. **W. Va.**—Eureka Pipe Line Co. *v.* Riggs, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995.

See 19 STANDARD PROC. 198; 16 STANDARD PROC. 767.

78. Eureka Pipe Line Co. *v.* Riggs, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995.

[a] **Order for Repayment of Taxes.** Eureka Pipe Line Co. *v.* Riggs, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995.

79. First Nat. Bank of Neligh *v.* Lancaster, 54 Neb. 467, 74 N. W. 858; People *v.* McClay, 2 Neb. 7; Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136. But see State *v.* Sanford, 12 Neb. 425, 11 N. W. 868.

[a] **After the sale of property by the sheriff** it is too late to proceed by mandamus to compel him to take measures to set aside as exempt from sale the property he has already sold. State *v.* Bowden, 18 Fla. 17.

80. State *v.* Walker, 5 S. C. 263.

81. See the title "**Service of Process and Papers.**"

Enforcement of judgment, see 19 STANDARD PROC. 210; 15 STANDARD PROC. 918.

82. Williams *v.* McArthur, 111 Ga. 28, 36 S. E. 301.

[a] **Not Where the Affidavit Is Insufficient in Law.**—Notwithstanding the charter of a municipality authorizes one against whom a municipal execution is being enforced by levy to make defense thereto by affidavit of illegality, a mandamus will not be granted to compel the levying officer to accept such affidavit, where the defense therein pleaded is insufficient in law. Vanduzer *v.* Irvin, 138 Ga. 524, 75 S. E. 649.

[b] **Where an affidavit of illegality is not the proper remedy** mandamus will not lie to compel the sheriff to accept the affidavit of illegality. Webb *v.* Newsom, 138 Ga. 342, 75 S. E. 106.

83. See *infra*, this note.

Duties in connection with the enforcement and satisfaction of judgments, see 19 STANDARD PROC. 210.

[a] **Compelling Sheriff To Restore Possession.**—The sheriff may be compelled by mandamus to restore a petitioner to the possession of premises in obedience to an order of the court. Quan Wo Chung & Co. *v.* Laumeister, 83 Cal. 384, 23 Pac. 320, 17 Am. St. Rep. 261; Fogarty *v.* Sparks, 22 Cal. 142.

84. State *v.* Holliday, 35 Neb. 327, 53 N. W. 142. See generally the title "**Mandamus.**"

[a] **Advertisement in Particular Paper.**—The court will not direct the officer by mandamus to advertise in a particular paper. Tillman *v.* Thrasher, 61 Ga. 15; State *v.* Holliday, 35 Neb. 327, 53 N. W. 142. But where a particular paper has been designated, see 16 STANDARD PROC. 166, note 68 [f].

B. SUMMARY PROCEEDINGS.[85] — Courts exercise control over their writs and process,[86] and may, upon motion or other application of interested parties, order a sheriff, constable or marshal to proceed with the performance of his prescribed duties under such writs,[87] or else stand committed for contempt.[88] Thus the officer may upon motion be compelled to levy an attachment,[89] or to transmit papers to the court as required by statute,[90] or to collect money on execution,[91] or to pay over money collected on a judgment,[92] or to make a return of execution,[93] or to make a deed to the purchaser at an execution sale,[94] or to execute a writ of restitution.[95] The officer may of course interpose to such application for rule or order any defense which he may have,[96] but the burden is upon him to show affirmatively an excuse for not

85. See generally the title "**Summary Proceedings.**"

86. See 21 STANDARD PROC. 787.

87. **Cal.**—Leese *v.* Clark, 29 Cal. 664. **Ga.**—Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Reeves *v.* Parish, 80 Ga. 222, 4 S. E. 768; Brannon *v.* Central Bank, 18 Ga. 361. **Mo.**—Linck *v.* Troll, 84 Mo. App. 49. **N. Y.**—Wendt *v.* McCarrier, 176 App. Div. 695, 163 N. Y. Supp. 767; Riddle *v.* Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15; Matter of Dawson, 20 Abb. N. C. 188, 13 Civ. Proc. 142, 13 N. Y. St. 910. **Tenn.**—Phillips *v.* Cunningham, 5 Yerg. 416.

See 19 STANDARD PROC. 199, note 65.

[a] **Motion for rule** upon the officer. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Cottle *v.* Dodson, 25 Ga. 633.

[b] **Motion for Order To Show Cause.**—Leese *v.* Clark, 29 Cal. 664.

[c] **Attachment.**—At common law the officer could be coerced into performing his duties by attachment of his person. Gwin *v.* Breedlove, 2 How. (U. S.) 29, 11 L. ed. 167; West *v.* Hughes, 1 Har. & J. (Md.) 453.

88. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Reeves *v.* Parish, 80 Ga. 222, 4 S. E. 768; Phillips *v.* Cunningham, 5 Yerg. (Tenn.) 416.

89. Riddle *v.* Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15.

[a] **Levying Attachments in Proper Order.**—The remedy of a party whose attachment the officer is bound to levy before levying that of another, is not in equity but by motion to compel the officer to do his duty. Riddle *v.* Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15.

90. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689.

[a] **Execution and Claim Papers.** If after a levy is made by a sheriff or other officer, a claim is interposed to the property, it is the duty of such officer to transmit the execution, with his entries thereon, to the court from which it issued, together with the claim papers, and if he fails to transmit the papers, the court may upon proper application rule him to do so. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Brannan *v.* Cheek, 103 Ga. 353, 29 S. E. 937; Cottle *v.* Dodson, 25 Ga. 633.

91. Reeves *v.* Parish, 80 Ga. 222, 4 S. E. 768.

92. Wendt *v.* McCarrier, 176 App. Div. 695, 163 N. Y. Supp. 767.

93. Phillips *v.* Cunningham, 5 Yerg. (Tenn.) 416.

[a] **A return in accordance with the facts** may be ordered on motion. Matter of Dawson, 20 Abb. N. C. (N. Y.) 188, 13 Civ. Proc. 142, 13 N. Y. St. 910.

94. See 21 STANDARD PROC. 199; 16 STANDARD PROC. 827.

95. Leese *v.* Clark, 29 Cal. 664.

Mandamus to compel officer to execute a writ of restitution, see *supra*, VII, A.

96. See *infra*, this note.

[a] **Failure To Levy Execution.** It is competent for a sheriff in defense to a rule brought against him for neglecting to sell property upon which he made levy, to show that the property levied on was not subject to the execution. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Wilkin *v.* American Freehold etc. Mtg. Co., 106 Ga. 182, 32 S. E. 135.

executing the writ,[97] and that no injury resulted from his default.[98] The sureties on the officer's official bond are not necessary parties to a proceeding against him by motion.[99]

VIII. PROCEEDINGS TO RESTRAIN OFFICER. — Where the acts of the sheriff or constable would result in irremediable injury, they may, within the limitations of that remedy,[1] be prevented by injunction.[2]

IX. PENALTIES, FINES AND AMERCEMENTS. — A. In General. — In a number of states an amercement or fine is imposed by statute upon sheriffs or constables for misconduct or neglect in the performance of their official duties.[3] It is regarded as a penalty in some jurisdictions, being of a definite and fixed amount, recoverable absolutely;[4] in others it is given in compensation and is measured by the extent of the injury.[5]

B. For What Defaults. — If the statute enumerates the causes for which the officer may be fined or amerced the complainant must bring his case within its provisions.[6] The remedy has been allowed for misconduct or neglect of an officer in respect to process,[7] as for failure[8]

97. Leese *v.* Clark, 29 Cal. 664.

98. Reeves *v.* Parish, 80 Ga. 222, 4 S. E. 768.

99. Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

1. See the title "Injunctions."

2. Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

Enjoining execution, and sale, see 16 Standard Proc. 450, et seq., 750, and the cross-references there found.

[a] **Sale of property by officer** enjoined. Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

3. Ark.—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Cal.**—Kelley *v.* Desmond, 63 Cal. 517. **Ga.**—Smith *v.* West, 134 Ga. 11, 67 S. E. 405; Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465; Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Minn.**—J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185. **Miss.**—State *v.* Nichols, 39 Miss. 318; Jenkins *v.* State, 33 Miss. 382. **Mo.** Conway *v.* Campbell, 11 Mo. 71. **Neb.** Russell *v.* Grimes, 27 Neb. 812, 44 N. W. 107. **N. J.**—Pierson *v.* Chardavoyne (N. J. Eq.), 103 Atl. 820; White *v.* Rockafellar, 45 N. J. L. 299. **N. D.** Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. **N. C.**—Yeargin *v.* Wood, 84 N. C. 326. **Ohio.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Moore *v.* McClief, 16 Ohio St. 50. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895; Henderson-Sturges Piano Co. *v.* Smith, 33 Okla. 335, 125 Pac. 454. **Tex.**—Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

[a] **A coroner acting as sheriff is** subject to the penalty. Patterson *v.* Gaston, 17 Ala. 223.

4. See *infra*, IX, L, 2.

5. See *infra*, IX, L, 2.

6. Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12.

7. Duncan *v.* Philpot, 64 N. C. 479.

8. Ga.—Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465. **Minn.** J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185. **N. J.** White *v.* Rockafellar, 45 N. J. L. 299; Stryker *v.* Merseles, 24 N. J. L. 542; Melvin *v.* Purdy, 17 N. J. L. 162. **N. D.** Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. **Ohio.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456.

[a] **Writ of Execution.**—Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007; Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895; Henderson-Sturges Piano Co. *v.* Smith, 33 Okla. 335, 125 Pac. 454.

[b] **Failure to make money** on execution. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[c] **The gravamen** of the statutory right to proceed by amercement is the "neglect" or "refusal" to execute

to properly execute or return[9] process, or for improper conduct of official sales,[10] or for failure to pay over money coming into his hands.[11]

C. REMEDIES TO RECOVER. — **1. Form of.** — The fine or amercement thus imposed against sheriffs and constables has been recovered in an ordinary action,[12] but in most states statutory proceeding is provided for the purpose,[13] and in some jurisdictions the common law action is thereby replaced.[14]

2. Nature of Statutory Remedy. — The remedy authorized by statute[15] is summary[16] and rigorous,[17] and is in many states regarded

the writ of execution. Stryker *v.* Merseles, 24 N. J. L. 542.

9. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Ky.**—Com. *v.* Bradley, 1 Litt. 48. **Miss.**—Vance *v.* Connell, Walk. 254. **N. C.**—Yeargin *v.* Wood, 84 N. C. 326; Waugh *v.* Brittain, 49 N. C. 470; Kea *v.* Melvin, 48 N. C. 243; Hogg *v.* Bloodworth, 1 N. C. 593. **Ohio.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Conkling *v.* Parker, 10 Ohio St. 28. **Okla.**—Henderson-Sturges Piano Co. *v.* Smith, 33 Okla. 335, 125 Pac. 454. **Tex.**—Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422. **Va.**—Fletcher *v.* Chapman, 2 Leigh (29 Va.) 560.

[a] **Return on bench warrant not made.** Jenkins *v.* State, 33 Miss. 382.

[b] **False Return of Process.—Miss.** State *v.* Nichols, 39 Miss. 318. **N. C.** Houser *v.* Hampton, 29 N. C. 333. **Tenn.** Hill *v.* Hinton, 2 Head 124.

[c] **Penalty** for failure to return execution. Patterson *v.* Gaston, 17 Ala. 223.

10. Smith *v.* West, 134 Ga. 11, 67 S. E. 405; Pierson *v.* Chardavoyne (N. J. Eq.), 103 Atl. 820.

[a] **For failure to give notice** before selling property. Kelley *v.* Desmond, 63 Cal. 517.

[b] **Neglect To Sell Goods and Chattels.**—Wadsworth *v.* Parsons, 6 Ohio 449.

11. **Ga.**—Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122. **Mo.**—Conway *v.* Campbell, 11 Mo. 71. **Neb.**—Russell *v.* Grimes, 27 Neb. 812, 44 N. W. 107. **Tex.**—W. T. Rickards & Co. *v.* J. H. Bemis & Co. (Tex. Civ. App.), 78 S. W. 239.

12. **Cal.**—Kelley *v.* Desmond, 63 Cal. 517. **Ill.**—Figueira *v.* Pyatt, 88 Ill. 402; Pace *v.* Vaughan, 6 Ill. 30. **N. C.**—Houser *v.* Hampton, 29 N. C. 333.

[a] **Debt** for the penalty. **Me.** Eustis *v.* Kidder, 26 Me. 97; Barter *v.* Martin, 5 Greenl. 76. **N. Y.**—Colton *v.* Mott, 15 Wend. 619. **N. C.**—Duncan *v.* Philpot, 64 N. C. 479; Houser *v.* Hampton, 29 N. C. 333.

[b] **Trespass** against sheriff for selling exempt property. Figueira *v.* Pyatt, 88 Ill. 402.

13. **Colo.**—Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52. **Kan.** Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Miss.**—State *v.* Nichols, 39 Miss. 318. **N. J.**—Stryker *v.* Merseles, 24 N. J. L. 542. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

14. Pace *v.* Vaughan, 6 Ill. 30; Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46; Com. *v.* Bradley, 1 Litt. (Ky.) 48.

[a] **An action on the sheriff's bond** will not lie for failure to make return on execution where the remedy given by statute to recover the penalty is by motion. Com. *v.* Bradley, 1 Litt. (Ky.) 48; Stryker *v.* Merseles, 24 N. J. L. 542.

15. See *supra*, IX, C, 1.

16. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Minn.** J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622. **N. J.**—Stryker *v.* Merseles, 24 N. J. L. 542. **N. D.**—Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. **Ohio.**—Moore *v.* McClief, 16 Ohio St. 50; Duncan *v.* Drakeley, 10 Ohio 45; Conkling *v.* Parker, 10 Ohio St. 28; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12. **Okla.** Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

17. **Ga.**—Read Phosphate Co. *v.* S.

as penal in its nature.[18] It must, therefore, be strictly construed,[19] and the party seeking to enforce it must make a case clearly within the letter and spirit of the statute.[20]

D. PARTIES. — The amercement or fine is recoverable at the instance of the party aggrieved.[21] He is sometimes required to proceed in the name of the state,[22] a rule which would probably give way to the provision of codes and statutes that actions be brought in the name of the real party in interest.[23] The defendant in such proceedings is the officer[24] in default, and the statute sometimes confines the remedy to

Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122. **Minn.**—J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622. **N. D.**—Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. **Ohio.** Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12. **Okla.** Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

[a] **"The courts must have control of their officers,** and power to compel the prompt and faithful execution of their processes. To permit an officer, to whom judicial process is issued, to set himself up as an independent authority, as such officers are sometimes inclined to do, and execute or not at his pleasure and leisure or those of the judgment debtor, with impunity, would make the administration of justice a practical mockery; and these and kindred considerations have been acted upon, not only in our legislation, but elsewhere." Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

[b] **The purpose** of the statute is to furnish the execution creditor with a prompt remedy without any unnecessary formality. Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007.

18. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Minn.**—J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185. **Mo.**—Conway *v.* Campbell, 11 Mo. 71. **Ohio.**—Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12.

19. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Ill.**—Figueira *v.* Pyatt, 88 Ill. 402. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Minn.**—J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185. **Miss.**—State *v.* Nichols, 39 Miss. 318; Vance *v.* Connell, Walk. 254. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

20. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218; Duncan *v.* Drakeley, 10 Ohio St. 45; Conkling *v.* Parker, 10 Ohio St. 28; Webb *v.* Anspach, Brother & Co., 3 Ohio St. 522.

[a] **Amercement not based on equitable grounds** and in enforcing the right to it the courts are bound to hold the party claiming it to a strict observance of the requirements of the statute. Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

21. Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007; Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

[a] **A purchaser** at a sheriff's sale is not entitled to maintain an action to recover the penalty for selling without notice. Kelley *v.* Desmond, 63 Cal. 517.

[b] **Where the state is a party** to the suit in which the false return is made, it may proceed to recover the penalty. State *v.* Nichols, 39 Miss. 318.

22. Duncan *v.* Philpot, 64 N. C. 479.

[a] **For the benefit** of the person injured. Duncan *v.* Philpot, 64 N. C. 479.

23. See the title "**Parties.**"

[a] **An assignee** of the judgment must proceed to amerce the officer in his own name. Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

24. Pace *v.* Vaughan, 6 Ill. 30.

[a] **The plaintiff in execution** cannot be proceeded against for the penalty. Pace *v.* Vaughan, 6 Ill. 30.

the particular officer or deputy committing the act.[25]

E. JURISDICTION AND VENUE. — Jurisdiction of proceedings to amerce officers may be vested by statutes in particular courts.[26] Generally, if the misconduct or neglect of the officer is in respect to process, the court from which the process issued has jurisdiction,[27] even though the process issued to a sheriff in another county.[28]

F. PLEADING. — **1. Form of.** — An action to recover from a sheriff or constable an amercement, fine or penalty, proceeds upon a declaration, complaint or petition[29] like actions generally. Formal pleadings are sometimes dispensed with where the plaintiff proceeds upon the summary statutory remedy;[30] a bare notice to defendant of the charge against him being all that is required.[31] The usual procedure where summary relief is sought is to make application therefor[32] by motion[33] or petition.[34]

25. Pace *v.* Vaughan, 6 Ill. 30; State *v.* Nichols, 39 Miss. 318.

[a] **On breach of duty by a deputy sheriff** a motion will not lie against the sheriff, where the statute permits the remedy only against the officer committing the act. State *v.* Nichols, 39 Miss. 318.

26. Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46.

[a] **Original jurisdiction vested in justices of peace** of cases (1) to recover penalties against constables for failing to return execution. Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46. (2) And in such cases the circuit court has not concurrent jurisdiction with the justice. Nor can two or more liabilities be consolidated in one motion so as to give the circuit court jurisdiction. Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46.

27. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

[a] **The district court** from which the execution issued, has jurisdiction. Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

28. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341.

29. **Colo.**—Madera *v.* Holdredge, 4 Colo. App. 126, 35 Pac. 52. **Ill.**—Figueira *v.* Pyatt, 88 Ill. 402; Pace *v.* Vaughan, 6 Ill. 30. **Me.**—Eustis *v.* Kidder, 26 Me. 97.

30. Ritter *v.* Merseles, 24 N. J. L. 627; Stryker *v.* Merseles, 24 N. J. L. 542; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12.

31. Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12.

[a] **Office of a declaration** performed by notice. Stryker *v.* Merseles, 24 N. J. L. 542.

32. See the title "**Summary Proceedings.**"

33. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Ky.**—Gore *v.* Hedges, 7 Mon. 520; Com. *v.* Bradley, 1 Litt. 48. **Miss.**—State *v.* Nichols, 39 Miss. 318; Jenkins *v.* State, 33 Miss. 382; Vance *v.* Connell, Walk. 254. **Mo.** Conway *v.* Campbell, 11 Mo. 71. **Neb.** Russell *v.* Grimes, 27 Neb. 812, 44 N. W. 107. **N. J.**—Pierson *v.* Chardavoyne (N. J. Eq.), 103 Atl. 820; White *v.* Rockafellar, 45 N. J. L. 299; Stryker *v.* Merseles, 24 N. J. L. 542; Melvin *v.* Purdy, 17 N. J. L. 162. **Ohio.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Conkling *v.* Parker, 10 Ohio St. 28; Wadsworth *v.* Parsons, 6 Ohio 449; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895. **Tenn.**—Hill *v.* Hinton, 2 Head 124. **Tex.**—Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

[a] **Motion for judgment** for amount of penalty authorized by statute. Patterson *v.* Gaston, 17 Ala. 223.

[b] **For Order To Show Cause.**—J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

34. Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122; Brantley *v.*

2. Sufficiency of. — a. *Declaration or Complaint.* — The plaintiff should show clearly a state of facts which will entitle him to recover[35] under the statute.[36]

b. *Application by Petition or Motion.* — Plaintiff's status need not appear from his application.[37] All the facts necessary to constitute the alleged breach of duty of the officer must be stated,[38] together with the resulting injury to plaintiff.[39] An adjudicated form of motion against sheriff for failure to make return on execution is set out in the notes.[40]

Southerland, 1 Ga. App. 804, 57 S. E. 960.

[a] **Petition for rule** upon officer. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[b] **The rule is not a regular suit** but an exercise of the court's power over its officer to compel him to do his duty. Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465.

[c] **The rule may not include a requirement to show cause** why he should not be attached for contempt, but the practice as to the manner of hearing is similar, whether the first proceeding is merely to obtain a rule absolute for the money or includes also a proceeding to attach the officer if it should not be paid. Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465.

35. **Colo.**—Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52. **Ill.**—Figueira *v.* Pyatt, 88 Ill. 402; Pace *v.* Vaughan, 6 Ill. 30. **Me.**—Eustis *v.* Kidder, 26 Me. 97.

[a] **A complaint for treble the value of exempt property** levied on should state plaintiff's title, his right under the statute, the levy of the process, his demand upon the sheriff, sheriff's refusal to surrender. Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52.

36. Figueira *v.* Pyatt, 88 Ill. 402; Pace *v.* Vaughan, 6 Ill. 30.

[a] **"As the action is based upon a penal statute,** which should receive a strict construction, the plaintiff was bound to show, by his averments, that the case clearly came within the provisions of the act." Figueira *v.* Pyatt, 88 Ill. 402.

[b] **Reference to the statute** need not be made in a complaint to recover the statutory penalty. Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52.

[c] **Levy on Exempt Property.**—In a suit to recover a penalty for levying on exempt property which is claimed as exempt in lieu of the articles enumerated in the statute, the plaintiff must aver that he did not have any or either of the articles enumerated in the statute exempted, or if he had a portion and not all he must allege what articles he did not have exempted. Figueira *v.* Pyatt, 88 Ill. 402.

37. Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

[a] **Whether plaintiff is a firm, partnership or corporation** need not appear, as plaintiff's right to sue was determined in the former action. Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

38. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[a] **Where failure to make money on execution** is the default, it should be shown that the process was placed in the hands of the sheriff, that there was property to levy on, and that the sheriff has not made the money under the process. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

39. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

40. **Form of Motion.**—The case of Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422, contains the following form: Now comes the ———, plaintiff in the above entitled and numbered cause, and respectfully represents to the court: That ———, a resident of the county of ———, state of, is the duly qualified and acting sheriff of said——— county and was such at the times and dates hereinafter mentioned. That, heretofore, on the —— day of —— 19—, plaintiff in the above entitled and numbered cause recovered judgment in this court for the sum of $273 with interest thereon at the rate of 8 per cent. per annum and $12.90 costs of suit against the defendants —— —— in said cause. That afterwards on the

G. PLEA, ANSWER, OR AFFIDAVIT. — The practice in some states does not require either plea or answer to an application to amerce.[41] In some other jurisdictions the defendant should within the time required by statute[42] make answer to the application for summary judgment,[43] or rule to show cause[44] setting up whatever defenses he may have.[45] He may file affidavits showing that his conduct was justified.[46]

H. OBJECTIONS TO PLEADING. — The usual methods of objecting to pleadings are open to the parties entitled to make them.[47] Thus the defendant may demur to plaintiff's application[48] where it fails to state a cause of action[49] or fails to allege that plaintiff suffered damages.[50]

——day of ——, and after the adjournment of the term of this court at which such judgment was obtained, the clerk of this court issued an execution in said cause to carry out the orders of this court in said judgment, directed to the sheriff or any constable of —— county ——, commanding him to make said moneys in said judgment mentioned returnable to the first day of the next term of this court. That on the same day of its said issue, said clerk delivered said execution to said ——, as sheriff of said —— county, ——. That said ——— received said execution in his official capacity, as sheriff as aforesaid, whereby he became officially bound to execute and return said execution as he was therein directed. That though there has been the beginning of two terms of this court since said sheriff, ———, received said execution, he has neglected and failed to turn over to plaintiff or its counsel the moneys mentioned in said writ of execution. Whereby said —— as sheriff of —— county —— has become liable to pay to plaintiff said sums of money in said writ of execution mentioned. That plaintiff is still the holder and owner of said judgment. Wherefore plaintiff moves the court and prays that said sheriff, ——— be served with a copy of this motion, and that the plaintiff have judgment against him, as sheriff as aforesaid, for said sum of $273 with 8 per cent. per annum interest thereon from ——, $12.90 costs therein mentioned in said execution, costs of this motion, and plaintiff prays for general relief and such process as it may be entitled to.

———.

Attorney for Plaintiff.

41. Wadsworth *v.* Parsons, 6 Ohio 449.

42. See *infra,* IX, J, 1, b.

[a] **At the first term** of the court. Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12.

43. Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

44. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122; Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[a] **Verification** of the answer is necessary. But want of verification may be corrected by amendment. Pace *v.* Tarver, 19 Ga. App. 708, 92 S. E. 227.

45. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122; Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

[a] **A legal excuse** for his failure to make money on execution, where that is the default complained of, should be pleaded. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[b] **That notwithstanding the exercise of reasonable diligence,** he could not collect the money on fi. fa., should be shown. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

46. J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185.

47. See *infra,* this section.

[a] **The sureties on a bond** of the sheriff, who would be ultimately liable for the penalty if it is recovered against the sheriff, may interpose an objection. W. T. Rickards & Co. *v.* J. H. Bemis & Co. (Tex. Civ. App.), 78 S. W. 239.

48. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960. See generally the title "**Demurrer.**"

49. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

50. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

And defects in the plea, answer or affidavit of defendant may be reached by demurrer[51] or motion.[52]

I. REPLICATION OR REPLY.[53] — The plaintiff excepting to the truth of the officer's answer to the rule to show cause, should traverse the same,[54] otherwise it is to be taken as true.[55]

J. PROCESS.[56] — **1. Notice.** — a. *In General.* — The process, where the plaintiff proceeds by motion or petition for summary relief, consists in notice to the defendant,[57] and, as has already been seen,[58] such

[a] **The plaintiff waives an objection to amendment** ordered on demurrer, requiring a special allegation of damages, when he submits to the ruling and without objection amends as ordered. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

51. Davis *v.* Reid, 57 Ga. 188; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

[a] **Special Demurrer.**—Defects in the answer should be pointed out by special demurrer so as to permit of amendment. Davis *v.* Reid, 57 Ga. 188; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

52. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

[a] **Matter constituting a meritorious** defense should not be stricken from the answer (Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122), for "to needlessly or improperly strike the answer is not only to deprive the sheriff of his rights, but also, perhaps, to deprive some party to the cause of a substantial benefit accruing to him by operation of law." Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

[b] **His alleged excuse for not paying the money** on demand should not be stricken out. "The court is always warranted in striking (upon proper objection thereto) bare conclusions of, the pleader, but the portions of the sheriff's answer which were stricken in this case were not conclusions of the sheriff, but statements of facts which had influenced him in not paying over the money upon demand." Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

53. See generally the title, "**Replication and Reply.**"

54. Davis *v.* Reid, 57 Ga. 188; Hutchins *v.* Hullman, 34 Ga. 346; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122; Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[a] **Time To Traverse.**—The traverse may be made at the second term and before the case is called for trial. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

55. Davis *v.* Reid, 57 Ga. 188; Hutchins *v.* Hullman, 34 Ga. 346; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

[a] **No issue** for a jury or for the court exists where the answer is not traversed. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

56. See generally the titles "**Process;**" "**Service of Process and Papers.**"

57. **Kan.**—Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Ky.**—Gore *v.* Hedges, 7 Mon. 520. **Miss.**—Jenkins *v.* State, 33 Miss. 382; Vance *v.* Connell, Walk. 254. **Neb.**—Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723. **N. J.** White *v.* Rockafellar, 45 N. J. L. 299; Stryker *v.* Merseles, 24 N. J. L. 542; Scott *v.* Dow, 14 N. J. L. 350. **N. C.** Yeargin *v.* Wood, 84 N. C. 326. **Ohio.** Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

[a] **A rule to show cause** is served on the officer where petition to show cause is filed. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[b] **The record should show** that notice was given of the motion, either by written notice executed and returned, or by the officer's appearance to the motion, or by statement in the record of the judgment nisi, that it appeared to the court that due notice was given. Jenkins *v.* State, 33 Miss. 382.

58. See *supra*, IX, F, 1.

notice stands in the place of formal pleading on the part of the plaintiff.

b. *Length of Notice.* — Notice for the period required by statute must be given.[59] It may provide that the notice be "reasonable,"[60] or again that it be for a certain number of days.[61]

c. *Form and Contents.* — If the statute so requires, the notice should be in writing.[62] It need not be dated,[63] and if dated, an error therein is not fatal.[64] Where the notice takes the place of a formal pleading,[65] it should allege a good cause for amercement[66] and should do so with the same certainty, though not necessarily with the same formality, as a declaration at common law.[67]

d. *Service of Notice.* — Notice in these summary proceedings is served in the same manner as notices generally.[68] It should be personal,[69] or by leaving a copy at the defendant's dwelling place, and mailing notice would not be sufficient[70] in the absence of proof that the defendant actually received it in time.[71]

K. TRIAL OR HEARING. — **1. Time and Place of Moving.** — Where the proceeding is upon application by motion,[72] the motion[73] should be

59. Jenkins *v.* State, 33 Miss. 382.

60. Jenkins *v.* State, 33 Miss. 382.

61. Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

[a] **Two days' notice** (1) required (Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218; Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895), if (2) defendant is a resident of the county. Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12.

[b] **Fifteen Days' Notice.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456.

[c] **Ten days** before first day of term. Melvin *v.* Purdy, 17 N. J. L. 162.

62. Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218; Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

63. Scott *v.* Dow, 14 N. J. L. 350.

[a] **From the time of service** the notice is operative. Scott *v.* Dow, 14 N. J. L. 350.

64. Scott *v.* Dow, 14 N. J. L. 350.

[a] **An impossible date** will not invalidate the notice. Scott *v.* Dow, 14 N. J. L. 350.

[b] **Error in the date of a notice,** corrected by the statement of the time the court would be held at which the motion would be made. Gore *v.* Hedges, 7 Mon. (Ky.) 520.

65. See *supra,* IX, F, 1.

66. Stryker *v.* Merseles, 24 N. J. L. 542; Ritter *v.* Merseles, 24 N. J. L. 627.

[a] **Failure to return an execution according to law** is not sufficient cause for amercement. Ritter *v.* Merseles, 24 N. J. L. 627.

[b] **Both neglect and refusal to execute** the writ of execution must be alleged. Mere stating that the amercement would be moved "for not executing the writ of execution" is not sufficient. Stryker *v.* Merseles, 24 N. J. L. 542.

67. Ritter *v.* Merseles, 24 N. J. L. 627; Stryker *v.* Merseles, 24 N. J. L. 542. See generally the title "**Certainty in Pleading.**"

[a] **It is the only information which the sheriff has** of the cause of complaint. Stryker *v.* Merseles, 24 N. J. L. 542.

[b] **Irregularities in the notice** waived by taking testimony under the notice and by adjourning the hearing without objection. White *v.* Rockafellar, 45 N. J. L. 299.

68. See the title "**Service of Process and Papers.**"

69. Anonymous, 6 N. J. L. 159.

70. Melvin *v.* Purdy, 17 N. J. L. 162; Anonymous, 6 N. J. L. 159; Yeargin *v.* Wood, 84 N. C. 326.

71. Melvin *v.* Purdy, 17 N. J. L. 162; Yeargin *v.* Wood, 84 N. C. 326.

72. See *supra,* IX, F, 1.

73. Webb *v.* Anspach, Brother & Co., 3 Ohio St. 522.

[a] **Filing a paper in clerk's office** in vacation not such a motion. Webb

made in open court, and at the time contemplated in the notice.[74]

2. Jury.[75] — Though a jury trial is permitted in particular jurisdictions in these summary proceedings[76] they are quite often regarded as not being in the nature of a trial in court in which the parties are privileged to have a jury.[77]

3. Province of Judge and Jury.[78] — Questions of law[79] should in accordance with the general rules, be decided by the court and those involving disputed facts be submitted to the jury.[80]

4. Burden of Proof. — The proceeding follows the usual course as to the burden of proof.[81]

5. Dismissal.[82] — The court may in a proper case order the proceedings dismissed.[83]

L. Order or Judgment.[84] — **1. In General.** — Where the charge against the officer is sustained the court should order or adjudge that he be amerced or fined.[85] Yet the court ought to carefully guard against allowing amercements where the proceedings have been irregular or not strictly followed.[86]

v. Anspach, Brother & Co., 3 Ohio St. 522.

74. Webb *v.* Anspach, Brother & Co., 3 Ohio St. 522.

75. See generally the title "**Juries and Jurors.**"

76. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

[a] **Upon traverse of the answer** of sheriff in Georgia any issues of fact are to be submitted to the jury. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

77. Kan.—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Ohio.** Duncan *v.* Drakeley, 10 Ohio 45; Conkling *v.* Parker, 10 Ohio St. 28; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12; Moore *v.* McClief, 16 Ohio St. 50. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

78. See generally the title "**Province of Judge and Jury.**"

79. Waugh *v.* Brittain, 49 N. C. 470.

[a] **What is a proper return** in form and substance, is a question of law for the court. Waugh *v.* Brittain, 49 N. C. 470.

80. Waugh *v.* Brittain, 49 N. C. 470.

[a] **Whether return made in time,** for the jury. Waugh *v.* Brittain, 49 N. C. 470.

81. Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422. See 2 Ency. of Ev. 773.

[a] **The burden is upon the officer,** where the injury is shown, to excuse his failure to execute the writ by showing that he could not have collected anything by executing it. Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

82. See generally the title "**Dismissal, Discontinuance and Nonsuit.**"

83. J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185.

[a] **Thus an order to show cause** may be dismissed where from the facts presented at the hearing no damage to the plaintiff appears and the conduct of the sheriff does not appear to have been willful or corrupt. J. H. Allen & Co. *v.* Christensen, 111 Minn. 414, 127 N. W. 185.

84. See generally the titles "**Judgments;**" "**Orders.**"

85. Kan.—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341. **Ohio.**—Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12. **Okla.** Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895; Henderson-Sturges Piano Co. *v.* Smith, 33 Okla. 335, 125 Pac. 454.

[a] **Where the execution exceeds the judgment,** as shown by the recitals in the execution, the officer cannot be amerced for neglecting to return the execution. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Ohio.** Moore *v.* McClief, 16 Ohio St. 50. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

86. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Fletcher *v.* Chapman, 2 Leigh (29 Va.) 560.

2. Amount. — In some states the amount of the judgment is measured by the amount of damages resulting from the injury,[87] but in others a showing of damages or absence of damage to the plaintiff is irrelevant,[88] the liability of the defendant being absolute for a fixed penalty.[89] If, for example, the proceeding is based on failure to levy or return execution, the judgment is for the amount of the execution judgment[90] with interest thereon,[91] and, in some states, an additional penalty is authorized.[92]

Costs. — The officer against whom the judgment is obtained is chargeable with the costs of the proceeding.[93]

[a] **The court in its sound discretion** may give or deny the judgment. Fletcher *v.* Chapman, 2 Leigh (29 Va.) 560.

87. **Ga.**—Beck & Gregg Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. (N. S.) 420. **Minn.** Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622. **Neb.**—Shufeldt *v.* Barlass, 33 Neb. 785, 51 N. W. 134; Hellman *v.* Spielman, 19 Neb. 152, 27 N. W. 131; Crooker *v.* Melick, 18 Neb. 227, 24 N. W. 689. **S. D.**—Swenson *v.* Christoferson, 10 S. D. 188, 72 N. W. 459, 66 Am. St. Rep. 712. **Tex.**—Ranken *v.* Jones, 53 S. W. 583; Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295; Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422. **Vt.**—Kidder *v.* Barker, 18 Vt. 454.

88. Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007; Moore *v.* McClief, 16 Ohio St. 50.

89. **Ala.**—Reid *v.* Dunklin, 5 Ala. 205. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Ind.**—State *v.* Youmans, 5 Ind. 280. **Kan.**—Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Smith *v.* Martin, 20 Kan. 572; Bond *v.* Weber, 17 Kan. 410. **Mass.** Goodnow *v.* Willard, 5 Metc. 517. **Miss.** Cox *v.* Ross, 56 Miss. 481. **N. J.**—Rutzkowski *v.* George, 92 Hun 412, 36 N. Y. Supp. 762, 71 N. Y. St. 855. **N. D.** Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. **N. C.**—Swain *v.* Phelps, 125 N. C. 43, 34 S. E. 110. **Ohio.**—Moore *v.* McClief, 16 Ohio St. 50; Duncan *v.* Drakeley, 10 Ohio 45; Conkling *v.* Parker, 10 Ohio St. 28. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895; Henderson-Sturges Piano Co. *v.* Smith, 33 Okla. 335, 125 Pac. 454. **Pa.**—Bachman *v.* Fenstermacher, 112 Pa. 331, 4 Atl. 546. **Vt.**—Hall & Co. *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

[a] **No discretion rests in the court** as to the amount of the judgment. **Kan.** Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341. **N. D.**—Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. **Ohio.**—Moore *v.* McClief, 16 Ohio St. 50.

90. **Ark.** — Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Colo.**—Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52. **Kan.**—Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Ky.** Gore *v.* Hedges, 7 Mon. 520; Partlow *v.* Lawson, 2 B. Mon. 46. **N. J.**—White *v.* Rockafellar, 45 N. J. L. 299. **Ohio.** Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895. **Tex.**—Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

91. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Kan.**—Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Minn.**—Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622. **Ohio.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895.

92. **Ky.**—Gore *v.* Hedges, 7 Mon. 520; Partlow *v.* Lawson, 2 B. Mon. 46. **Minn.**—Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622. **Ohio.**—Conkling *v.* Parker, 10 Ohio St. 28.

[a] **Penalty for Use of the County.** Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

[b] **Not in Excess of $200.**—Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

93. **Ark.**—Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. **Kan.**—Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218. **Minn.**—Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622. **N. J.**

3. Enforcement of Orders or Judgment.[94] — The court may enforce the amercement and fine by commitment of the defendant.[95] Where the sheriff is called upon to respond to a rule and the rule is made absolute, an execution may issue against the sheriff or he may be attached for contempt.[96]

4. Vacating and Modifying Order or Judgment. — The court has power upon a proper showing to vacate its order or judgment in amercement.[97]

5. Force and Effect. — An order of amercement has the force and effect of a judgment,[98] and is therefore a lien upon the real estate of the officer within the county[99] from the day upon which it is entered.[1]

6. Conclusiveness of. — The adjudication in amercement possesses the same degree of conclusiveness as other decisions of the court generally.[2] If valid,[3] it is res judicata of the material facts directly in issue and passed upon by the court.[4]

M. Review. — The judgment in amercement is reviewable by appeal[5] or writ of error.[6] The case must, as in other proceedings,[7] be properly brought up for review,[8] and the proper objections must be made in the trial court.[9] Where prejudicial error appears the court may reverse the judgment of the lower court.[10]

White *v.* Rockafellar, 45 N. J. L. 299. **Ohio.**—Woodbury & Co. *v.* Berry, 18 Ohio St. 456; Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28. **Okla.**—Stein *v.* Scanlan, 34 Okla. 801, 127 Pac. 483, 42 L. R. A. (N. S.) 895. **Tex.**—Waxahachie Nursery Co. *v.* Sansom (Tex. Civ. App.), 138 S. W. 422.

94. See generally the title "**Judgments and Decrees, Enforcement of.**"

95. Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

96. Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

97. Yeargin *v.* Wood, 84 N. C. 326. See generally the title "**Judgments.**"

98. Knox *v.* Merrill, 22 Kan. 572.

99. Knox *v.* Merrill, 22 Kan. 572.

1. Knox *v.* Merrill, 22 Kan. 572.

2. See the titles "**Judgments;**" "**Orders;**" "**Res Judicata.**"

3. See *infra*, this note.

[a] **Where void for want of notice,** it possesses no force as res judicata. Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723.

4. Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723.

[a] **In a subsequent action on sheriff's bond,** judgment in amercement used to evidence the facts adjudicated by it. Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723.

5. Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007. See generally the title "**Appeals.**"

6. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960. See the title "**Writ of Error.**"

7. See the titles "**Case on Appeal;**" "**Bills of Exceptions;**" "**Statement and Abstract of Case.**"

8. Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

[a] **Case Made.**—For contents and sufficiency of a case made in error, see Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

9. Pace *v.* Tarver, 19 Ga. App. 708, 92 S. E. 227; Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960; Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007.

[a] **The sufficiency of the evidence** must be challenged below. Lee *v.* Dolan, 34 N. D. 449, 158 N. W. 1007.

[b] **Error in ordering petition for rule amended** to allege damages specially, not available in the absence of proper objection. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

[c] **Failure to verify answer** cannot be raised for first time in reviewing court. Pace *v.* Tarver, 19 Ga. App. 708, 92 S. E. 227.

10. Jenkins *v.* State, 33 Miss. 382; Vance *v.* Connell, Walk. (Miss.) 254.

X. INDEMNITY BOND OR UNDERTAKING AND PROCEEDINGS THEREON. — A. GENERALLY. — The statutes quite generally authorize sheriffs, constables and marshals before proceeding upon the execution of a writ to exact indemnity to protect themselves from any loss or damage which may ensue.[11]

B. ACTIONS. — **1. In General.** — The persons thus indemnified[12] may have recourse to an action on the indemnity bond,[13] or upon the verbal agreement of indemnity,[14] and to a summary proceeding where that is authorized by statute.[15]

Bill in Equity. — The remedy upon an indemnity bond is one at law, and a bill in equity will not lie,[16] at least where the legal remedy is full, adequate and complete.[17]

2. Joinder of Actions.[18] — A single action may be maintained on

[a] **Want of notice of motion** cause for reversal. Jenkins *v.* State, 33 Miss. 382; Vance *v.* Connell, Walk. (Miss.) 254.

11. Ala.—Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270. **Cal.**—White *v.* Fratt, 13 Cal. 521. **Ga.**—Turner *v.* Woodward, 123 Ga. 866, 51 S. E. 762. **Ia.**—Constantine *v.* Rowland, 154 Iowa 115, 134 N. W. 549. **Ky.**—Dine *v.* Donnelly, 134 Ky. 776, 121 S. W. 685; Fite *v.* Briedenback, 127 Ky. 504, 105 S. W. 1182. **Me.**—Crossman *v.* Owen, 62 Me. 528. **Mont.**—Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369. **Tex.**—Maxwell-Clark Drug Co. *v.* Singley (Tex. Civ. App.), 152 S. W. 827. **Va.**—Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7.

[a] **Before Selling Attached Property.**—Fite *v.* Briedenback, 127 Ky. 504, 105 S. W. 1182; Topliff *v.* Hayes, 20 Vt. 362.

12. See *infra*, X, A, 4.

13. Ala.—Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270. **Cal.**—White *v.* Fratt, 13 Cal. 521. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Ga.**—Turner *v.* Woodward, 123 Ga. 866, 51 S. E. 762. **Kan.**—Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540. **Ky.**—Dine *v.* Donnelly, 134 Ky. 776, 121 S. W. 685; Brock, etc. *v.* Church, etc., 5 Ky. L. Rep. 855. **Me.** Crossman *v.* Owen, 62 Me. 528. **Mass.** Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745; Cook *v.* Merrifield, 139 Mass. 139, 29 N. E. 540. **Mich.**—Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534. **Miss.**—Butler *v.* Alcus, 51 Miss. 47. **Mont.**—Whipps *v.* Lowney, 42 Mont. 546, 113 Pac. 750. **Neb.**—Omaha Carpet Co. *v.* Clapp, 2 Neb. (Unof.) 406, 89 N. W. 246. **N. Y.**—Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483; Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839; Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439; Bowe *v.* Brown, 26 N. Y. Wkly. Dig. 47. **Okla.**—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573. **Ore.**—Houser *v.* West, 39 Ore. 392, 65 Pac. 82. **Pa.**—Barber *v.* Wolcott, 15 Pa. 57. **R. I.**—Horton *v.* Di Panni, 80 Atl. 8. **Tex.**—Maxwell-Clark Drug Co. *v.* Singley (Tex. Civ. App.), 152 S. W. 827. **Vt.**—Topliff *v.* Hayes, 20 Vt. 362. **Va.**—Lewis *v.* Adams, 6 Leigh (33 Va.) 320. **Wash.**—National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637; Barnett *v.* O'Loughlin, 8 Wash. 260, 35 Pac. 1099. **W. Va.** Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

[a] **The Action Is Ex Contractu.** Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.

[b] **Debt** on the bond. Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

[c] **A bond good as a common law bond** though defective as a statutory bond may be sued on. Dabney *v.* Catlett, 12 Leigh (39 Va.) 383.

14. Cal.—Stark *v.* Raney, 18 Cal. 622. **Ga.**—Turner *v.* Woodward, 123 Ga. 866, 51 S. E. 762. **R. I.**—Horton *v.* Di Panni (R. I.), 80 Atl. 8.

15. See *infra*, X, B.

16. White *v.* Fratt, 13 Cal. 521.

[a] **A bill quia timet,** and to enforce specific execution of the indemnity agreement will not lie even though the sheriff is insolvent and unable to pay the judgment against him. White *v.* Fratt, 13 Cal. 521.

17. See White *v.* Fratt, 13 Cal. 521.

18. See generally the title "**Joinder of Actions.**"

several bonds given to indemnify the sheriff on proceeding with the performance of a certain duty.[19]

3. Conditions Precedent.[20] — Conditions precedent to the maintenance of the action against the indemnitors must be performed before suit is brought.[21]

4. Parties. — The proceedings are had at the instance of any person indemnified, whether he be the officer performing the official duty or another person. Thus the sheriff,[22] constable,[23] or a deputy of either,[24] may maintain the suit as may also a surety on the officer's official bond;[25] a judgment plaintiff;[26] a claimant of the property;[27]

19. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

[a] **"This course is in harmony with the code practice** to settle all matters in controversy, so far as may be consistent with the rights of the parties, in one action." Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

[b] **The court may apportion the liability** of each bond, and of the several sureties thereon. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

20. See generally the title **"Suits and Actions."**

21. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

[a] **Notice to the sureties of suit against the sheriff** is not a condition precedent to a subsequent suit by the sheriff against the sureties but only to a motion for summary judgment against the indemnitors. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

[b] **Payment of Judgment.** — Payment of the judgment against the sheriff or constable is not necessary prior to maintaining the action. **Mass.** Cook *v.* Merrifield, 139 Mass. 139, 29 N. E. 540. **N. Y.**—Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439. **N. C.** Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035. **Okla.**—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

[c] **Notice of payment of judgment** against sheriff not a condition precedent to an action against indemnitors. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Okla.**—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573. **Vt.**—Topliff *v.* Hayes, 20 Vt. 362.

22. **Ala.**—Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270. **Cal.**—White *v.* Fratt, 13 Cal. 521. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Mich.** Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534. **Miss.**—Butler *v.* Alcus, 51 Miss. 47. **Neb.**—Omaha Carpet Co. *v.* Clapp, 2 Neb. (Unof.) 406, 89 N. W. 246. **N. Y.**—Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839; Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439; Bowe *v.* Brown, 26 Wkly. Dig. 47. **Ore.** Houser *v.* West, 39 Ore. 392, 65 Pac. 82. **Tex.**—Maxwell-Clark Drug Co. *v.* Singley (Tex. Civ. App.), 152 S. W. 827. **Wash.**—Barnett *v.* O'Loughlin, 8 Wash. 260, 35 Pac. 1099.

[a] **By Sheriff for Deputy's Benefit.** Stillwell *v.* Hurlbert, 18 N. Y. 374.

23. **Ga.**—Turner *v.* Woodward, 123 Ga. 866, 51 S. E. 762. **Mass.**—Cook *v.* Merrifield, 139 Mass. 139, 29 N. E. 540. **Okla.**—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573. **Pa.**—Barber *v.* Wolcott, 15 Pa. 57. **Vt.**—Topliff *v.* Hayes, 20 Vt. 362. **W. Va.**—Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

24. Crossman *v.* Owen, 62 Me. 528.

[a] **Deputy Sheriff.** — **Me.** — Crossman *v.* Owen, 62 Me. 528. **Mass.** Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745. **R. I.**—Horton *v.* Di Panni, 80 Atl. 8.

25. Dine *v.* Donnelly, 134 Ky. 776, 121 S. W. 685; National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637.

[a] **In an action against the sheriff and indemnitors,** the sureties on his official bond can by cross-petition be subrogated to the sheriff's rights and proceed to judgment against the indemnitors. Dine *v.* Donnelly, 134 Ky. 776, 121 S. W. 685.

26. Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

27. Brock, etc. *v.* Church, etc., 5 Ky. L. Rep. 855; Lewis *v.* Adams, 6 Leigh (33 Va.) 320.

[a] **That an assignee of the claimant** cannot maintain the suit, see Whipps *v.* Lowney, 42 Mont. 546, 113 Pac. 750.

an assignee of the bond,[28] or an assignee of the sheriff's rights against the indemnitors.[29] The plaintiff under the codes must be the real party in interest[30] unless he comes within an exception to that requirement as for example where he sues as a trustee of an express trust.[31] A claimant of the property is sometimes permitted by statute to prosecute the suit in the name of the sheriff.[32]

5. **Pleading.** — a. *Declaration and Complaint or Petition.* **(I.) Form and Contents.**[33] — The declaration or complaint should state facts sufficient to show the execution of the bond,[34] its covenants and conditions,[35] the breach thereof,[36] and the judgment or other liability sustained by the officer.[37] Plaintiff need not allege that the judgment has been paid,[38] or that notice of payment of judgment was given the indemnitors,[39] or that the property taken by the officer was not subject to attachment or execution.[40]

(II.) Objections to. — (A.) **Demurrer.**[41] — A general demurrer will reach defects appearing on the face of plaintiff's pleading,[42] as that the

28. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483.

29. National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637.

30. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573. See the title "**Parties.**"

[a] **Regardless of who are the nominal obligees** in the bond the sheriff may sue in his own name where he is the real party in interest. Maxwell-Clark Drug Co. *v.* Singley (Tex. Civ. App.), 152 S. W. 827.

[b] **Upon a bond given to a constable** to indemnify him against loss the suit should be in his name and for his own use; he cannot sue for the benefit of others. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

31. Stillwell *v.* Hurlbert, 18 N. Y. 374.

[a] **Where a deputy sheriff** holding an execution takes a bond running to his principal, conditioned to indemnify the latter and all persons assisting him in the premises, an action will lie in the name of the sheriff for the benefit of the deputy, without any assignment of the cause of action by the latter. Stillwell *v.* Hurlbert, 18 N. Y. 374.

32. Lewis *v.* Adams, 6 Leigh (33 Va.) 320.

33. **For form of complaint,** see Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

34. **Ala.**—Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Ill.** Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392. **Ore.**—Thomas *v.* Barnes, 34 Ore. 416, 56 Pac. 73.

35. **Ala.**—Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Ill.**—Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392. **Okla.**—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

36. Topliff *v.* Hayes, 20 Vt. 362.

[a] **Notice of Breach.**—In assigning breaches of the condition of the indemnifying bond it is not necessary to set forth that the party bound to provide indemnity, was notified of the facts which constitute the breach. Topliff *v.* Hayes, 20 Vt. 362.

37. **Ala.**—Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Ill.** Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392. **Mass.**—Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745. **Okla.**—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573. **Ore.**—Thomas *v.* Barnes, 34 Ore. 416, 56 Pac. 73.

[a] **The amount of judgment and costs** recovered should be stated. Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.

38. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

39. Topliff *v.* Hayes, 20 Vt. 362.

40. Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

41. See generally the title "**Demurrer.**"

42. See *infra*, this note.

[a] **Collusion of the sheriff and the**

complaint states no cause of action,[43] or that the suit was brought in the wrong capacity,[44] or that a misjoinder of causes of action appears.[45]

(B.) MOTION.—Certain objections to the complaint, declaration or other pleading may be taken by motion,[46] as for example a motion to strike,[47] which must be resorted to where improper items of recovery are set forth in the complaint.[48]

(C.) WAIVER OF OBJECTIONS.—Defendant waives any objections not jurisdictional by failure to interpose them at the proper time.[49]

(III.) Amendments.—Plaintiff may, within the limitations elsewhere discussed,[50] amend his pleading.[51]

b. *Plea or Answer.*—Whatever defense the indemnitors have may be interposed by plea[52] or answer.[53]

6. Trial.—a. *In General.*—The trial proceeds in accordance with established rules[54] as to burden of proof,[55] questions of law and

creditor to make an illegal levy for the furtherance of which the bond is given cannot be reached by demurrer unless it appears on the face of the complaint. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

43. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

44. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

[a] **A petition by constable for the use and benefit** of other persons is demurrable where under the circumstances he should have been the sole plaintiff. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

45. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

[a] **Motion for nonsuit** not proper in such cases. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

46. See the titles "**Certainty in Pleading;**" "**Motions;**" "**Striking Out and Withdrawal.**"

47. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

48. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

[a] **Efforts To Adjust.**—Demurrer is not the proper method of objecting to an item of expense incurred by the sheriff in efforts to make an adjustment with the sureties. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

49. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

[a] **By jointly answering** the objection as to misjoinder is waived. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

50. See the titles "**Amendments and Jeofails;**" "**New Cause of Action or Defense;**" "**Parties.**"

51. Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270; Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

[a] **A petition by a constable for the benefit of others** may be amended so that the action will proceed in the name of the constable alone. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

[b] **Amendment to state the amount of judgment** and costs recovered against sheriff. Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.

52. Butler *v.* Alcus, 51 Miss. 47. See the titles "**Pleas;**" "**Pleas in Equity.**"

[a] **Nil Debet.**—A plea of nil debet will not lie where the bond is not within the contemplation of the statute allowing such a plea in actions on bonds or other sealed instruments for the payment of money. Butler *v.* Alcus, 51 Miss. 47.

53. See the titles "**Answers;**" "**Confession and Avoidance;**" "**Denials.**"

54. See the title "**Trial,**" and the cross-references there found.

55. See 2 ENCY. OF EV. 773.

[a] **Affirmative Defense.**—(1) The burden is upon the indemnitors to establish any affirmative defense pleaded by them (Dine *v.* Donnelly, 134 Ky. 776, 121 S. W. 685) as, for example (2) that the sheriff proceeded contrary to instructions. Dine *v.* Donnelly, 134 Ky. 776, 121 S. W. 685.

[b] **Return of Bond With Attachment.**—Where plaintiff avers in his replication that the bond was taken and returned with the attachment, he has the burden of proving that such

fact,[56] and instructions.[57]

b. *Judgment Against Sheriff as Res Judicata.* — Indemnitors who have notice of, and an opportunity to defend proceedings against the sheriff or constable,[58] or who actually participate in such defense,[59] are, in the absence of fraud and collusion,[60] concluded by the judgment therein rendered. And even though the indemnitors had no notice of the proceedings, and took no part therein, the judgment is prima facie evidence against them of the fact and amount of the officer's liability.[61]

was the fact. Butler *v.* Alcus, 51 Miss. 47.

56. See the title "**Province of Judge and Jury.**"

[a] **Fraud in Obtaining Judgment.** The jury must determine, under proper instructions from the court, whether the judgment was fraudulently or collusively recovered against the officer. Dunn *v.* National Surety Co., 80 App. Div. 605, 80 N. Y. Supp. 744, *affirmed*, 178 N. Y. 552, 70 N. E. 1098.

57. See generally the title "**Instructions.**"

[a] **All the material issues** should be embraced in the instructions. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483; Illies *v.* Fitzgerald, 11 Tex. 417.

[b] **Where a defense of fraud and collusion** on the part of the sheriff is interposed by the indemnitors, the instructions should touch upon all material facts bearing on such defense, such for example, as the validity of a chattel mortgage held by the plaintiffs in the suit against the sheriff. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483.

[c] **Officer's Judgment as to Ownership.**—Failure to charge that if neither the sheriff, nor any of his deputies judged that the property taken under the execution was owned by the plaintiff, is reversible error. O'Donohue *v.* Simmons, 36 Hun (N. Y.) 331.

[d] **Instruction as to bond** binding force when given after the levy, see Illies *v.* Fitzgerald, 11 Tex. 417.

58. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Ill.**—Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392. **Neb.** Pasewalk *v.* Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399; Omaha Carpet Co. *v.* Clapp, 2 Neb. (Unof.) 406, 89 N. W. 246. **N. Y.**—Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483; Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439. **Pa.**—Barber *v.* Wolcott, 15 Pa. 57. **Tex.**—Illies *v.* Fitzgerald, 11 Tex. 417.

[a] **Collateral issues** not concluded. National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637.

[b] "**The correct rule** is that, when a sheriff is sued touching a matter upon which he has taken a bond of indemnity, and gives the indemnitors notice, offering ample opportunity to appear and defend or aid in the defense, the judgment against the sheriff, in the absence of fraud, collusion, or mistake, is conclusive as between him and the indemnitors on the question of the sheriff's liability and the facts necessary to establish it. . . . There are decisions which hold that, even in the absence of notice and opportunity to defend, the judgment is prima facie evidence against the indemnitors, but these also hold it is only prima facie evidence as to the fact and amount of the officer's liability." National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637.

[c] **Consent Judgment.**—Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745. See Dunn *v.* National Surety Co., 80 App. Div. 605, 80 N. Y. Supp. 744, *affirmed*, 178 N. Y. 552, 70 N. E. 1098.

[d] **That no appeal was taken** by the sheriff does not affect the binding force of the judgment. Illies *v.* Fitzgerald, 11 Tex. 417.

59. Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392.

60. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483.

[a] **Fraud or collusion of sheriff preventing a defense** by the indemnitors, will prevent the judgment from being conclusive against them as to their liability on the bond. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483.

61. **Colo.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171. **Ia.**—Charles *v.* Hoskins, 14 Iowa 471, 83 Am. Dec. 378. **Pa.**—Barber *v.* Wolcott, 15 Pa. 57.

[a] **A judgment by consent of the**

7. Judgment. — a. *Joint or Several.* — Where the bond or undertaking is joint, the judgment must be against all of the obligees.[62]

b. *Amount.* — Any judgment recovered against the indemnitors should cover the entire damages to which the officer has been subjected,[63] including the judgment against the officer[64] with interest thereon,[65] and the costs and expenses incurred by him in defending the suit against him,[66] and in the prosecution of the suit in hand.[67]

8. Review. — The proceedings are reviewable by the usual methods,[68] and in accordance with the settled rules that the court will not disturb findings on conflicting evidence,[69] nor reverse the decision unless prejudicial error appears.[70]

C. SUMMARY PROCEEDINGS. — The statutes sometimes provide for a summary proceeding against the indemnitors.[71] It is available to an indemnified officer against whom a judgment has been obtained[72] after notice to the indemnitors of the pendency of the action,[73] and is had upon motion for summary judgment against the indemnitors,[74] based

parties and without notice to or approval of the sureties, is presumptive evidence only against him. Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439.

62. Thomas *v.* Barnes, 34 Ore. 416, 56 Pac. 73.

63. **Cal.**—Stark *v.* Raney, 18 Cal. 622. **N. Y.**—Dunn *v.* National Surety Co., 80 App. Div. 605, 80 N. Y. Supp. 744. **W. Va.**—Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

64. Crossman *v.* Owen, 62 Me. 528.

65. Crossman *v.* Owen, 62 Me. 528.

66. **Cal.**—Stark *v.* Raney, 18 Cal. 622. **Mass.**—Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745. **N. Y.**—Dunn *v.* National Surety Co., 80 App. Div. 605, 80 N. Y. Supp. 744, *affirmed,* 178 N. Y. 552, 70 N. E. 1098. **W. Va.** Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

[a] **Attorney's fees** recoverable. Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745; Dunn *v.* National Surety Co., 80 App. Div. 605, 80 N. Y. Supp. 744, *affirmed,* 178 N. Y. 552, 70 N. E. 1098.

67. Bowe *v.* Brown, 26 N. Y. Wkly. Dig. 47.

[a] **Expenses of a referee** appointed on default to assess the sheriff's damages, which default was subsequently opened by an order which failed to provide for the payment of said fees, are taxable as costs upon final judgment in favor of the sheriff. Bowe *v.* Brown, 26 N. Y. Wkly. Dig. 47.

68. See the titles "**Appeals;**" "**Writ of Error.**"

69. National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637.

[a] **A finding that indemnitors accepted the defense** of the sheriff in the original action, based on disputed testimony, will not be disturbed. National Surety Co. *v.* A. C. Fry Co., 86 Wash. 118, 149 Pac. 637.

[b] **Question of Res Judicata Concluded.**—Whether the indemnitors had notice of the suit against the officer and participated in the defense thereof, thus becoming bound by the judgment therein rendered, are questions which are settled by the judgment of the lower court and the appellate court will not review them. Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392.

70. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483.

[a] **Where prejudicial error appears** as for example in the giving of instructions, the decision will be reversed. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483; O'Donohue *v.* Simmons, 36 Hun (N. Y.) 331.

71. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

72. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

73. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

[a] **Five Days' Notice.**—Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

74. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

upon the judgment recovered against the officer.[75]

XI. ACTIONS AGAINST OFFICER. — A. In General. — Special remedies provided by statute against sheriffs, constables and marshals are designed to furnish the injured party with a speedy means of redress. They do not in general preclude his resorting to the ordinary modes of recovery. For any wrongful act of such officer, therefore, resulting in injury to the complainant, he may pursue the wrongdoer in a direct action,[76] notwithstanding the statute gives him a summary remedy,[77] or a remedy on the officer's bond.[78]

B. For What Neglects or Defaults. — The negligence or default for which a sheriff, marshal or constable may be proceeded against in

75. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

[a] **Such judgment,** when notice has been given to the indemnitors of the proceeding against the officer, is conclusive evidence of the officer's right to recover upon the motion. Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

76. **Ala.**—Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362; Lyon *v.* Goree, 15 Ala. 360; Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177. **Ark.**—St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304. **Cal.** — Brinkley-Douglas Fruit Co. *v.* Silman, 33 Cal. App. 643, 166 Pac. 371. **Colo.**—Sandberg *v.* Borstadt, 48 Colo. 96, 109 Pac. 419; Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417; Greig *v.* Ware, 25 Colo. 184, 55 Pac. 163. **Del.** Fennemore *v.* Armstrong, 6 Boyce 35, 96 Atl. 204. **Ga.**—Rodgers *v.* McGuoirk, 139 Ga. 664, 77 S. E. 1059; Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34; Hathaway *v.* Smith, 117 Ga. 946, 43 S. E. 984. **Idaho.**—Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460. **Ill.**—Murphy *v.* Mulconnery, 183 Ill. App. 500. **Ia.**—Constantine *v.* Rowland, 154 Iowa 115, 134 N. W. 549; Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035. **Ky.**—Board *v.* Luigart, 150 Ky. 791, 151 S. W. 9; Owings *v.* Frier, 2 A. K. Marsh. 268, 12 Am. Dec. 393; Fite *v.* Briedenbeck, 32 Ky. L. Rep. 400, 105 S. W. 1182. **Mass.**—Morrin *v.* Manning, 205 Mass. 205, 91 N. E. 308; Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Wright *v.* Willis, 2 Allen 191; Riley *v.* Taber, 9 Gray 372; Tyler *v.* Ulmer, 12 Mass. 163. **Minn.**—Foster *v.* Wagener, 129 Minn. 11, 151 N. W. 407. **Mont.**—Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369; O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166. **Neb.** Strong *v.* Combs, 68 Neb. 315, 94 N. W. 149. **N. J.**—Breit *v.* Solferino, 77 N. J. L. 436, 72 Atl. 79. **N. Y.**—Feinberg *v.* Allen, 118 App. Div. 497, 103 N. Y. Supp. 339; Fitzpatrick *v.* Krause, 27 Misc. 792, 58 N. Y. Supp. 283; Hogan *v.* Ullman, 136 N. Y. Supp. 87; Smith *v.* Healey, 121 N. Y. Supp. 230; Goldstein *v.* Abramson, 86 N. Y. Supp. 30. **N. D.**—Mariner *v.* Wasser, 17 N. D. 361, 117 N. W. 343, 138 Am. St. Rep. 714. **Okla.**—Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070; Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047. **S. D.** Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829; Walbridge *v.* Griswold, 1 D. Chip 162.

[a] **An action either at common law or under the statute** is maintainable at the option of the party. Board *v.* Luigart, 150 Ky. 791, 151 S. W. 9.

77. **Ala.**—Chapman *v.* Weaver, 19 Ala. 626. **Ark.**—Levy *v.* Lawson, 5 Ark. 212. **Del.**—Pettyjohn *v.* Hudson, 4 Harr. 468. **Ga.**—French, Richards & Co. *v.* Kemp, 64 Ga. 749. **Ill.**—Beaird *v.* Foreman, 2 Ill. 40. **Ky.**—Mars *v.* Buckler, 1 Bibb 267. **Mo.**—State *v.* Durant, 53 Mo. App. 493. **N. Y.**—Hatfield *v.* Hatfield, 15 N. Y. St. 788. **Tenn.**—Rader *v.* Davis, 5 Lea 536.

Summary proceedings against officers, see *supra,* IX.

78. **Del.**—Pettyjohn *v.* Hudson, 4 Harr. 468. **Ill.**—Briley *v.* Copeland, 14 Ill. 38. **N. C.**—Fagan *v.* Williamson, 53 N. C. 433. **Pa.**—Enterline *v.* Comrey, 15 Pa. Co. Ct. 627.

Proceedings on official bonds, see *infra,* XII.

[a] **That an action of debt on the bond** is given by statute for money collected by the officer and which he fails to pay over does not prevent him from

a direct civil action may consist in his making a search without warrant,[79] or his permitting an escape,[80] or his failure to levy process,[81] or his making an excessive levy,[82] or his levying upon exempt property,[83] or upon the property of strangers,[84] or for his failure to make a return of process,[85] or his making a false return,[86] or for his failure

maintaining case for the same cause. Fagan *v.* Williamson, 53 N. C. 433.

79. Fennemore *v.* Armstrong, 6 Boyce (Del.) 35, 96 Atl. 204.

80. **Conn.**—Hart *v.* Stevenson, 25 Conn. 499. **Ill.**—Plumleigh *v.* Cook, 13 Ill. 669. **N. J.**—Greisner *v.* Greisner, 86 N. J. Eq. 76, 97 Atl. 287. **N. Y.** Tiffany *v.* Harvey, 216 N. Y. 300, 110 N. E. 624; Metcalf *v.* Stryker, 31 N. Y. 255; Smith *v.* Knapp, 30 N. Y. 581; Buczynski *v.* Anderson, 174 App. Div. 790, 161 N. Y. Supp. 697. **S. C.**—Boyce *v.* Barksdale, 4 McCord 141.

81. **Ala.**—Higdon *v.* Fields, 3 Ala. App. 322, 57 So. 58. **Ind.**—Terrell *v.* State, 66 Ind. 570. **Ky.**—Groom's Admr. *v.* Pickett, 4 Bush 372. **Mo.** Douglass *v.* Baker, 9 Mo. 41. **N. Y.** Packard *v.* Hesterberg, 48 Misc. 30, 96 N. Y. Supp. 72. **Vt.**—Wetherby *v.* Foster, 5 Vt. 136.

[a] **Failure to make money** on execution. Rodgers *v.* McGuoirk, 139 Ga. 664, 77 S. E. 1059.

[b] **Failure to take possession of mortgaged property** and sell the same, pursuant to statute. Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460.

82. St. Louis, I. M. & S. R. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304; Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238. See 15 STANDARD PROC. 972.

[a] **The basis of the action** for excessive levy is that the officer is a trespasser and cannot set up a legal warrant for his action. St. Louis, I. M. & S. R. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304.

83. **Colo.**—Sandberg *v.* Borstadt, 48 Colo. 96, 109 Pac. 419. **Ill.**—Amend *v.* Murphy, 69 Ill. 337. **Ky.**—Board *v.* Luigart, 150 Ky. 791, 151 S. W. 9. **Mass.**—Kiff *v.* Old Colony & N. Ry. Co., 117 Mass. 591, 19 Am. Rep. 429. **Minn.**—Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132. **Neb.**—Strong *v.* Combs, 68 Neb. 315, 94 N. W. 149. **Okla.** Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070. **S. D.**—Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136; Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840.

Remedies for enforcement and protection of exemption right, see 11 STANDARD PROC. 538, et seq.

84. **Ala.**—Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177. **Ark.**—Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Crump *v.* Starke, 23 Ark. 131. **Cal.** Richey *v.* Haley, 138 Cal. 441, 71 Pac. 499; Brinkley-Douglas Fruit Co. *v.* Silman, 33 Cal. App. 643, 166 Pac. 371; Citizens' Securities Co. *v.* Hammel, 14 Cal. App. 564, 112 Pac. 731. **Ill.** Hanchett *v.* Williams, 24 Ill. App. 56. **Ind.**—Wells *v.* Baldwin, 61 Ind. 265; Jamison *v.* Hendricks, 2 Blackf. 94, 18 Am. Dec. 131. **Ia.**—Constantine *v.* Rowland, 154 Iowa 115, 134 N. W. 549; Cheadle *v.* Guitar, 68 Iowa 680, 28 N. W. 14. **Ky.**—Fite *v.* Briedenback, 32 Ky. L. Rep. 400, 105 S. W. 1182; Vaughn *v.* Justice, 25 Ky. L. Rep. 1666, 78 S. W. 424. **La.**—Macias *v.* Lorio, 43 La. Ann. 289, 8 So. 886. **Me.**—Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256. **Mass.**—Stearns *v.* Dean, 129 Mass. 139; Woodbury *v.* Long, 8 Pick. 543, 19 Am. Dec. 345. **Miss.**—Perry *v.* Lewis, 49 Miss. 443. **Mo.**—State *v.* McKellop, 40 Mo. 184. **Mont.**—Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369; O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166. **Neb.**—Benson *v.* Caulfield, 64 Neb. 101, 89 N. W. 664. **N. H.**—Hills *v.* Hoitt, 18 N. H. 386. **N. J.**—Breit *v.* Solferino, 77 N. J. L. 436, 72 Atl. 79; Browning *v.* Skillman, 24 N. J. L. 351. **N. Y.**—Hogan *v.* Ullman, 136 N. Y. Supp. 87; Smith *v.* Healey, 121 N. Y. Supp. 230. **N. C.** Burgin *v.* Burgin, 23 N. C. 453. **N. D.** Mariner *v.* Wasser, 17 N. D. 361, 117 N. W. 343, 138 Am. St. Rep. 714. **Pa.** Kitchen *v.* McCloskey, 150 Pa. 376, 24 Atl. 688, 30 Am. St. Rep. 811. **Vt.** Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829.

See 16 STANDARD PROC. 356.

85. Burk *v.* Campbell, 15 Johns. (N. Y.) 456.

86. **Ala.**—Tombeckbee Bank *v.* Godbold, 3 Stew. 240, 20 Am. Dec. 80. **Ark.**—Stewart *v.* Houston, 25 Ark. 311. **Cal.**—Egery *v.* Buchanan, 5 Cal. 53. **Conn.**—Hartford County Bank *v.* Water-

to keep attached property,[87] or for his wrongful withholding of money,[88] or for any other wrong or neglect resulting in injury to plaintiff.[89]

C. FORM OF ACTION. — **1. To Recover Damages.** — Complainant seeking to recover damages for the wrongful act or neglect of an officer, resulting in injury to himself or property, may sue in trespass[90]

man, 26 Conn. 324. **Ill.**—Hunter *v.* Stoneburner, 92 Ill. 75; Ross *v.* Weber, 26 Ill. 221. **Ky.**—Bennett *v.* Bell, 20 Ky. L. Rep. 308, 46 S. W. 701. **Mass.** Simmons *r.* Richard, 171 Mass. 281, 50 N. E. 617; Brinley *v.* Allen, 3 Mass. 561; Livermore *v.* Bagley, 3 Mass. 487. **N. H.**—Bolles *v.* Bowen, 45 N. H. 124; Clough *v.* Monroe, 34 N. H. 381; Sawyer *v.* Whittier, 2 N. H. 315. **N. Y.** Watson *v.* Brennan, 7 Jones & S. 81. **N. C.**—Harrell *v.* Warren, 100 N. C. 259, 6 S. E. 777. **Pa.**—Jacobs *v.* People's Electric, etc. Co., 21 Pa. Co. Ct. 492; Knowles *r.* Lord, 4 Whart. 500, 34 Am. Dec. 525.

87. Wright *v.* Willis, 2 Allen (Mass.) 191.

88. **Colo.**—Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713. **Del.**—Pettyjohn *v.* Hudson, 4 Harr. 468. **Mass.** King *v.* Rice, 12 Cush. 161. **Mich.** Munger *v.* Sanford, 144 Mich. 323, 107 N. W. 914. **Mo.**—Evans *v.* Hays, 1 Mo. 697. **N. H.**—Farley *v.* Monroe, 21 N. H. 146. **N. Y.**—Nelson *v.* Kerr, 59 N. Y. 224; Crane *v.* Dygert, 1 Wend. 534. **N. C.**—Fagan *v.* Williamson, 53 N. C. 433. **Pa.**—Enterline *v.* Comrey, 15 Pa. Co. Ct. 627. **S. C.**—State *v.* Turner, 32 S. C. 348, 11 S. E. 99; State *v.* Sheriff, 1 Mill 145.

89. See *infra*, this note.

[a] **For Damage to Property in His Custody.**—Briggs *v.* Taylor, 35 Vt. 57.

[b] **For excluding a defendant in attachment from his place of business.** Morrin *v.* Manning, 205 Mass. 205, 91 N. E. 308.

[c] **Service of notice of expiration of redemption** from tax sale improperly made. Foster *v.* Wagener, 129 Minn. 11, 151 N. W. 407.

90. **Ala.**—Sparkman *v.* Swift, 81 Ala. 231, 8 So. 160; Screws *v.* Watson, 48 Ala. 628; Sheppard *r.* Shelton, 34 Ala. 652; Lyon *v.* Goree, 15 Ala. 360; Wright *v.* Spencer, 1 Stew. 576, 18 Am. Dec. 76; Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177. **Ark.**—Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Crump *v.* Starke, 23 Ark. 131. **Colo.**—Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417. **Del.**—Fennemore *v.* Armstrong, 6 Boyce 35, 96 Atl. 204. **Ga.** Hathaway *v.* Smith, 117 Ga. 946, 43 S. E. 984; Gorham *v.* Hood, 27 Ga. 299. **Ill.**—Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Barnes *v.* Rogers, 23 Ill. 350; Cornelia *v.* Ellis, 11 Ill. 584. **Ind.**—Stephens *v.* Lawson, 7 Blackf. 275; Jamison *v.* Hendricks, 2 Blackf. 94, 18 Am. Dec. 131. **Md.** Richardson *v.* Hall, 21 Md. 399; Trieber *v.* Blocher, 10 Md. 14. **Mass.**—Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Campbell *v.* Phelps, 17 Mass. 244; Bean *r.* Hubbard, 4 Cush. 85; Codman *v.* Freeman, 3 Cush. 306; Heminway *v.* Saxton, 3 Mass. 222. **Mich.**—Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431. **Minn.** Murphy *v.* Sherman, 25 Minn. 196. **Miss.**—Perry *v.* Lewis, 49 Miss. 443. **Mo.**—Wetzell *v.* Waters, 18 Mo. 396. **Neb.**—Strong *v.* Combs, 68 Neb. 315, 94 N. W. 149. **N. H.**—Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605; Hills *v.* Hoitt, 18 N. H. 386. **N. Y.**—Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Vail *v.* Lewis, 4 Johns. 450, 4 Am. Dec. 300. **N. D.**—Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784. **N. C.**—Burgin *v.* Burgin, 23 N. C. 453. **Pa.**—Berwald *v.* Ray, 165 Pa. 192, 30 Atl. 727; Carrier *v.* Esbaugh, 70 Pa. 239; Van Dresor *v.* King, 34 Pa. 201, 75 Am. Dec. 643; Bogue *v.* Steel, 1 Phila. 90, 7 Leg. Int. 162. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829; Churchill *v.* Churchill, 12 Vt. 661.

See generally the title "**Trespass.**"

[a] **Levy on Property of Strangers. Ala.**—Watson *v.* Tool, 36 Ala. 13; Kirksey *v.* Dubose, 19 Ala. 43; Lyon *v.* Goree, 15 Ala. 360. **Ark.**—Crump *v.* Starke, 23 Ark. 131. **Colo.**—Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417. **Ind.**—Jamison *v.* Hendricks, 2 Blackf. 94, 18 Am. Dec. 131. **Md.**—Richardson *v.* Hall, 21 Md. 399. **Mass.**—Campbell *v.* Phelps,

or trespass on the case,[91] according to the facts and circumstances of the case.

2. To Recover the Value of the Property. — A plaintiff whose property has been converted by a sheriff, marshal, or constable, may proceed against the wrongdoer in trover, or its equivalent under the code to recover the value thereof,[92] or he may under certain circum-

17 Mass. 244; Hallowell & Augusta Bank *v.* Howard, 14 Mass. 178. **N. C.** Burgin *v.* Burgin, 23 N. C. 453. See 16 STANDARD PROC. 356, note 76.

[b] **Levying on Exempt Property. Ill.**—Cornelia *v.* Ellis, 11 Ill. 584. **Ind.** Stephens *v.* Lawson, 7 Blackf. 275. **Mass.**—Bean *v.* Hubbard, 4 Cush. 85. **Mich.**—Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431. **Minn.**—Murphy *v.* Sherman, 25 Minn. 196. **Neb.**—Strong *v.* Combs, 68 Neb. 315, 94 N. W. 149. See 11 STANDARD PROC. 548.

[c] **Not for Making an Excessive Levy.**—Jarratt *v.* Gwathmey, 5 Blackf. (Ind.) 237.

91. **Ala.**—Spence *v.* Tuggle, 10 Ala. 538; Griffin *v.* Ganaway, 6 Ala. 148; Tombeckbee Bk. *v.* Godbold, 3 Stew. 240, 20 Am. Dec. 80; Sawyer *v.* Ballew, 4 Port. 116. **Ark.**—Stewart *v.* Houston, 25 Ark. 311. **Conn.** Hartford County Bank *v.* Waterman, 26 Conn. 324; Humphrey *v.* Case, 8 Conn. 101, 20 Am. Dec. 95. **Ga.**—Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34. **Ill.**—Hunter *v.* Stoneburner, 92 Ill. 75; Ross *v.* Weber, 26 Ill. 221. **Mass.**—Whitaker *v.* Sumner, 7 Pick. 551, 19 Am. Dec. 298; Bean *v.* Parker, 17 Mass. 591; Colby *v.* Sampson, 5 Mass. 310; Slayton *v.* Chester, 4 Mass. 478; Livermore *v.* Bagley, 3 Mass. 487. **N. H.**—Bolles *v.* Bowen, 45 N. H. 124; Clough *v.* Monroe, 34 N. H. 381. **N. J.**—Briggs *v.* Bell, 8 N. J. L. 251. **N. Y.**—Every *v.* Edgerton, 7 Wend. 259; Platt *v.* Sherry, 7 Wend. 236; Rawson *v.* Dole, 2 Johns. 454. **Pa.** Van Dresor *v.* King, 34 Pa. 201, 75 Am. Dec. 643; Jacobs *v.* People's Electric, etc. Co., 21 Pa. Co. Ct. 492; Knowles *v.* Lord, 4 Whart. 500, 34 Am. Dec. 525. **S. C.**—Boyce *v.* Barksdale, 4 McCord 141. **Vt.**—Flinn *v.* St. John, 51 Vt. 334.

See 11 STANDARD PROC. 549, and generally the title "**Case (The Action of Trespass on the).**"

[a] **Where trespass is the proper remedy, case will not lie.** Campbell *v.* Phelps, 17 Mass. 244.

[b] **Improper execution of bail process** in a trover suit, remedied by action on the case. Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34.

[c] **For escape** suffered in a civil action the common law remedy is case. **Ala.**—Sawyer *v.* Ballew, 4 Port. 116. **Ind.**—Gwinn *v.* Hubbard, 3 Blackf. 14. **Mass.**—Colby *v.* Sampson, 5 Mass. 310. **N. Y.**—Rawson *v.* Dole, 2 Johns. 454. See 21 STANDARD PROC. 599.

[d] **Failure To Levy an Attachment.** Griffin *v.* Ganaway, 6 Ala. 148; Hartford County Bank *v.* Waterman, 26 Conn. 324.

[e] **For Failure of Officer To Satisfy Execution.**—Tyler *v.* Ulmer, 12 Mass. 163.

[f] **Failure to advertise execution sale** before selling the property will subject the sheriff to an action in case for false return. Livermore *v.* Bagley, 3 Mass. 487.

[g] **For Making an Excessive Levy.** Jarratt *v.* Gwathmey, 5 Blackf. (Ind.) 237.

[h] **For False Return.—Ala.**—Tombeckbee Bank *v.* Godbold, 3 Stew. 240, 20 Am. Dec. 80. **Ark.**—Stewart *v.* Houston, 25 Ark. 311. **Conn.**—Hartford County Bank *v.* Waterman, 26 Conn. 324. **Ill.**—Hunter *v.* Stoneburner, 92 Ill. 75; Ross *v.* Weber, 26 Ill. 221. **Mass.**—Bean *v.* Parker, 17 Mass. 591; Slayton *v.* Chester, 4 Mass. 478. **N. H.** Bolles *v.* Bowen, 45 N. H. 124. **Pa.** Jacobs *v.* Peoples' Electric, etc. Co., 21 Pa. Co. Ct. 492.

[i] **Refusal To Pay Over Money Collected.**—Fagan *v.* Williamson, 53 N. C. 433.

92. **Ala.**—Stephens *v.* Head, 138 Ala. 455, 35 So. 565; Wright *v.* Spencer, 1 Stew. 576, 18 Am. Dec. 76. **Cal.** Rider *v.* Edgar, 54 Cal. 127; Boulware *v.* Craddock, 30 Cal. 190; Brinkley-Douglas Fruit Co. *v.* Silman, 33 Cal. App. 643, 166 Pac. 371; McRae *v.* Lackmann, 8 Cal. App. 241, 96 Pac. 505. **Colo.**—Woodworth *v.* Gorsline, 30 Colo.

stances sue to recover the property.[93]

3. Recovery of the Property. — While at common law, acccording to some authorities, replevin would not lie against an officer to recover property taken by him under process,[94] the rule now quite generally recognized is that one whose property is wrongfully withheld or converted by an officer may sue for its specific recovery[95] in replevin[96]

186, 69 Pac. 705, 58 L. R. A. 417. **Ga.** Griner *v.* Lowe, 19 Ga. App. 520, 91 S. E. 919. **Ill.**—Yockey *v.* Smith, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286; Hanchett *v.* Williams, 24 Ill. App. 56. **Ind.**—Mandlove *v.* Burton, 1 Ind. 39, Smith 3. **Mass.**—Morrin *v.* Manning, 205 Mass. 205, 91 N. E. 398; Dorman *v.* Kane, 5 Allen 38; Davlin *v.* Stone, 4 Cush. 359. **Minn.**—Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781. **N. H.**—York *v.* Sanborn, 47 N. H. 403; Perkins *v.* Thompson, 3 N. H. 144. **N. Y.** Manning, Bowman & Co. *v.* Keenan, 73 N. Y. 45; Feinberg *v.* Allen, 118 App. Div. 497, 103 N. Y. Supp. 339; Hill *v.* Page, 108 App. Div. 71, 95 N. Y. Supp. 465; Murphy *v.* Callan, 69 App. Div. 413, 74 N. Y. Supp. 1009; Sugarman *v.* Brengel, 68 App. Div. 377, 74 N. Y. Supp. 167, 10 N. Y. Ann. Cas. 385; Smith *v.* Healey, 121 N. Y. Supp. 230; Witowski *v.* Brennan, 9 Jones & S. 284. **N. D.**—Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974; Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784. **Okla.**—Sale *v.* Shipp, 160 Pac. 502. **S. D.**—Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136. **Tenn.** Hunt *v.* Walker, 12 Heisk. 551; Hawkins *v.* Pearce, 11 Humph. 44. **Tex.** Herring *v.* Patten, 18 Tex. Civ. App. 147, 44 S. W. 50; Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829. **Wis.**—Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

See 16 STANDARD PROC. 124, 126, 356 and generally the title "**Trover and Conversion.**"

[a] **Levy on Property of Strangers. Ala.**—Lyon *v.* Goree, 15 Ala. 360. **Cal.** Brinkley-Douglas Fruit Co. *v.* Silman, 33 Cal. App. 643, 166 Pac. 371. **N. D.** Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974. **Okla.**—Sale *v.* Shipp, 160 Pac. 502. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829. See 16 STANDARD PROC. 124, 126, 356.

[b] **For the conversion of money as well as other personal property, trover** will lie. Morrin *v.* Manning, 205 Mass. 205, 91 N. E. 308.

[c] **For taking an insufficient replevin bond** an action of trover will not lie against the officer. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98.

[d] **Levy on Exempt Property. Mass.**—Davlin *v.* Stone, 4 Cush. 359. **Tenn.**—Hawkins *v.* Pearce, 11 Humph. 44. **Wis.**—Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467. See 11 STANDARD PROC. 549.

93. See *infra*, XI, C, 3.

94. See 11 STANDARD PROC. 555, note 92.

95. **Ala.**—Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188; Governor *v.* Gibson, 14 Ala. 326. **Ia.**—Gimble *v.* Acklex, 12 Iowa 27; Smith *v.* Montgomery, 5 Iowa 370. **Ky.**—Owings *v.* Frier, 2 A. K. Marsh. 268, 12 Am. Dec. 393. **Miss.**—Yarborough *v.* Harper, 25 Miss. 112.

See 16 STANDARD PROC. 124, 126, 356.

[a] **That a statutory remedy to try** the right of property exists does not preclude a resort to the common law remedy against the officer where the claim is ignored. Breit *v.* Solferino, 77 N. J. L. 436, 72 Atl. 79. See 16 STANDARD PROC. 126.

Recovery of exempt property, see 11 STANDARD PROC. 555.

96. **Ill.**—Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722; Horn *v.* Zimmer, 180 Ill. App. 323. **Ky.**—Board *v.* Luigart, 150 Ky. 791, 151 S. W. 9. **N. D.**—Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784. **Okla.**—Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829. **Wis.** Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

See also preceding note and cross-references there made.

[a] **For Goods Held Under Invalid Attachment.**—Allen *v.* Wright, 134 Mass. 347.

or detinue,[97] subject, of course, to statutory limitations.

4. To Enforce Obligations To Pay Money. — An indebtedness of the officer to complainant may be recovered in an action of debt[98] or in assumpsit for money had and received.[99]

D. CONDITIONS PRECEDENT. — Conditions precedent to the maintenance of the suit should be performed,[1] such as, in some jurisdictions,

[b] **To recover personal property levied on** under process against the property of another. **Ark.**—Ferguson *v.* Ehrenberg, 39 Ark. 420. **Ia.**—Cooley *v.* Davis, 34 Iowa 128; Miller *v.* Bryan, 3 Iowa 58. **Mass.**—Tracy *v.* Warren, 104 Mass. 376. **Okla.**—Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070. **Vt.** Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829. **Wis.**—Frisbie *v.* Langworthy, 11 Wis. 375. See 16 STANDARD PROC. 124, 126, 356.

[c] **To recover exempt property** seized. Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784; Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467. See 11 STANDARD PROC. 555.

97. Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362; Governor *v.* Gibson, 14 Ala. 326; Easly *v.* Dye, 14 Ala. 158; Bissell *v.* Lindsay, 9 Ala. 162; Owings *v.* Frier, 2 A. K. Marsh. (Ky.) 268, 12 Am. Dec. 393. See 11 STANDARD PROC. 557.

98. **Ark.**—Randolph *v.* Ringgold, 10 Ark. 279, 52 Am. Dec. 235. **Ind.** Gwinn *v.* Hubbard, 3 Blackf. 14. **N. Y.** Platt *v.* Sherry, 7 Wend. 236; Pierce *v.* Sheldon, 13 Johns. 191. **Tenn.** Bodenhamer *v.* Bodenhamer, 6 Humph. 264.

[a] **For escape in a civil case** (1) debt will not lie at common law since it is a contractual remedy and escape is a tort. By the statutes of West. 2, ch. 11 (13th ed. 1) and 1 Rich. II, ch. 12, the action of debt for escapes is given. See Gwinn *v.* Hubbard, 3 Blackf. (Ind.) 14, and 21 STANDARD PROC. 599. (2) That the creditor may maintain debt against the officer for an escape permitted under final process, see Greisner *v.* Greisner, 86 N. J. Eq. 76, 97 Atl. 287. See also **Ill.**—Plumleigh *v.* Cook, 13 Ill. 669. **N. Y.**—Rawson *v.* Dole, 2 Johns. 454. **S. C.**—Boyce *v.* Barksdale, 4 McCord 141; and 21 STANDARD PROC. 599.

[b] **Refusal To Pay Over Money Collected.**—Fagan *v.* Williamson, 53 N. C. 433.

99. **Del.**—Pettyjohn *v.* Hudson, 4 Harr. 468. **Me.**—Richardson *v.* Kimball, 28 Me. 463; Waite *v.* Delesdernier, 15 Me. 144. **Mass.**—McCabe *v.* Maguire, 182 Mass. 255, 65 N. E. 162; Appleton *v.* Bancroft, 10 Metc. 231. **Mo.**—Evans *v.* Hays, 1 Mo. 697. **Mont.** Merchants' & Miners' Nat. Bank *v.* Barnes, 18 Mont. 335, 45 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737. **N. H.**—Farley *v.* Monroe, 21 N. H. 146. **N. Y.**—Crane *v.* Dygert, 1 Wend. 534; Armstrong *v.* Garrow, 6 Cow. 465; Griffith *v.* Ketchum's Admrs., 12 Johns. 379; Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264. **S. C.**—State *v.* Turner, 32 S. C. 348, 11 S. E. 99; Murray *v.* Moorer, Cheves 111. **Va.** Overton *v.* Hudson, 2 Wash. (2 Va.) 172.

See generally the titles "**Assumpsit;**" "**Money Counts.**"

[a] **An attachment plaintiff** may maintain an action for money had and received against the officer for money which came into his hands on sale of the attached property. McCabe *v.* Maguire, 182 Mass. 255, 65 N. E. 162.

[b] **For Money Held Under Invalid Attachment.**—Allen *v.* Wright, 134 Mass. 347.

[c] **Money received by the officer in lieu of bail** may be recovered. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

1. **Ind.**—State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426. **N. Y.**—Tiffany *v.* Harvey, 216 N. Y. 300, 110 N. E. 624; Buczynski *v.* Anderson, 174 App. Div. 790, 161 N. Y. Supp. 697. **N. D.** Mariner *v.* Wasser, 17 N. D. 361, 117 N. W. 343, 138 Am. St. Rep. 714. **Okla.** Sale *v.* Shipp, 160 Pac. 502. **S. D.** Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136.

See generally the title "**Suits and Actions.**"

[a] **Action for Escape.**—An action against a sheriff to enforce his liability as bail for an escape of a person arrested on mesne process cannot be brought until an execution against the

notice to the officer,[2] or demand upon him,[3] or the filing of a claim to the property.[4] Whether or not a demand for the property is necessary before proceeding in trover against the officer depends not only on the statute but also on the circumstances of the case, it being necessary usually, only where the possession of the officer is rightful.[5]

E. JURISDICTION AND VENUE. — Subject to the limitations as to jurisdictional amount,[6] actions against sheriffs and constables may be entertained by courts of inferior or limited jurisdiction such as justices of the peace,[7] county courts,[8] and probate courts,[9] except in some states where the action is based on his misconduct in office.[10] In accordance

property of the defendant has been issued to the sheriff of the county in which he was arrested and returned wholly or partially unsatisfied and an execution has issued against the person of the defendant to the same sheriff and returned to the effect that the defendant cannot be found in his county. Tiffany *v.* Harvey, 216 N. Y. 300, 110 N. E. 624; Buczynski *v.* Anderson, 174 App. Div. 790, 161 N. Y. Supp. 697. As to actions for escape, see the title "Prisons and Prisoners."

2. Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

[a] **Written notice of ownership** of property must be given the officer. Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

3. Sale *v.* Shipp (Okla.), 160 Pac. 502. See *infra*, this sub-section.

[a] **Demand for Deposit.**—Prior to an action by the state to recover a deposit taken by the officer in lieu of bail, no formal demand upon him for the deposit is necessary. The judgment forfeiting the deposit on default of the prisoner to appear at trial is equivalent to an order on the sheriff to pay the money into court. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

[b] **Demand for copy of warrant** as a condition precedent to an action against the officer for anything done pursuant to the warrant, see Osborn *v.* Burket, 1 Browne (Pa.) 343; Mollison *v.* Bowman, 5 Pa. L. J. 181, 3 Clarke 281.

4. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166. See 16 STANDARD PROC. 126, 358.

[a] **Filing a third party claim as a statutory condition** precedent to an action for wrongful levy, see Richey *v.* Haley, 138 Cal. 441, 71 Pac. 499; O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166, unnecessary where defendant denies plaintiff's title.

[b] **Prior to action for wrongfully replevying** property, the plaintiff must file with the officer an affidavit asserting his claim. Fitzpatrick *v.* Krause, 27 Misc. 792, 58 N. Y. Supp. 283.

5. Mariner *v.* Wasser, 17 N. D. 361, 117 N. W. 343, 138 Am. St. Rep. 714; Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136. See 16 STANDARD PROC. 126, 358.

In case of exempt property, see 11 STANDARD PROC. 555, 557.

[a] **Where the original taking of the officer was wrongful** and the property is wrongfully detained at the time of the suit, no demand for possession is necessary. Sale *v.* Shipp (Okla.), 160 Pac. 502.

[b] **Where the debtor is in possession** of the property when taken by the sheriff a demand for its return or notice of ownership of the property are necessary, or the sheriff must have knowledge of the actual ownership of the same. Mariner *v.* Wasser, 17 N. D. 361, 117 N. W. 343, 138 Am. St. Rep. 714.

[c] **Where the officer takes the property with full notice** of claimant's title, no demand for a return thereof is necessary prior to bringing replevin to recover it. Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722.

6. See the title "Jurisdiction."

7. Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224; Neihardt *v.* Kilmer, 12 Neb. 35, 10 N. W. 531; Miller *v.* Roby, 9 Neb. 471, 4 N. W. 65.

8. Strong *v.* Combs, 68 Neb. 315, 94 N. W. 149.

9. Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

10. Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224; Neihardt *v.* Kilmer, 12 Neb. 35, 10 N. W. 531. See Walters *v.*

with the general rules as to venue,[11] a proceeding ex delicto against an officer should ordinarily be brought in the county where the cause of action arose.[12]

F. PARTIES. — **1. Plaintiff.** — In accordance with the general statutory rules as to parties plaintiff,[13] an action against a sheriff, constable or marshal is ordinarily brought by the interested party, or under the codes, by the real party in interest and in his own name.[14] Parties should join as plaintiffs where the cause of action exists in them jointly against the officer,[15] but not where the right of action rests in them severally.[16]

2. Defendant. — a. *In General.* — In England, by the common law, the sheriff alone could be sued for any neglect of duty by his under sheriff or deputy.[17] But, in the United States the practice has been uniform to sue either the sheriff or his deputy for the default of the latter at the election of the injured party.[18] He may, in such case, maintain separate actions against them and proceed to judgment against either.[19]

The obligor on the indemnity bond is in some states a party to the pro-

Ratliff, 10 Okla. 262, 61 Pac. 1070.

[a] **Seizure and Sale of Exempt Property.**—An action against a sheriff for damages for seizure and sale of exempt property under execution is not one for misconduct in office within the meaning of the statute. Strong *v.* Combs, 68 Neb. 315, 94 N. W. 149; Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224; Neihardt *v.* Kilmer, 12 Neb. 35, 10 N. W. 531; Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

[b] **The misconduct must be the gist** of the action and not be merely incidentally involved. Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

11. See the title "**Venue.**"

12. **Mich.**—Morse *v.* Dunham, 48 Mich. 590, 12 N. W. 865. **N. J.**—Dennis *v.* Ford, 7 N. J. L. 200. **N. Y.** Murphy *v.* Callan, 69 App. Div. 413, 74 N. Y. Supp. 1009; Packard *v.* Hesterberg, 48 Misc. 30, 96 N. Y. Supp. 72.

[a] **The county where the property is located,** and in which the sheriff holds office is the proper venue, though the process issues from another county. Packard *v.* Hesterberg, 48 Misc. 30, 96 N. Y. Supp. 72.

13. See generally the title "**Parties.**"

14. State *v.* McKellop, 40 Mo. 184; Page *v.* Thompson, 43 N. H. 373. See Riley *v.* Taber, 9 Gray (Mass.) 372, equitable assignee.

Parties in actions for levy on exempt property, see 11 STANDARD PROC. 550.

[a] **Where an officer pays the proceeds of a judgment to an assignor** after he had received notice that the claim on which the judgment had been recovered had been assigned to another person and was prosecuted at his cost, the assignee may, in the name of the assignor, recover of the sheriff for such tort. Riley *v.* Taber, 9 Gray (Mass.) 372.

15. Colton *v.* Mott, 15 Wend. (N. Y.) 619.

Joinder in case of levy on exempt property, see 11 STANDARD PROC. 550.

16. Riley *v.* Marshall, 5 Ala. 682; Waite *v.* Delesdernier, 15 Me. 144; Ulmer *v.* Cunningham, 2 Me. 117. See 11 STANDARD PROC. 550.

17. Lane *v.* Cotton, 12 Mod. 472, 88 Eng. Reprint 1458.

18. **Me.**—Severy *v.* Nye, 58 Me. 246; Walker *v.* Foxcroft, 2 Me. 270. **Mass.** Campbell *v.* Phelps, 17 Mass. 244; Tyler *v.* Ulmer, 12 Mass. 163; Draper *v.* Arnold, 12 Mass. 449. **Vt.**—Lyman *v.* Holmes, 88 Vt. 431, 92 Atl. 829; Hall *v.* Tomlinson, 5 Vt. 228.

19. Severy *v.* Nye, 58 Me. 246; Campbell *v.* Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139.

[a] **The pendency of an action against a deputy** will not abate an action against the sheriff for the same cause. Severy *v.* Nye, 58 Me. 246.

ceeding against the officer,[20] and without formal intervention or substitution[21] he is entitled to control the litigation.[22]

b. *Joinder of Parties Defendant.* — Where the same wrongful acts are committed jointly by the official and his deputy,[23] or by the officer and others,[24] they may be joined in one action to recover the damages suffered by the joint acts of all. But plaintiff cannot proceed jointly against an officer and another whom the officer has permitted to escape to recover a demand due from the latter.[25]

c. *Substitution of Parties.* — **(I.) In General.** — The sheriff's successor in office can be substituted in place of the sheriff only where he is in some manner concerned in the subject matter of the controversy, or responsible for the wrongful acts of his predecessor,[26] and where the action is against the officer and his deputy personally, no substitu-

20. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

[a] **The practice is,** in the event the sheriff is sued in conversion for property attached and retained by him to deliver the papers served on him to the plaintiff in the original case, or his attorney, and pay no further attention to the matter. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

[b] **The defense is interposed by** the attacking creditor and the sheriff perfunctorily verifies the answer. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

21. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

Substitution of indemnitors, see *infra,* XI, F, 2, c, (II).

22. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

[a] **An affidavit of prejudice** disqualifying the judge may be signed by him. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

23. Hoye *v.* Raymond, 25 Kan. 665; Waterbury *v.* Westervelt, 9 N. Y. 598. See 20 STANDARD PROC. 939; 21 STANDARD PROC. 553, 554, and see also 19 STANDARD PROC. 558.

[a] **That they are not joint** trespassers so as to be subject to a joint action, see Campbell *v.* Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139.

24. **Ark.**—Crump *v.* Starke, 23 Ark. 131. **N. D.**—Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974. **Tex.**—Hilliard *v.* Wilson, 76 Tex. 180, 13 S. W. 25.

See 16 STANDARD PROC. 358; 11 STANDARD PROC. 551.

[a] **Where they acted jointly in conversion** of plaintiff's property, the officer and another may be proceeded against jointly. Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

[b] **The officer and the plaintiff in attachment or execution** may be proceeded against jointly. Constantine *v.* Rowland, 154 Iowa 115, 134 N. W. 549; Fite *v.* Briedenback, 32 Ky. L. Rep. 400, 105 S. W. 1182.

[c] **That the purchaser at a sheriff's sale** cannot be made a party defendant with the officer for the tort of the latter, see Gloss *v.* Black, 91 Pa. 418. *Compare* 16 STANDARD PROC. 359, note 89 [g].

[d] **Joinder of a sheriff and his predecessor** not permitted where no joint wrong shown. New Orleans Ins. Assn. *v.* Harper, 32 La. Ann. 1165.

Against the officer and indemnitors, see *supra,* X.

25. Graves *v.* Walker, Sneed (Ky.) 127.

[a] **A separate action against the** officer for suffering the prisoner to escape would be the only mode of recovering the debt from such officer. Graves *v.* Walker, Sneed (Ky.) 127.

26. See Greig *v.* Ware, 25 Colo. 184, 55 Pac. 163; Hines *v.* Stahl, 79 Kan. 88, 99 Pac. 273, 131 Am. St. Rep. 280, 20 L. R. A. (N. S.) 1118.

[a] **The common law** rule that the action abates upon the death of the officer has been changed by statute and proceedings against the officer for breach of a continuing duty connected with the office and which exists irrespective of the incumbent may be continued against the officer's successor. Eureka Pipe Line Co. *v.* Riggs, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995. See Todd *v.* Bradford, 17 Mass. 567.

tion of their successor can be had,[27] particularly against the wishes of the plaintiff.[28] In some jurisdictions, a judgment creditor may be substituted as defendant in an action against a sheriff or constable for the recovery of property taken under execution, and replevied by the plaintiff in such action.[29]

(II.) Substitution of Indemnitors. — Under some statutes the sureties on the indemnity bond[30] may be substituted in place of the officer sued by the claimant of property.[31] Such substitution is made on application of the indemnitors,[32] for an order of substitution[33] upon the granting of which the court, in its discretion, may impose terms,[34] such as requiring the indemnitors to furnish additional security to the plaintiff,[35] or to pay the reasonable expenses of the defendant, necessarily incurred before the order is granted.[36]

27. Greig *v.* Ware, 25 Colo. 184, 55 Pac. 163.

28. Greig *v.* Ware, 25 Colo. 184, 55 Pac. 163.

29. Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047.

[a] **The permission to substitute is discretionary** with the court, and error cannot be assigned upon it unless the discretion is abused. Pierce *v.* Englekemeier, 10 Okla. 308, 61 Pac. 1047.

[b] **But where the property is not "replevied by the plaintiff in the action,"** but remains (1) in the possession of the judgment creditors, the application to substitute will not be granted (Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047) particularly where (2) the judgment creditor is a non resident. Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047.

30. **As to indemnity bond** and actions thereon, see *supra*, X.

31. Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699; Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Hayes *v.* Davidson, 98 N. Y. 19, 7 Civ. Proc. 46, 1 How. Pr. (N. S.) 310; Leonard *v.* Buttling, 13 App. Div. 179, 43 N. Y. Supp. 387; Coddington *v.* Harburger, 77 Misc. 211, 137 N. Y. Supp. 536.

[a] §1421, **Code Civ. Proc.**, has no bearing upon the construction of §1711, Code Civ. Proc. Leonard *v.* Buttling, 13 App. Div. 179, 43 N. Y. Supp. 387, 4 N. Y. Ann. Cas. 59.

[b] **The executor of a deceased indemnitor** may not be substituted. Buchner *v.* Tamsen, 26 App. Div. 612, 50 N. Y. Supp. 125.

[c] **Though a sum in excess of the undertaking** of the sureties is demanded by the plaintiff, the officer may nevertheless have the sureties substituted. Cassani *v.* Dunn, 44 App. Div. 248, 60 N. Y. Supp. 756.

[d] **That the undertaking was given after the action** in replevin against the sheriff was begun does not prevent substitution of the indemnitors. Terhune *v.* Dunn, 23 Misc. 600, 51 N. Y. Supp. 1122.

32. Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699.

[a] **The sheriff** is not entitled to have the sureties substituted. Leonard *v.* Buttling, 13 App. Div. 179, 43 N. Y. Supp. 387, 4 N. Y. Ann. Cas. 59.

[b] **The law is unconstitutional** in so far as (1) it requires the court to substitute the indemnitor upon the application of the sheriff in opposition to the wishes of the plaintiff (Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699), or (2) the indemnitors. De Shields *v.* Creamer, 43 App. Div. 579, 60 N. Y. Supp. 245.

33. Coddington *v.* Harburger, 77 Misc. 211, 137 N. Y. Supp. 536.

34. Coddington *v.* Harburger, 77 Misc. 211, 137 N. Y. Supp. 536.

[a] **Such terms** may be imposed in granting the motion to substitute, as justice requires for the security of the original parties. Rosenblum *v.* Gorman, 21 App. Div. 618, 47 N. Y. Supp. 754.

35. See Coddington *v.* Harburger, 77 Misc. 211, 137 N. Y. Supp. 536.

36. Coddington *v.* Harburger, 77 Misc. 211, 137 N. Y. Supp. 536.

[a] **Whether costs** in excess of ten dollars may be awarded sheriff under this provision, see Coddington *v.* Harburger, 77 Misc. 211, 137 N. Y. Supp. 536.

G. PLEADING. — 1. Declaration, Complaint or Petition. — a. *In General.*[37] — The declaration, complaint or petition must, in accordance with the requirements as to such pleadings generally,[38] allege with certainty and precision[39] facts[40] sufficient to constitute a cause of action against the officer or other person sought to be held liable.[41] It must state facts which disclose a duty resting upon the officer[42] in the prem-

37. **For a form of complaint** in conversion against a sheriff and another, see Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

38. See generally the title "**Declaration and Complaint.**"

39. Chatten *v.* Snider, 126 Ind. 387, 26 N. E. 166; Clark *v.* Gleason, 30 Mich. 158. See generally the title "**Certainty in Pleading.**"

40. See generally the title "**Conclusions of Law.**"

41. **Ala.**—Higdon *v.* Fields, 3 Ala. App. 322, 57 So. 58. **Ark.**—St. Louis I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304. **Cal.**—McRae *v.* Lackman, 8 Cal. App. 241, 96 Pac. 505. **Colo.**—People *v.* Cramer, 15 Colo. 155, 25 Pac. 302. **Ga.**—Hathaway *v.* Smith, 117 Ga. 946, 43 S. E. 984; Thurman *v.* Avera, 20 Ga. App. 802, 93 S. E. 495. **Ia.**—Shaw *v.* Tyrrell, 129 Iowa 556, 105 N. W. 1006. **Ky.**—Bennett *v.* Bell, 20 Ky. L. Rep. 308, 46 S. W. 701. **Minn.**—Foster *v.* Wagener, 129 Minn. 11, 151 N. W. 407. **N. D.**—Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974. **Wis.**—Loomis *v.* Wheeler, 18 Wis. 524.

See 16 STANDARD PROC. 359; 11 STANDARD PROC. 552; and the titles "**Replevin;**" "**Trover and Conversion.**"

[a] **For a sufficient statement of a cause of action in conversion** against the officer, see Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

[b] **Cause of action for wrongful seizure of property under distress warrant,** sufficiently stated. Board *v.* Luigart, 150 Ky. 791, 151 S. W. 9.

[c] **Failure To Serve Notice of Redemption.**—Where plaintiff's cause of action rests upon his loss of title to land through the sheriff's failure to serve notice of the expiration of the time for redemption, he must allege facts sufficient to show that no redemption would have been made had the notice been properly given. Foster *v.* Wagener, 129 Minn. 11, 151 N. W. 407.

[d] **Where sheriff is sued for failure to take possession of mortgaged chattels** and sell the same pursuant to statute, the complaint must allege the mortgagee, his agent or attorney, made an affidavit as required by §3413, Rev. Codes, as amended by Sess. Laws, 1909, p. 149, setting out the names of the parties, a description of the property mortgaged, and the amount due thereon, and under such affidavit demanded the possession of the property described in the chattel mortgage, which demand was refused by the mortgagor and that by reason of such refusal, the affidavit was placed in the hands of the officer together with the notice signed by the mortgagee, his agent or attorney, requiring the officer to take the mortgaged property into his possession and sell the same. Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460.

[e] **Illegal Execution as a Means of Exacting Costs.**—A petition alleging that there were no proceedings pending in a justice's court, and that no affidavit had been made on which an execution could issue, and that for the purpose of illegally exacting costs an execution had been prepared and levied on plaintiff's property, sets out a cause of action against the officers issuing and levying such fi. fa. Hathaway *v.* Smith, 117 Ga. 946, 43 S. E. 984.

[f] **Cause of Action Against Bondsmen.**—If the complaint alleges a conversion against the sheriff, it thereby states a cause of action against his bondsmen who are joined as defendants, where the bond is properly pleaded. Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

42. Higdon *v.* Fields, 3 Ala. App. 322, 57 So. 58; State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

[a] **Duty To Make Levy.**—Higdon *v.* Fields, 3 Ala. App. 322, 57 So. 58.

[b] **Complaint in an action to recover a deposit** taken (1) by the sheriff in lieu of bail should, by way of showing the officer's duty, allege that the prisoner had been held to answer

ises, and a breach of that duty,[43] resulting in an invasion of some rights of plaintiff.[44]

b. *Reference to Exhibits.* — As in other cases,[45] allegations wanting in the declaratory part of the petition or complaint may be supplied by an exhibit attached to the pleading and by appropriate reference made a part thereof.[46]

c. *Anticipating Defenses.* — The general rule that the complainant need not in his pleading anticipate defenses applies to complaints against officers.[47]

d. *Against Joint Tort-feasors.* — Where the officer and others are proceeded against as joint participants in the tort for which the action

a criminal charge; the making of the deposit with the sheriff; and the forfeiture of such deposit. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426. (2) It need not allege actual return of the indictment, nor that the forfeiture had never been set aside. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

43. **Ala.**—Higdon *v.* Fields, 3 Ala. App. 322, 57 So. 58. **Ga.**—Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34. **N. J.**—Astor *v.* Heller, 61 N. J. L. 78, 38 Atl. 819; Laming *v.* Denney, 3 N. J. L. 611; Bonnet *v.* Bozorth, 3 N. J. L. 543.

[a] **The sheriff's failure to pay the deposit** to the official entitled to receive it must be alleged in an action to recover a deposit taken in lieu of bail. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

[b] **An allegation that the sheriff levied** upon and seized the property under the writ of attachment is sufficient. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166.

[c] **Possession of Officer.**—In alleging conversion by an officer, plaintiff must allege possession of the defendant. Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34.

[d] **Negligence or wrong** on the part of the officer must appear. O'Bryan Bros. *v.* Webb, 142 Ala. 259, 37 So. 935; Astor *v.* Heller, 61 N. J. L. 78, 38 Atl. 819. See generally the title "Negligence."

44. **Ga.**—Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34. **Ia.**—Hawkeye Lumber Co. *v.* Diddy, 84 Iowa 634, 51 N. W. 2. **Mont.**—O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166.

[a] **Plaintiff's ownership of property** involved should be alleged (1) in complaints for wrongful levy (O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166), or (2) for conversion. Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34.

45. See generally the title "Exhibits."

46. Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34.

[a] **Ownership of Plaintiff and Possession by Defendant in Bail Trover Suit.**—In an action on the case against a sheriff for damages resulting from a breach of duty on the part of his deputy by omitting to take the statutory bond in a bail trover suit, seize the property, or commit the defendant to jail, the petition did not expressly allege that plaintiff was the owner of the property involved in the trover suit, or that the property was in possession of the defendant; but a copy of the petition in the trover suit, together with the judgment in favor of the plaintiff therein, was attached as an exhibit and made a part of the petition in the suit against the sheriff, and the petition so exhibited contained allegations to the effect that the property was that of the plaintiff and that the defendant was in possession of it at the time of the institution of the suit. It was held that when taken in connection with the exhibit, the petition against the sheriff was not wanting as to such allegations of ownership by the plaintiff and possession by the defendant. Edwards *v.* Boyd Co., 136 Ga. 733, 72 S. E. 34.

47. Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954; Paden *v.* Goldbaum, 104 Cal. xviii, 37 Pac. 759; Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136.

Need not negative exception to exemption, see *infra*, XI, G, 1, e, (III).

is brought the complaint must sufficiently show that the defendants acted jointly in committing the wrong.[48]

e. *Allegations as to Particular Matters.* — **(I.) Failure To Execute Process.** — A complaint based on the officer's failure to execute process should disclose a valid process[49] which, under the circumstances, the officer could have executed.[50] It must show that the defendant in the writ owned or was in possession of property legally subject to be levied on under the process,[51] and the value thereof,[52] and that the defendant officer would have found it if he had been duly diligent.[53]

(II.) Excessive Levy. — In order to show that an officer has violated his duty in making an excessive levy, it is necessary to allege and prove not only that the property levied upon was excessive,[54] but also, where it consists of a single indivisible piece of property, that the officer knew that the defendant owned other sufficient leviable property within his jurisdiction.[55]

48. Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

[a] **The reasons for their wrongful acts,** conceding that their acts were wrongful, are immaterial. The test is whether the pleading shows that the defendants could act, and could act conjointly, and while so acting did those things which amount to a conversion of plaintiff's property. Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

49. Berry *v.* Burckhartt, 1 Mo. 418.

[a] **Jurisdiction of the justice of the peace** in the action upon which the judgment was rendered must be shown in a complaint for failure to execute process issued on the judgment. Robinson *v.* Harlan, 2 Ill. 237.

50. Higdon *v.* Fields (Ala. App.), 76 So. 466; Wetherby *v.* Foster, 5 Vt. 136.

[a] **Failure To Levy Attachment.** Higdon *v.* Fields (Ala. App.), 76 So. 466.

[b] **As against demurrer a complaint is sufficient** in this respect which alleges: "And plaintiff avers that, while said attachment was in the hands of said sheriff for levy, the defendant in said cause in which said attachment was issued, viz . . . owned property in said Jefferson County, Alabama, subject to execution, and upon which said sheriff, by the exercise of reasonable care, could have levied said attachment, and out of the sale of which, under said attachment, said sheriff could have made the demand of plaintiff in said cause in which said attachment was issued, or a substantial part thereof." Higdon *v.* Fields (Ala. App.), 76 So. 466.

[c] **That there was not sufficient property** of defendant upon which to levy, should be averred in a complaint for failure to arrest a defendant upon an execution running against the property of defendant and, in default thereof, against his body. Hammett *v.* State, 7 Ark. 220.

51. Higdon *v.* Fields (Ala. App.), 76 So. 466; Terrell *v.* State, 66 Ind. 570.

[a] **An averment that the officer could have levied** the writ on the property of the defendant in J. county does not amount to an averment that the defendant in the attachment had property which could have been found and levied on by the sheriff. Higdon *v.* Fields, 3 Ala. App. 322, 57 So. 58.

52. Terrell *v.* State, 66 Ind. 570.

[a] **Precise Value Need Not Be Alleged.**—An averment that the execution defendant at the time the execution was in sheriff's hands "owned a large amount of real and personal property, —more than enough to pay and satisfy said execution," is equivalent to an averment that such property was of some value, and of greater aggregate value than the amount of the relator's judgment. Terrell *v.* State, 66 Ind. 570.

53. Higdon *v.* Fields (Ala. App.), 76 So. 466.

54. St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304; Sexey *v.* Adkinson, 40 Cal. 408.

55. St. Louis, I. M. & S. Ry. Co. *v.*

(III.) Levying on Exempt Property. — In an action against an officer for levying on exempt property it is necessary to set forth sufficient facts to show that plaintiff was entitled to the exemption.[56] Though the plaintiff need not plead the statute upon which the exemption is based,[57] he should show that he had substantially complied with the statute in making, verifying and filing the schedule of exemptions.[58]

(IV.) Levying on Property of Stranger. — Plaintiff in an action against the officer for wrongful levy on his property must sufficiently allege his ownership of the property at the time the levy was made,[59] that there was an invasion of his right to, or an exclusion of him from, the possession of the property seized,[60] and, where necessary,[61] that he gave notice to the officer stating the nature of his interest in the property.[62]

(V.) False Return.[63] — In charging a false return by the officer, the pleader should state facts sufficient to show the nature[64] and falsity[65]

Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304.

56. Sandberg *v.* Bortstadt, 48 Colo. 96, 109 Pac. 419; Huseman *v.* Sims, 104 Ind. 317, 4 N. E. 42; Boesker *v.* Pickett, 81 Ind. 554. See 11 STANDARD PROC. 552. But see Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431; Dennis *v.* Snell, 50 Barb. (N. Y.) 95, 54 Barb. 411, 34 How. Pr. 467.

[a] **Citizenship and Residence.**—A complaint which alleges that plaintiff has resided in the state for a considerable time, and has been engaged in business therein, sufficiently shows plaintiff to be a citizen of the state within the exemption laws. Sandberg *v.* Borstadt, 48 Colo. 96, 109 Pac. 419. See also State *v.* Clark, 42 Mo. 519; Thompson *v.* Donahoe, 16 S. D. 244, 92 N. W. 27. Necessity of alleging residence, see 11 STANDARD PROC. 552.

[b] **Negativing Exception.**—A complaint for conversion for levying on exempt property need not allege that the debt sued upon was not for the purchase money due on property claimed to be exempt. Millerke *v.* Reiley, 31 S. D. 342, 141 N. W. 136. *Compare* 11 STANDARD PROC. 552.

57. Sandberg *v.* Borstadt, 48 Colo. 96, 109 Pac. 419; Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52.

[a] **Stating a case within the statute** on the subject is sufficient. Sandberg *v.* Borstadt, 48 Colo. 96, 109 Pac. 419.

58. Huseman *v.* Sims, 104 Ind. 317, 4 N. E. 42; Holdridge *v.* Lee, 3 S. D. 134, 52 N. W. 265. See 11 STANDARD PROC. 554, 555.

59. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166; Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. 161. See generally the titles "**Title;**" "**Trespass.**"

[a] **Alleging ownership on the day the levy was made** is sufficient, without alleging ownership at the particular time of the day when the officer seized the property. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166.

[b] **That facts concerning the acquisition of the property** are matters of evidence and need not be averred, see Rains *v.* Herring, 68 Tex. 468, 5 S. W. 369. But see Shaw *v.* Tyrrell, 129 Iowa 556, 105 N. W. 1006.

60. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166.

[a] **Seizure Under Writ of Attachment.**—An allegation that the sheriff levied upon and seized the property under a writ of attachment is sufficient, where the only method of attaching personal property under the circumstances disclosed is by actually taking possession of the same. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166.

61. See *supra*, XI, D.

62. Shaw *v.* Tyrrell, 129 Iowa 556, 105 N. W. 1006. See also Killey *v.* Scannell, 12 Cal. 73.

63. See generally the title "**Returns.**"

64. Com. *v.* Bartlett's Exrs., 7 J. J. Marsh. (Ky.) 161.

[a] **A false return as of the date when the process was returnable** may be alleged, notwithstanding the return was made thereafter. Michaels *v.* Shaw, 12 Wend. (N. Y.) 587.

65. **Ind.**—State *v.* Hammond, 72 Ind. 472. **Ky.**—Com. *v.* Bartlett's Exrs., 7

of the return, and that he suffered damage therefrom.[66]

f. *Conditions Precedent.* — Sufficient must appear in plaintiff's pleading to show substantial compliance with all conditions precedent to the maintenance of the action.[67]

2. Objections to Declaration, Complaint, or Petition. — The form or substance of the declaration or complaint may be challenged by demurrer[68] or motion[69] subject, of course, to the usual limitations on the use of such remedies.

J. J. Marsh. 161. **N. C.**—Harrell *v.* Warren, 100 N. C. 259, 6 S. E. 777; Peebles *v.* Newsom, 74 N. C. 473; Lemit *v.* Mooring, 30 N. C. 312.

[a] **An allegation "that he failed to make a true and correct return** on execution" not sufficient to show a false return. Com. *v.* Bartlett's Exrs., 7 J. J. Marsh. (Ky.) 161.

66. Kendall *v.* Clark, 10 Cal. 17, 70 Am. Dec. 691.

67. **Idaho.**—Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460. **Ia.**—Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035. **N. Y.**—Tiffany *v.* Harvey, 216 N. Y. 300, 110 N. E. 624; Buczynski *v.* Anderson, 174 App. Div. 790, 161 N. Y. Supp. 697.

As to conditions precedent, see *supra,* XI, D, and generally the title **"Suits and Actions."**

[a] **As that notice of ownership** was given by the claimant to the officer. Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

[b] **Issuance of an execution** against the person of the judgment debtor to the county where he resides must be averred. Tiffany *v.* Harvey, 216 N. Y. 300, 110 N. E. 624; Buczynski *v.* Anderson, 174 App. Div. 790, 161 N. Y. Supp. 697.

[c] **Demand of Possession by Mortgagee.**—A complaint for failure to take possession of certain personal property described in a chattel mortgage should show that the mortgagee demanded, under affidavit, the possession of the mortgaged chattels and that such demand was refused. Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460.

[d] **Demand for Money.**—In a complaint against an officer for failure to pay over money collected, there should be an allegation that a demand was made upon the officer for the money. McBroom *v.* Governor, 6 Port. (Ala.) 32; Church *v.* Clark, 1 Root (Conn.) 303.

68. See generally the title **"Demurrer."**

[a] **It is cause for general demurrer** that the pleading fails to state a cause of action. **Ark.**—St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304. **Cal.** McRae *v.* Lackmann, 8 Cal. App. 241, 96 Pac. 505. **Idaho.**—Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460. **N. D.** Allen *v.* Cruden, 34 N. D. 166, 157 N. W. 974.

[b] **A complaint for making an excessive levy** is demurrable, when it fails to allege that the officer had knowledge of other property belonging to the judgment debtor that might be levied on besides the particular indivisible article the value of which was greatly in excess of the amount for which execution issued. St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304; Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

[c] **An objection that notice** to the sheriff given by the claimant of the property levied on is insufficient may be made by demurrer. Gray *v.* Carroll, 144 Iowa 68, 120 N. W. 1035.

[d] **Demand for Possession of Mortgaged Chattels.**—A complaint in an action against the sheriff for failure to take possession of personal property described in a chattel mortgage, is demurrable where it fails to allege that plaintiff has complied with the provisions of the statute requiring him to demand, under affidavit, the possession of the chattels covered by the mortgage for the purpose of selling the same to satisfy the indebtedness due from the mortgagor, and that he has been unable to secure the possession of said chattels peaceably. Tappin *v.* McCabe, 27 Idaho 402, 149 Pac. 460.

[e] **Misjoinder of Causes of Action.** O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166.

69. **See such particular titles as**

3. Plea or Answer. — a. *Generally.* — The nature of the defendant officer's plea or answer depends somewhat upon the character of the action,[70] and it will, of course, follow the general rules applicable to such actions,[71] as well as the rules governing pleas and answers,[72] and the particular defense sought to be interposed.[73]

b. *Justification.* — According to some authorities justification must be specially pleaded by the officer,[74] though according to others, it is provable under the general issue or general denial.[75] But when the sheriff justifies the seizure of property under legal process, the plea must show facts amounting to justification,[76] as that he acted under process regular on its face and issued by competent authority,[77] and must describe it with certainty and particularity sufficient to identify it,[78] and if the process is against any third person, must allege that person's ownership of the property[79] or his liability to the process.[80] The return of mesne process under which the officer justifies should be averred in

"Certainty in Pleading;" "Motions;" "Striking Out and Withdrawal;" "Surplusage and Scandal."

[a] **Motion to strike** allegations from petition relating to attorney's fees and exemplary damages. Constantine *v.* Rowland, 154 Iowa 115, 134 N. W. 549.

70. See *supra*, XI, C.

[a] **In an action for failure to levy,** defendant must specially plead that property was exempt from levy. Terrell *v.* State, 66 Ind. 570.

71. See such titles as **"Assumpsit;" "Debt;" "Detinue;" "Negligence;" "Replevin;" "Trover and Conversion."**

72. See the titles **"Answers;" "Confession and Avoidance;" "Denials;" "Pleas."**

73. See generally titles dealing with particular defenses and *infra*, this section.

74. **Ala.**—Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362. **Cal.**—Glazer *v.* Clift, 10 Cal. 303. **Ill.**—Olsen *v.* Upsahl, 69 Ill. 273; Dayton *v.* Fry, 29 Ill. 525. **Ind.**—De Bord *v.* La Hue, 26 Ind. 212. **N. Y.**—Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360; Beaty *v.* Swarthout, 32 Barb. 293. **Wis.**—Schultz *v.* Frank, 1 Wis. 352.

See 16 STANDARD PROC. 359, note 96; 22 STANDARD PROC. 930.

75. Hall *v.* Snowhill, 14 N. J. L. 551, in an action in case. See 22 STANDARD PROC. 930.

As to matters provable under general issue, see generally 7 STANDARD PROC. 66, et seq.

As to matters provable under general denial, see 7 STANDARD PROC. 88, et seq.

76. See 22 STANDARD PROC. 931.

77. Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362. See 22 STANDARD PROC. 931.

[a] **Jurisdiction of the court which** issued the process must appear where the court is an inferior one. Gillespie *v.* McClesky, 160 Ala. 289, 49 So. 362; Cleveland *v.* Rogers, 6 Wend. (N. Y.) 438.

Copy of process need not be annexed, see 22 STANDARD PROC. 931, note 1.

78. **Ala.**—Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362; Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188; McAden *v.* Gibson, 5 Ala. 341. **Cal.** Towdy *v.* Ellis, 22 Cal. 650. **Ia.**—Kingsbury *v.* Buchanan, 11 Iowa 387.

79. **Ala.**—Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362; Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188. **Mo.** Barley *v.* Cannon, 17 Mo. 595. **N. J.** Hawk *v.* Lepple, 51 N. J. L. 208, 17 Atl. 351, 14 Am. St. Rep. 677, 4 L. R. A. 48; Brown *v.* Bissett, 21 N. J. L. 46; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593. **Ore.**—Howard *v.* Conde, 22 Ore. 581, 30 Pac. 454; Krewson *v.* Purdom, 11 Ore. 266, 3 Pac. 822.

See 22 STANDARD PROC. 921.

80. Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362.

[a] **Where it is alleged that the property was subject to process,** ownership need not also be alleged. Gillespie *v.* McCleskey, 160 Ala. 289, 49 So. 362.

his plea,[81] or an excuse pleaded for failure to make return.[82] It is not necessary, where an officer justifies under an execution, to make averments as to the judgment upon which the execution issued,[83] unless the suit is brought by a stranger whose property was taken under the process.[84]

c. *Estoppel.* — The necessity of pleading an estoppel follows the general rule elsewhere treated.[85]

d. *Verification.* — Where it is the practice for the attaching creditor, after notice from the officer, to interpose the defense, the officer perfunctorily verifies the answer.[86]

4. Reply or Replication. — The necessity for and character of a replication or reply is governed by the general rules elsewhere treated.[87] Matter in confession and avoidance of justification may be set up by way of replication.[88] A replication to a plea of justification should newly assign matter relied on to make the officer a trespasser ab initio.[89]

H. AMENDMENTS. — The court may, as in other cases,[90] permit amendments to remedy a defective statement of a cause of action,[91] but not, in general, to allow the introduction of a new cause of action.[92]

I. PROCESS. — Process is required as in other actions,[93] and service[94]

81. **Ala.**—Kirksey *v.* Dubose, 19 Ala. 43; McAden *v.* Gibson, 5 Ala. 341. **Ind.** Caldwell *v.* Kenworthy, 31 Ind. 238; Davis *v.* Bush, 4 Blackf. 330. **Me.** Clark *v.* Foxcroft, 6 Greenl. 296, 20 Am. Dec. 309. **Mass.**—Williams *v.* Babbitt, 14 Gray 141, 74 Am. Dec. 670. **Vt.**—Wright *v.* Marvin, 59 Vt. 437, 9 Atl. 601; Ellis *v.* Cleveland, 54 Vt. 437.

82. McAden *v.* Gibson, 5 Ala. 341; Taylor *v.* Knowlton, 10 Allen (Mass.) 137.

83. **Ala.**—Shepherd *v.* Nabors, 6 Ala. 631. **Del.**—Davis *v.* White, 1 Houst. 228. **Ill.**—Outhouse *v.* Allen, 72 Ill. 529; Jackson *v.* Hobson, 5 Ill. 411. **Mass.**—Damon *v.* Bryant, 2 Pick. 411. **Mo.**—Burton *v.* Sweaney, 4 Mo. 1. **N. Y.** Werner *v.* Waters, 55 Barb. 591. **Va.** Davis *v.* Davis, 2 Gratt. (43 Va.) 363.

84. **Ill.**—Johnson *v.* Holloway, 82 Ill. 334. **Nev.**—McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517. **N. Y.** Jansen *v.* Acker, 23 Wend. 480.

85. See 8 STANDARD PROC. 682.

[a] **It is not necessary** for the sheriff to plead facts relied upon to create an estoppel arising from plaintiff's statement that he did not own the property levied upon. Feinberg *v.* Allen, 118 App. Div. 497, 103 N. Y. Supp. 339.

86. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

87. See generally the title **"Replication and Reply"** and Hale *v.* Dennie, 4 Pick. (Mass.) 501; Long *v.* Hoban, 7 Ohio Dec. (Reprint) 688, 4 Wkly. L. Bul. 986.

88. Beatty *v.* Holloway, 4 Ala. 178; Lincoln *v.* McLaughlin, 74 Ill. 11.

89. **Ill.**—McGillis *v.* Bishop, 27 Ill. App. 53. **Ind.**—Jarratt *v.* Gwathmey, 5 Blackf. 237. **Eng.**—Shorland *v.* Govett, 5 Barn. & C. 485, 11 E. C. L. 551, 8 D. & R. 257, 4 L. J. K. B. (O. S.) 212, 108 Eng. Reprint 181.

90. See the titles **"Amendments and Jeofails;" "New Cause of Action or Defense;" "Parties."**

91. Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760; Herring *v.* Patten, 18 Tex. Civ. App. 147, 44 S. W. 50.

92. Herring *v.* Patten, 18 Tex. Civ. App. 147, 44 S. W. 50.

93. Smith *v.* Hunt, 1 McCord (S. C.) 464.

See generally the titles **"Process;" "Service of Process and Papers."**

94. White *v.* Wilcox, 1 Conn. 347.

[a] **Where service fourteen days before** the term of court to which the process is returnable is required in certain statutory actions against the sheriff or constable, this does not extend to a common law action against the officer for breach of duty in respect to execution process. White *v.* Wilcox,

thereof must be made within the time, and in the manner[95] prescribed by law.

J. TRIAL. — The trial is conducted in accordance with the general rules elsewhere treated.[96]

Burden of Proof. — The presumption is that the officer acts in good faith in making a levy, and the burden devolves upon the plaintiff to show that he has violated his duty[97] in making an excessive levy,[98] or levying upon property owned by or rightfully in possession of plaintiff.[99] But where it is shown that the execution debtor owned specific property, of sufficient value, subject to levy and sale, the burden rests upon the officer to prove some excuse which would be valid in law, for failing to make the money.[1]

Province of Judge and Jury.[2] — It is for the jury to determine under disputed facts whether the officer relied on plaintiff's statement that he was not the owner of the property levied upon;[3] whether the householder voluntarily consented to a search without warrant,[4] and whether acts of the officer were done in malice so as to warrant punitive damages.[5]

K. JUDGMENT AND REVIEW. — The general rules in respect to judgments and review[6] are applicable to actions against sheriffs, constables and marshals.

XII. PROCEEDINGS ON OFFICIAL BONDS. — A. SUMMARY PROCEEDINGS. — **1. In General.** — To persons suffering injury through the negligence or default of sheriffs and constables, the statutes of most

1 Conn. 347. See also Sanborn *v.* Hamilton, 18 Vt. 590; Johnson *v.* Rice, 14 Vt. 391.

95. Dunford *v.* Weaver, 84 N. Y. 445; Sherman *v.* Conner, 50 How. Pr. (N. Y.) 29.

[a] **Service upon deputy** at the office of the sheriff is sufficient service upon the latter. Dunford *v.* Weaver, 84 N. Y. 445. *Compare* Sherman *v.* Conner, 50 How. Pr. (N. Y.) 29.

96. See generally the titles "**Juries and Jurors;**" "**Trial;**" "**Verdict;**" and other titles dealing with particular aspects of trial practice.

[a] **Dismissal.**—In an action for escape dismissal is proper where the plaintiff fails to prove any damages resulting from the escape. Buczynski *v.* Anderson, 174 App. Div. 790, 161 N. Y. Supp. 697. See generally the title "**Dismissal, Discontinuance and Nonsuit.**"

[b] **Reference.**—See Clevenger's Estate, 1 Lanc. L. Rev. (Pa.) 277, 2 Chester 263, and the title "**References.**"

97. St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304.

98. St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 102 Ark. 175, 143 S. W. 1084, Ann. Cas. 1914A, 304.

99. Citizens' Securities Co. *v.* Hammel, 14 Cal. App. 564, 112 Pac. 731.

1. Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306.

2. See generally the title "**Province of Judge and Jury.**"

3. Feinberg *v.* Allen, 118 App. Div. 497, 103 N. Y. Supp. 339.

4. Fennemore *v.* Armstrong, 6 Boyce (Del.) 35, 96 Atl. 204.

5. Fennemore *v.* Armstrong, 6 Boyce (Del.) 35, 96 Atl. 204.

6. See the titles "**Appeals,**" "**Judgments;**" "**Replevin;**" "**Trover and Conversion;**" "**Writ of Error;**" and other titles dealing with particular aspects of appellate procedure.

7. See *infra*, this note.

[a] **The judgment must be final,** to be reviewable by appeal. Barnard *v.* Henry, 25 Vt. 289.

[b] **The sheriff need not join in an** appeal in an action by claimants against him to determine the value of the property. Kato *v.* Union Oil Co., 91 Wash. 302, 157 Pac. 688.

jurisdictions furnish a means of redress by a summary remedy on the officer's official bond.[8] The proceeding thus authorized is in some states merely incidental,[9] and not an original action.[10] It is also in some jurisdictions an ex parte proceeding,[11] though generally not so.[12]

2. Whether Exclusive. — This summary proceeding which the injured party has upon the officer's bond is, except in so far as the statute makes it exclusive, cumulative to other modes of redress,[13] such as a common law action,[14] or a statutory remedy by suit on a bond.[15] Under some statutes it is the only method of recovering a penalty imposed for the officer's default.[16]

[c] **An appeal bond** for costs on the other defendant's appeal need not be given by the sheriff. Kato *v.* Union Oil Co., 91 Wash. 302, 157 Pac. 688.

8. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Johnson *v.* Petty, 5 Ala. 528; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574; Atkinson *v.* Hulse, 30 Ark. 760; Milor *v.* Farrelly, 25 Ark. 353. **Cal.**—Wilson *v.* Broder, 10 Cal. 486. **Ill.**—People *v.* McHatton, 7 Ill. 731. **Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Ky.**—O'Bannon *v.* Huffman, 1 B. Mon. 212; Hall *v.* Com., 8 Bush 378; Carter *v.* Sympson, 8 B. Mon. 155; Com. *v.* Webb, 19 Ky. L. Rep. 944, 42 S. W. 737. **La.**—Hernandez *v.* Hugh, 22 La. Ann. 245; Soule *v.* Worsham, 22 La. Ann. 78. **Miss.**—Tapp *v.* Bonds, 57 Miss. 281; Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Smed. & M. 625. **Nev.**—Nash *v.* Muldoon, 16 Nev. 404. **N. C.**—State *v.* Howell, 65 N. C. 61. **Pa.**—Com. *v.* Lelar, 13 Pa. 22. **Tenn.** Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Wood *v.* Orr, 10 Yerg. 505; Barnes *v.* White, 2 Swan 442; Hand *v.* State, 5 Humph. 518. **Tex.**—Sharp *v.* Morgan, 192 S. W. 599; Peck *v.* Murphy, 184 S. W. 542; Haley *v.* Greenwood & Co., 28 Tex. 680; Poer *v.* Brown, 24 Tex. 34; Griswold *v.* Chandler, 22 Tex. 637; Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098. **Vt.**—State Treasurer *v.* Kelsey, 4 Vt. 371. **Va.** Carr *v.* Meade's Exx., 77 Va. 142; Harrison *v.* Lane, 4 Munf. (18 Va.) 238. **W. Va.**—State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976; Barrett *v.* Smith, 4 W. Va. 709.

[a] **The constitutionality of the remedy upheld. Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Ky.**—Murry *v.* Askew, 6 J. J. Marsh. 27. **Miss.**—Lewis *v.* Garrett's Admrs., 5 How. 434.

[b] **That the remedy is anomalous** in judicial proceedings, see Calloway *v.* Com., 4 Bush (Ky.) 383.

[c] **The object of the statute is to** require prompt performance of their duties by officers, and to give plaintiffs an ample and speedy remedy for any default. Tapp *v.* Bonds, 57 Miss. 281.

9. See *infra*, this note.

[a] **It is incidental to the proceeding** out of which it grows. Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098.

10. Griswold *v.* Chandler, 22 Tex. 637; Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098.

11. Calloway *v.* Com., 4 Bush (Ky.) 383.

12. See *infra*, XII, A, 9, a.

13. **Ala.**—Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Levy *v.* Lawson, 5 Ark. 212. **Ky.**—Hall *v.* Com., 8 Bush 378; Carter *v.* Sympson, 8 B. Mon. 155; Mars *v.* Buckler, 1 Bibb 267.

14. **Ky.**—Mars *v.* Buckler, 1 Bibb 267. **Tex.**—Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098. **Vt.**—State Treasurer *v.* Kelsey, 4 Vt. 371.

See *supra*, XI.

15. Levy *v.* Lawson, 5 Ark. 212; Carter *v.* Sympson, 8 B. Mon. (Ky.) 155; Hall *v.* Com., 8 Bush (Ky.) 378; Mars *v.* Buckler, 1 Bibb (Ky.) 267.

See *supra*, X, and *infra*, XII, B.

[a] **The party injured may elect** to proceed by suit on the officer's official bond for the false return or he may proceed by motion. Levy *v.* Lawson, 5 Ark. 212.

16. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[a] **Penalty for Failure To Execute Process.**—The penalty provided by sec-

3. Construction of Statutes Authorizing. — Statutes authorizing summary proceedings against sheriffs and constables are generally regarded as being penal,[17] and the remedy, being quasi criminal,[18] and in derogation of common law,[19] is strictly construed.[20] Before, therefore, it can be enforced all the conditions of the statute in regard thereto must be complied with[21] for the courts will not by construction extend it beyond the terms of the statute.[22]

4. Defaults Remedied by. — Where the statutes limit the summary remedy against an officer to certain defaults and delinquencies, it must be confined to those specified,[23] and cannot by construction be extended to breaches of duty not enumerated.[24] The remedy has been invoked to redress the officer's failure to perform his prescribed duty in reference to process coming to his hands[25] as for failure to properly execute a summons,[26] an attachment,[27] or an execution,[28] or to make the re-

tions 5904, 5910, of the Alabama code for the sheriff's failure to perform his duty in reference to process coming into his hands, is not recoverable in a common law action on the sheriff's official bond, but can be recovered only in the summary proceeding provided for by statute. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[b] **The pendency of an action on sheriff's bond** for his failure to levy an attachment will not abate a summary proceeding for judgment on motion for the statutory penalty. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

17. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Westmoreland *v.* Hale, 11 Ala. 122; McRae *v.* Colclough, 2 Ala. 74; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574; Milor *v.* Farrelly, 25 Ark. 353. **Cal.**—Wilson *v.* Broder, 10 Cal. 486. **Ky.**—Judy *v.* Howard, 2 Metc. 44. **Miss.**—State *v.* Nichols, 39 Miss. 318. **Tenn.**—Wood *v.* Orr, 10 Yerg. 505.

18. Wright *v.* McKenney, 34 Tex. 568.

19. **Ark.**—Milor *v.* Farrelly, 25 Ark. 353. **Ky.**—Morrow *v.* McKinney, Sneed 63. **Tenn.**—Hearn *v.* Ewin, Pendleton & Co., 3 Coldw. 399.

20. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574; Milor *v.* Farrelly, 25 Ark. 353. **Cal.** Wilson *v.* Broder, 10 Cal. 486. **Ky.** Hall *v.* Com., 8 Bush 378; Judy *v.* Howard, 2 Metc. 44. **Tenn.**—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067; Hearn *v.* Ewin, Pendleton & Co., 3 Coldw. 399; Wood *v.* Orr, 10 Yerg. 505.

21. Hall *v.* Com., 8 Bush (Ky.) 378; Calloway *v.* Com., 4 Bush (Ky.) 383.

Only defaults specified can be remedied in this summary proceeding, see *infra*, XII, A, 4.

22. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Leinkauff *v.* Tuskaloosa S. & A. Co., 105 Ala. 328, 16 So. 891. **Miss.**—State *v.* Nichols, 39 Miss. 318. **Tenn.**—Wood *v.* Orr, 10 Yerg. 505.

23. **Ala.**—Leinkauff *v.* Tuskaloosa Sale & Advancing Co., 105 Ala. 328, 16 So. 891; Johnson *v.* Petty, 5 Ala. 528; Reid *v.* Bibb, 5 Ala. 281. **Ky.**—Mars *v.* Buckler, 1 Bibb 267. **Miss.**—Tapp *v.* Bonds, 57 Miss. 281. **Tenn.**—Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067.

[a] **Failure to pay attaching creditors** their pro rata share, will not authorize a summary judgment. Leinkauff *v.* Tuskaloosa S. & A. Co., 105 Ala. 328, 16 So. 891.

[b] **The remedy not available** for default of officer in failure to execute and make return of attachment writ issued by justice of the peace. Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067.

24. Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067. See cases in preceding note.

25. Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

26. Atkinson *v.* Hulse, 30 Ark. 760.

27. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

28. **Ark.**—Milor *v.* Farrelly, 25 Ark. 353. **Miss.**—Garrett *v.* Hamblin, 11

quired return on execution[29] or other process.[30] In other instances, also, the remedy has been resorted to, as for example, where the officer wrongfully refuses to pay over money coming into his possession,[31] or fails to pay claims allowed by order of court,[32] or to pay taxes due the state.[33]

5. Conditions Precedent. — Whatever conditions there are precedent to the plaintiff's right to proceed summarily against the officer upon his bond, they must be performed.[34]

Smed. & M. 219, 49 Am. Dec. 53. **Tex.** Sharp *v.* Morgan, 192 S. W. 599; Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098.

[a] **Failure to make money** on execution. Hodges *v.* Laird, 10 Ala. 678; Leavitt *v.* Smith, 7 Ala. 175.

29. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574. **Ky.**—Pogue *v.* Lusk, 6 J. J. Marsh. 579; O'Bannon *v.* Huffman, 1 B. Mon. 212; Goodrum *v.* Root, 2 Metc. 427. **Miss.**—Tapp *v.* Bonds, 57 Miss. 281; Cox *v.* Ross, 56 Miss. 481; Paddleford *v.* Moore, 32 Miss. 622; Morehead *v.* Holliday, 1 Smed. & M. 625. **Tenn.** Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Kinzer *v.* Helm, 7 Heisk. 672; Smith *v.* Gilmore, 3 Sneed 481; Barnes *v.* White, 2 Swan 442; Hand *v.* State, 4 Humph. 475; Hearn *v.* Ewin, Pendleton & Co., 3 Coldw. 399. **Tex.** Griswold *v.* Chandler, 22 Tex. 637.

[a] **Belated return** of execution. Sanders *v.* Bank of Kentucky, 2 Metc. (Ky.) 327.

[b] **Failure to indorse** upon execution its date of delivery. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Chandler *v.* Henry, 90 Ala. 271, 8 So. 96.

30. State *v.* Nichols, 39 Miss. 318.

[a] **False return** on process issued against a person charged with a misdemeanor. State *v.* Nichols, 39 Miss. 318.

31. **Ala.**—Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; Wallace *v.* Taylor, 7 Ala. 668; Price *v.* Cloud, 6 Ala. 248; Robertson *v.* Locke, 6 Ala. 246; Johnson *v.* Petty, 5 Ala. 528. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574; Milor *v.* Farrelly, 25 Ark. 353. **Cal.**—Wilson *v.* Broder, 10 Cal. 486. **Ill.** People *v.* McHatton, 7 Ill. 731. **Ind.** Dawson *v.* Shaver, 1 Blackf. 204. **Ky.** Hail *v.* Com., 8 Bush 378; Morrow *v.* McClintock, Sneed 44; Mars *v.* Buckler, 1 Bibb 267; Com. *v.* Webb, 19 Ky. L. Rep. 944, 42 S. W. 737. **Miss.**—Hamblin *v.* Foster, 4 Smed. & M. 139. **Nev.** Nash *v.* Muldoon, 16 Nev. 404. **Tex.** Haley *v.* Greenwood & Co., 28 Tex. 680. **Va.**—Carr *v.* Meade's Exx., 77 Va. 142; Goss *v.* Southall, 23 Gratt. (64 Va.) 825; Cook *v.* Hays, 9 Gratt. (50 Va.) 142. **W. Va.**—State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976; Barrett *v.* Smith, 4 W. Va. 709.

[a] **If not received on execution,** a motion to recover the money will not lie. Radford *v.* Hull, 30 Miss. 712.

[b] **Failure To Pay County Order.** State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

[c] **If the officer is in doubt** as to the right of the other party to receive the money, his failure to pay it over will not justify a summary remedy on his bond. Wilson *v.* Broder, 10 Cal. 486.

32. Terrill *v.* Cecil, 3 Metc. (Ky.) 347.

33. Monteith *v.* Com., 15 Gratt. (56 Va.) 172.

34. **Ala.**—Wallace *v.* Taylor, 7 Ala. 668. **Ky.**—Thompson *v.* Healy, 4 Metc. 257. **Tenn.**—Patterson *v.* Coleman, 4 Humph. 64. **Vt.**—Tute *v.* James, 46 Vt. 60. **Va.**—Cook *v.* Hays, 9 Gratt. (50 Va.) 142.

[a] **Demand for Money.**—(1) Where the officer's default consists in a failure to pay over money in his hands, a demand for the same is a condition precedent to a summary proceeding on his bond. **Ala.**—Wallace *v.* Taylor, 7 Ala. 668. **Ky.**—Thompson *v.* Healy, 4 Metc. 257. **Va.**—Cook *v.* Hays, 9 Gratt. (50 Va.) 142. (2) But where the officer's return shows that he has collected the money, no demand seems to be necessary. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

[b] **The return of the sheriff** admitting receipt of the money is not a condition precedent to a proceeding on the bond for failure of the sheriff to turn over money on demand; the

6. By and Against Whom. — The application for summary judgment on an officer's bond may be made by any party aggrieved,[35] or by the legal representative of such party,[36] and against the officer in default,[37] and the sureties on his official bond.[38] The remedy has been

receipt of the money may be established by other evidence. Nash *v.* Muldoon, 16 Nev. 404.

35. Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Ranken *v.* Jones (Tex. Civ. App.), 53 S. W. 583.

[a] **The plaintiff in execution is** (1) entitled to the remedy (**Ala.**—Chandler *v.* Reid, 114 Ala. 390, 21 So. 475. **Cal.** Wilson *v.* Broder, 10 Cal. 486. **Miss.** Morehead *v.* Holliday, 1 Smed. & M. 625), whether (2) he was the plaintiff in the action or not. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

[b] **Whether a surety by paying the execution** becomes entitled to prosecute a motion against the sheriff, see Sanders *v.* Bank of Kentucky, 2 Metc. (Ky.) 327.

[c] **The chairman of the county court** may in his own name maintain the motion for county revenue. Dawson *v.* Clark, 3 Sneed (Tenn.) 438.

[d] **The sheriff has the remedy** against his deputy when through the latter's default or misconduct he has been obliged to pay money to the party injured. Patterson *v.* Coleman, 4 Humph. (Tenn.) 64. And see Stephens *v.* Womack, 3 Ala. 738; Anderson *v.* Bradford's Admr., 7 J. J. Marsh. (Ky.) 623; Lindsey *v.* McClelland, 1 Bibb. (Ky.) 262.

[e] **The state is entitled** (1) to the remedy. State *v.* Nichols, 39 Miss. 318; Dawson *v.* Clark, 3 Sneed (Tenn.) 438. (2) But where an individual alone is aggrieved, the proceedings cannot be instituted in the name of the state. Hand *v.* State, 5 Humph. (Tenn.) 518.

36. Carr *v.* Meade's Exx., 77 Va. 142.

37. **Ala.**—O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574. **Ky.**—Com. *v.* Webb, 19 Ky. L. Rep. 944, 42 S. W. 737. **Miss.**—Tapp *v.* Bonds, 57 Miss. 281; Garrett *v.* Hamblin, 11 Smed. & M. 219, 49 Am. Dec. 53; Morehead *v.* Holliday, 1 Smed. & M. 625. **N. C.** State *v.* Howell, 65 N. C. 61. **Tenn.** Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Barnes *v.* White, 2 Swan 442; Hearn *v.* Ewin, Pendleton & Co., 3 Coldw. 399; Smith *v.* Gilmore, 3 Sneed 481. **Tex.**—Haley *v.* Greenwood & Co., 28 Tex. 680; Griswold *v.* Chandler, 22 Tex. 637; Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098. **Va.**—Carr *v.* Meade's Exx., 77 Va. 142.

[a] **For a false return of the deputy** the remedy by motion does not lie against the sheriff and his sureties. State *v.* Nichols, 39 Miss. 318.

38. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Reed *v.* Summers, 79 Ala. 522; *Ex parte* Wilson, 54 Ala. 296; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574. **Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Ky.**—Martin *v.* Hardin Justices, 6 J. J. Marsh. 7. **N. C.**—State *v.* Howell, 65 N. C. 61. **Tenn.**—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

[a] **All the Sureties.**—A motion against a constable must embrace all his sureties, or show that those not included are dead. Hearn *v.* Ewin, Pendleton & Co., 3 Coldw. (Tenn.) 399.

[b] **The expiration of the officer's term** does not prevent a party from maintaining the motion. Tapp *v.* Bonds, 57 Miss. 281.

[c] **A joint motion** against the sheriff and his sureties is not maintainable for arrears of the county levy. Martin *v.* Hardin Justices, 6 J. J. Marsh. (Ky.) 7.

[d] **Only jointly with the officer** can (1) the sureties be reached (Burroughs *v.* Goodall, 2 Head [Tenn.] 29; Bittick *v.* McEwen, 7 Heisk. [Tenn.] 1) unless (2) they are jointly and severally liable. Poer *v.* Brown, 24 Tex. 34.

[e] **A joint motion against all the sureties,** (1) is necessary (**Ky.**—Sutton *v.* Stark, 1 Mon. 147. **Tenn.**—Gibson *v.* Martin, 7 Humph. 127; Rice *v.* Kirkman, 3 Humph. 415. **Va.**—Harrison *v.* Lane, 4 Munf. [18 Va.] 238), unless (2) one or more of the sureties be dead. See Rice *v.* Kirkman, 3 Humph. (Tenn.) 415; Gibson *v.* Martin, 7 Humph. (Tenn.) 127. (3) **And this, it**

allowed as against the representatives of a deceased officer,[39] as well as against the representatives of deceased sureties.[40]

7. Jurisdiction and Venue.[41] — What courts have power to hear these summary proceedings against officers and their sureties, is indicated generally by the statutes prescribing the remedy,[42] and where the delinquency in question relates to process, they usually require the application for summary judgment to be made in the court from which the process issued or to which it is returnable.[43] Justice's courts,[44] courts of quarter sessions[45] and county courts[46] as well as both circuit

seems, is true whether the bond be joint or joint and several. Harrison *v.* Lane, 4 Munf. (18 Va.) 238.

[f] **The remedy is available against the sureties or any of them** (1) without notice to the sheriff. Camp *v.* Watt, 14 Ala. 616. *Contra,* Orr *v.* Duval, 1 Ala. 262, under prior statute. (2) Thus the sureties of sheriff may be proceeded against though the sheriff be dead. Camp *v.* Watt, 14 Ala. 616. (3) But motion does not lie against the sureties of a constable after his death. James *v.* Auld, 9 Ala. 462.

[g] **Originally** (1) the proceeding could have been pursued against the sheriff only, and if the fact of suretyship was proved, a judgment could be obtained against the sureties without notice to them. McRae *v.* Colclough, 2 Ala. 74; Orr *v.* Duvall, 1 Ala. 262. (2) But now the proceeding may be maintained and pursued to judgment against any of the parties principal or sureties who may have notice. Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730.

[h] **But a rule against the sureties** on the sheriff's bond is not authorized by a statute authorizing a proceeding by rule against the sheriff or his succession. Soule *v.* Worsham, 22 La. Ann. 78; Hernandez *v.* Hugh, 22 La. Ann. 245; Soule *v.* Worsham, 22 La. Ann. 78.

[i] **The representatives of deceased sureties** need not be included. Chapman *v.* Chevis, 9 Leigh (36 Va.) 297.

39. Soule *v.* Worsham, 22 La. Ann. 78.

[a] *Contra,* State *v.* Deberry, 9 Humph. (Tenn.) 605, a common-law action on the bond is the appropriate remedy in such case.

40. Park *v.* Walker, 2 Sneed (Tenn.) 503; Smith *v.* Gilmore, 3 Sneed (Tenn.) 481; Chapman *v.* Chevis, 9 Leigh (36 Va.) 297.

[a] **But representatives of deceased sureties** need not be joined. Chapman *v.* Chevis, 9 Leigh (36 Va.) 297.

41. See the titles "**Jurisdiction;**" "**Venue.**"

42. **Ala.**—Johnson *v.* Petty, 5 Ala. 528. **Ky.**—Morrow *v.* McKinney, Sneed 63. **Miss.**—Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Smed & M. 625. **Tex.**—Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098. **Va.**—Carr *v.* Meade's Exx., 77 Va. 142.

43. Griswold *v.* Chandler, 22 Tex. 637.

[a] **In court from which the execution** issued. Mitcheson's Admr. *v.* Foster, 3 Metc. (Ky.) 324; Griswold *v.* Chandler, 22 Tex. 637; Ranken *v.* Jones (Tex. Civ. App.), 53 S. W. 583.

[b] **Court To Which Process Is Returnable.**—Tapp *v.* Bonds, 57 Miss. 281; Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Smed. & M. (Miss.) 625.

[c] **That the defaulting officer resides** in some other county, is not material. Cox *v.* Ross, 56 Miss. 481.

44. Henderson *v.* Plumb & Robbins, 18 Ala. 74; Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

[a] **Record Must Show Jurisdiction.** That the facts and circumstances upon which the court might assume jurisdiction under the statute were present, must appear from the record. Yancey *v.* Hankins, Minor (Ala.) 171.

See generally the title "**Justices of the Peace.**"

45. Anderson *v.* Bradford's Admr., 7 J. J. Marsh. (Ky.) 623.

[a] **Motion by Sheriff Against His Deputy.**—Anderson *v.* Bradford's Admr., 7 J. J. Marsh. (Ky.) 623; Lindsey *v.* McClelland, 1 Bibb (Ky.) 262.

46. Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098; Carr *v.* Meade's Exx., 77 Va. 142.

[a] **But a motion by sheriff against his deputy,** or the latter's sureties, can-

courts,[47] and appellate courts[48] have entertained the proceeding.

Equity will not ordinarily enforce the penalty recoverable in these summary proceedings.[49]

8. Declaration, Petition, Motion or Other Application. — a. *In General.* — In these summary proceedings against officers and their sureties, no declaration or petition is as a rule required.[50] The motion,[51] together, in some jurisdictions, with the notice,[52] constitute the pleadings on the part of plaintiff.

b. *Motion or Other Application.* — **(I.) In General.** — Application for summary judgment against an officer and his sureties is made by motion,[53] which is the first step in court,[54] and stands in place of a petition, declaration or complaint.[55]

(II.) Form of. — The motion for summary relief need not be in writing,[56] nor need it conform to the technical requirements of a pleading,[57] although the allegations should be set forth with reason-

not be made in the county court. Anderson *v.* Bradford's Admr., 7 J. J. Marsh. (Ky.) 623.

[b] **Jurisdictional Amount Exceeded.**—A motion based on refusal to levy an execution on a judgment of the county court, may be made in that court though the amount of the demand is in excess of the court's jurisdiction, because the motion is not a new suit but merely a further step taken in the original suit to enforce the jurisdiction already obtained. Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098.

47. See Johnson *v.* Betty, 5 Ala. 528.

48. Mitcheson's Admr. *v.* Foster, 3 Metc. (Ky.) 324.

[a] **The court of appeals** has jurisdiction where the execution which the officer failed to return issued from that court. Mitcheson's Admr. *v.* Foster, 3 Metc. (Ky.) 324.

49. Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574.

50. Henderson *v.* Plumb, 18 Ala. 74; Condry *v.* Henley, 4 Stew. & P. (Ala.) 9.

51. See *infra*, XII, A, 8, b.

52 See *infra*, XII, A, 9.

53. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Cooley *v.* Lovewell, 95 Ark. 567, 130 S. W. 574; Milor *v.* Farrelly, 25 Ark. 353. **Cal.**—Wilson *v.* Broder, 10 Cal. 486. **Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Ky.**—Pogue *v.* Lusk, 6 J. J. Marsh. 579; Com. *v.* Webb, 19 Ky. L. Rep. 944, 42 S. W. 737. **La.**—Soule *v.* Worsham, 22 La. Ann. 78. **Miss.** Tapp *v.* Bonds, 57 Miss. 281; Paddleford *v.* Moore, 32 Miss. 622; Morehead *v.* Holliday, 1 Smed. & M. 625. **Nev.**—Nash *v.* Muldoon, 16 Nev. 404. **N. C.**—State *v.* Howell, 65 N. C. 61. **Tenn.**—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Patterson *v.* Coleman, 4 Humph. 64. **Tex.**—Sharp *v.* Morgan, 192 S. W. 599; Peck *v.* Murphy, 184 S. W. 542; Haley *v.* Greenwood & Co., 28 Tex. 680; Griswold *v.* Chandler, 22 Tex. 637; Ranken *v.* Jones (Tex. Civ. App.), 53 S. W. 583; Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098. **Va.**—Carr *v.* Meade's Exx., 77 Va. 142. **W. Va.**—State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

54. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201; Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99.

[a] **The notice is not the commencement** of the suit. Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99.

55. Wright *v.* McKenney, 34 Tex. 568.

56. Milor *v.* Farrelly, 25 Ark. 353; Pogue *v.* Lusk, 6 J. J. Marsh. (Ky.) 579.

57. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[a] **It Is Not a Pleading.**—Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[b] **The precision and fullness required in a pleading not necessary.** Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

able[58] clearness and succinctness.[59]

(III.) Contents. — The application should disclose all the facts necessary to entitle the party to recover in such summary proceeding,[60] and, in particular, the default relied upon,[61] as in case of the officer's failure to make proper return on execution,[62] or to pay over money collected on execution.[63] It is not necessary to state the amount for which judgment is moved.[64]

(IV.) Objections to. — The sufficiency of a motion for summary judgment may be challenged by demurrer.[65]

9. Notice of Application. — a. *Necessity for.* — In these summary proceedings, as in other proceedings generally,[66] there must be some kind of process or appearance to support the judgment.[67] Accordingly on application by motion, notice must be given,[68] though it has been

58. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

59. Paddleford *v.* Moore, 32 Miss. 622; Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

60. Paddleford *v.* Moore, 32 Miss. 622; Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

[a] **Reference to a notice** which is already spread upon the minutes and which contains the necessary facts will not aid a motion deficient in proper recitals. Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99; Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

61. **Ala.**—Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Tenn.**—Watkins *v.* Barnes, 1 Sneed 201. **Tex.** Haley *v.* Greenwood & Co., 28 Tex. 680.

62. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

[a] **On what judgment** the execution issued, must appear. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

[b] **Amount and date of the execution** should be shown. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

[c] **The person against whom** the execution issued should be stated. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

63. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; Haley *v.* Greenwood & Co., 28 Tex. 680.

[a] **That the money was collected on execution** should be stated. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

[b] **That the execution was in full force** when the money was collected must be averred. Haley *v.* Greenwood & Co., 28 Tex. 680.

[c] **Officer's failure to pay over the money** upon demand of the plaintiff, his agent or attorney must appear. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

64. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[a] **The statute itself gives notice** of the amount for which the judgment can be rendered. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

65. Tapp *v.* Bonds, 57 Miss. 281.

66. See the titles "**Appearances;**" "**Jurisdiction;**" "**Motions;**" "**Notice;**" "**Process;**" "**Service of Process and Papers;**" "**Summary Proceedings.**"

67. **Ala.**—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730. **Ky.**—Hall *v.* Com., 8 Bush 378. **Miss.**—Demoss *v.* Camp, 5 How. 516. **Va.**—Carr *v.* Meade's Exx., 77 Va. 142.

68. **Ala.**—Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; Wallace *v.* Taylor, 7 Ala. 668; McRae *v.* Colclough, 2 Ala. 74; Yancey *v.* Hankins, Minor 171. **Ark.**—Milor *v.* Farrelly, 25 Ark. 353. **Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Ky.**—Thompson *v.* Healy, 4 Metc. 257; Terrill *v.* Cecil, 3 Metc. 347; Pope *v.* Com., Sneed 119; Mars *v.* Buckler, 1 Bibb 267; Murry *v.* Askew, 6 J. J. Marsh. 27. **Miss.**—Demoss *v.* Camp, 5 How. 516; Coleman *v.* Saunders, 5 How. 287. **Nev.**—Nash *v.* Muldoon, 16 Nev. 404. **Tenn.**—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Lashley *v.* Wilkinson, 2 Head 482; Patterson *v.* Coleman, 4 Humph. 64. **Tex.**—Haley *v.* Greenwood & Co., 28 Tex. 680. **Va.** Carr *v.* Meade's Exx., 77 Va. 142. **W. Va.**—State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976; Barrett *v.* Smith, 4 W. Va. 709.

[a] **Notice to sureties** not necessary, State *v.* Howell, 65 N. C. 61.

held that where the statute does not require notice or other process, it is unnecessary.[69] The notice performs the duty of a summons,[70] and in some states that of a declaration or petition.[71]

b. *To Whom Given.* — The required notice of motion should be given to all the parties sought to be charged.[72] But notice to the officer may be sufficient as against his sureties,[73] or as against his deputy.[74]

c. *Length of Notice.* — The statutory requirements as to the length of notice must be observed,[75] and in case the statute is silent upon the matter, due or reasonable notice should be given.[76]

d. *Form and Contents.* — (I.) **Sufficiency in Form.** — It is necessary that the notice be in writing,[77] properly signed,[78] but, it seems, it need not be dated.[79] It should be given in the name of,[80] and properly

[b] **Notice to Sureties Necessary.** Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

[c] **Where no notice to sureties** is given the justice of the peace would have no jurisdiction to render judgment against them unless plaintiff produces a certified copy of the bond. Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

69. Williams *v.* Harvey, Cooke (Tenn.) 466. See also Calloway *v.* Com., 4 Bush (Ky.) 383.

[a] **But the rule dispensing with notice** is to be understood to apply only "when the motion for judgment is made at the next court after the existence of the delinquency." Baxter *v.* Marsh, 1 Yerg. (Tenn.) 460.

70. **Ark.**—Milor *v.* Farrelly, 25 Ark. 353. **Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Miss.**—Lewis *v.* Garrett's Admrs., 5 How. 434; Demoss *v.* Camp, 5 How. 516; Hamblin *v.* Foster, 4 Smed. & M. 139.

[a] **But that notice is not process** see Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99.

71. **Ark.**—Milor *v.* Farrelly, 25 Ark. 353. **Ky.**—Terrill *v.* Cecil, 3 Metc. 347. **Miss.**—Hamblin *v.* Foster, 4 Smed. & M. 139. **Tex.**—Griswold *v.* Chandler, 22 Tex. 637.

[a] **That notice is not a pleading,** see Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99.

72. Demoss *v.* Camp, 5 How. (Miss.) 516.

[a] **All the sureties** must be notified but by death or otherwise, it may abate as to one or more. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27.

73. Broughton *v.* State Bank, 6 Port. (Ala.) 48; Reid *v.* Planters' & Merchants' Bank, 3 Ala. 712; McRae *v.* Colclough, 2 Ala. 74; Baxter *v.* Marsh, 1 Yerg. (Tenn.) 460.

74. Stephens *v.* Womack, 3 Ala. 738.

[a] **In a proceeding by the sheriff against his deputy** no notice to the deputy or his sureties of the intended motion is necessary. But the deputy must have had one day's notice of the proceedings against the sheriff. Stephens *v.* Womack, 3 Ala. 738.

75. See *infra*, this note.

[a] **Three Days' Notice.**—Welch *v.* Fourier, 6 Ala. 516; McRae *v.* Colclough, 2 Ala. 74; Yancey *v.* Hankins, Minor (Ala.) 171; Haley *v.* Greenwood & Co., 28 Tex. 680; Griswold *v.* Chandler, 22 Tex. 637.

[b] **Five Days' Notice.**—Nash *v.* Muldoon, 16 Nev. 404; Lashley *v.* Wilkinson, 2 Head (Tenn.) 482.

[c] **Ten Days.**—Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186.

76. Arthur *v.* State, 22 **Ala.** 61.

77. Higdon *v.* **Fields, 6 Ala. App.** 281, 60 So. 594; Milor *v.* **Farrelly,** 25 Ark. 353.

[a] **Reading the notice** in the presence of defendants is not sufficient. Milor *v.* Farrelly, 25 Ark. 353.

78. McRae *v.* Colclough, 2 Ala. 74; Board of Education *v.* Parsons, 22 W. Va. 308.

[a] **An attorney** for the plaintiff in the motion may sign it. McRae *v.* Colclough, 2 Ala. 74.

79. McRae *v.* Colclough, 2 Ala. 74.

[a] **The date of services** is sufficiently shown by the officer's return. McRae *v.* Colclough, 2 Ala. 74.

[b] **Especially when the coroner's return shows** when it was served. McRae *v.* Colclough, 2 Ala. 74.

80. Lyon *v.* Horner, 32 W. Va. 432, 9 S. E. 875.

[a] **A notice in the name of the**

designate[81] the plaintiffs in the motion, and be directed to,[82] and properly designate[83] the defendants.

(II.) Sufficiency in Substance. — The notice should apprise the defendant of the time[84] and the place[85] the motion will be made, and state in a succinct manner[86] the grounds upon which it will be based.[87] It

state to the use of the plaintiff in the motion is not necessary though the bond is payable to the state and the statute provides that suits on such bonds may be prosecuted in the name of the state. Lyon *v.* Horner, 32 W. Va. 432, 9 S. E. 875.

81. Johnson *v.* Petty, 5 Ala. 528.

[a] **Stating the initials** only, instead of setting out the first names of the plaintiffs, is sufficient. Johnson *v.* Petty, 5 Ala. 528.

82. Milor *v.* Farrelly, 25 Ark. 353.

[a] **To the sheriff and his sureties** where the proceeding is against them. Milor *v.* Farrelly, 25 Ark. 353.

83. Milor *v.* Farrelly, 25 Ark. 353; Haley *v.* Greenwood & Co., 28 Tex. 680.

But see Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27.

[a] **Merely serving a copy of the motion** on the defendants will not suffice when such motion does not designate who the sureties are. Haley *v.* Greenwood & Co., 28 Tex. 680.

[b] **That they were in fact sureties** of the sheriff when the default took place need not be averred. Branch Bank *v.* Broughton, 10 Ala. 147.

[c] **It is sufficient to allege the official character** of defendant at the time the process which he failed to return was placed in his hands, without stating that his official character continued up to the time when the process was returnable. Casky *v.* Haviland, Risley & Co., 13 Ala. 314.

[d] **That the principal defendant was sheriff,** and that the deputy was his deputy when the execution was delivered, need not be averred. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27.

[e] **But if not addressed to the sureties,** and not to be executed upon them, the notice need not particularize the sureties by name. McRae *v.* Colclough, 2 Ala. 74.

84. **Ky.**—Mershon *v.* Com., 2 Metc. 371. **Tenn.**—Curry *v.* Munford, 5 Heisk. 61; Lashley *v.* Wilkinson, 2 Head 482; Thomison *v.* Douglass & Co., 3 Baxt. 74. **Tex.**—Haley *v.* Greenwood & Co., 28 Tex. 680.

[a] **The term of court** at which judgment will be sought, should be stated. McRae *v.* Colclough, 2 Ala. 74; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[b] **The particular day of the term** need be designated. Welch *v.* Fourier, 6 Ala. 516; McRae *v.* Colclough, 2 Ala. 74.

85. Milor *v.* Farrelly, 25 Ark. 353; Lashley *v.* Wilkinson, 2 Head (Tenn.) 482; Curry *v.* Munford, 5 Heisk. (Tenn.) 61.

[a] **The court** before which the party will move should be stated. Milor *v.* Farrelly, 25 Ark. 353.

86. Milor *v.* Farrelly, 25 Ark. 353; Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

[a] **The same certainty as in a declaration** required in describing the bond where the proceeding is against the surety. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

[b] **Certainty to a common intent** is sufficient. Mars *v.* Buckler, 1 Bibb (Ky.) 267.

[c] **Formal and technical accuracy** not required. County Court *v.* Miller, 34 W. Va. 791, 12 S. E. 1078; Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186; Board of Education *v.* Parsons, 22 W. Va. 308.

[d] **That the facts are recited under a quod cum** instead of by positive and direct averment is not ground for quashing the notice. State *v.* Keadle, 63 W. Va. 645, 60 S. E. 798; Board of Education *v.* Parsons, 22 W. Va. 308.

[e] **However informal the notice,** it will suffice, if it informs the defendants of the nature and object of the motion. Carr *v.* Meade's Exrx., 77 Va. 142.

87. **Ala.**—Johnson *v.* Petty, 5 Ala. 528; McRae *v.* Colclough, 2 Ala. 74; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Ark.**—Milor *v.* Farrelly, 25 Ark. 353. **Ind.**—Dawson *v.* Shaver, 1 Blackf. 204. **Ky.**—Thompson *v.* Healy, 4 Metc. 257; Mars *v.* Buckler, 1 Bibb 267. **Tenn.**—Lashley *v.* Wilkinson, 2

should set forth all the facts necessary to show that the sheriff or other officer in question is liable,[88] and state the statute under which the movant will proceed,[89] and for what penalty judgment will be sought.[90] Where the proceeding is against the sureties, the bond should be described in the notice.[91] A contrary rule has been upheld in a proceeding against the sheriff and sureties.[92]

e. *Service of Notice.*[93] — Service may be made either by an officer or a private person,[94] and may be made upon the defendant in per-

Head 482. **Va.**—Carr *v.* Meade's Exrx., 77 Va. 142. **W. Va.**—State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976; Board of Education *v.* Parsons, 22 W. Va. 308; Barrett *v.* Smith, 4 W. Va. 709.

[a] **Several grounds of motion** may be stated in one notice. County Court *v.* Miller, 34 W. Va. 791, 12 S. E. 1078.

88. **Ala.**—Branch Bank *v.* Broughton, 10 Ala. 147. **Ky.**—Johnson *v.* Bradley, 11 Bush 666; Thompson *v.* Healy, 4 Metc. 257. **W. Va.**—Board of Education *v.* Parsons, 22 W. Va. 308.

[a] **All the requisites of a petition** must be contained in the notice. Johnson *v.* Bradley, 11 Bush (Ky.) 666; Terrill *v.* Cecil, 3 Metc. (Ky.) 347.

[b] **An averment that the officer received or collected** the money sought to be recovered, is necessary. Barrett *v.* Smith, 4 W. Va. 709.

[c] **That the officer had sufficient funds** in his hands to pay a particular claim, must be alleged in a notice of motion for failing to pay a creditor such claim upon order of the court. Thompson *v.* Healy, 4 Metc. (Ky.) 257.

[d] **A demand for money collected** (1) must be averred and proved where that is a condition precedent (Wallace *v.* Taylor, 7 Ala. 668; Price *v.* Cloud, 6 Ala. 248; Broughton *v.* State Bank, 6 Port. (Ala.) 48; Barton *v.* Peck, 1 Stew. & P. [Ala.] 486), but (2) the particular day upon which demand was made to pay over money collected, need not be stated; it is sufficient, on demurrer at least, that the notice show demand to have been made after collection of the money. Branch Bank *v.* Broughton, 10 Ala. 147; Price *v.* Cloud, 6 Ala. 248.

[e] **A failure to pay the money** to the one entitled, should be alleged where the officer's default consists in wrongfully withholding money. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

[f] **Where failure to pay a county creditor a claim due is the basis of** the motion, the notice must show that the name of the plaintiff in the motion was upon the list of claims furnished by the clerk, and that payment of the claim had been demanded of the sheriff. Terrill *v.* Cecil, 3 Metc. (Ky.) 347.

[g] **Date of the execution** incorrectly described does not invalidate the notice. Lashley *v.* Wilkinson, 2 Head (Tenn.) 482.

[h] **That no reasonable excuse** for the officer's failure to return process existed must be stated. Johnson *v.* Bradley, 11 Bush (Ky.) 666.

[i] **Payment or tender of fees and mileage** to the officer should be shown where the motion is based on failure to execute summons. State *v.* Brown, 30 Ark. 761.

89. Hill *v.* State Bank, 5 Port. (Ala.) 537; McRae *v.* Colclough, 2 Ala. 74; Judy *v.* Howard, 2 Metc. (Ky.) 44.

90. Judy *v.* Howard, 2 Metc. (Ky.) 44.

[a] **An erroneous demand** in asking more or less than the movant is entitled to does not affect the validity of the notice. Lashley *v.* Wilkinson, 2 Head (Tenn.) 482.

91. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

92. Monteith *v.* Com., 15 Gratt. (56 Va.) 172.

[a] **Motion for Taxes.**—In a motion against the sheriff and sureties for taxes due from the sheriff, it was objected that the notice did not show on what bond the motion was made. The objection was overruled, the court stating that though no bond was described, it was incumbent on the commonwealth to show at the trial that the sheriff had executed a bond. Monteith *v.* Com., 15 Gratt. (56 Va.) 172.

93. See generally the title "**Service of Process and Papers.**"

94. Johnson *v.* Petty, 5 Ala. 528;

son,[95] or a copy left at his dwelling house.[96]

f. *Objections to Notice.* — **(I.) How Taken.** — Insufficiency of the notice may be challenged by demurrer[97] or motion to quash[98] in accordance with the general rules governing those remedies.

(II.) Waiver by Failure To Object. — The defendant's appearance,[99] without objection, waives want of notice[1] or irregularities in the notice,[2] or in the service thereof.[3]

10. Plea, Answer, etc. — In some states defenses to the motion are made in the same manner and to the same extent as in actions at law generally.[4] If defendant wishes to contest the due execution of the bond he should put its execution in issue by proper pleading,[5] as by plea of non est factum.[6] Certain defenses must be specially pleaded.[7]

11. Proof and Variance.[8] — Where the sureties appear and unite with the principal in the defence, a plea to the merits admits the fact of suretyship and supersedes the necessity of proving it.[9] Such proof is only necessary on the plea of non est factum.[10]

Haley *v.* Greenwood & Co., 28 Tex. 680.

95. Milor *v.* Farrelly, 25 Ark. 353.

96. Pope *v.* Com., Sneed (Ky.) 119.

[a] **Leaving a copy at defendant's usual place of abode** with a member of the family. Milor *v.* Farrelly, 25 Ark. 353.

97. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

[a] **That no cause of action** is set out in the notice. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

98. Carr *v.* Meade's Exrx., 77 Va. 142; State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976; Lyon *v.* Horner, 32 W. Va. 432, 9 S. E. 875; Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186; Barrett *v.* Smith, 4 W. Va. 709.

[a] **If the notice on its face shows sufficient averments,** if proven, to entitle the plaintiffs to a judgment, the motion to quash should be overruled. State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

[b] **That the money came into the officer's hands,** should be averred; its absence will justify a quashal of the notice. Barrett *v.* Smith, 4 W. Va. 709.

99. See generally the title **"Appearances."**

1. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

2. Chaffin *v.* Crutcher, 2 Sneed (Tenn.) 360.

[a] **But if the notice is fatally defective** on its face, defendant does not lose his right to have the same quashed by appearing and obtaining repeated continuance of the cause. Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186.

3. Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186.

4. State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

5. Poer *v.* Brown, 24 Tex. 34.

[a] **A plea by the sureties setting** up the invalidity of the sheriff's official bond upon the ground that it is payable to the governor and his successors in office and not to the state, should expressly negative the execution of any official bond by them payable to the state. Paddleford *v.* Moore, 32 Miss. 622.

6. Poer *v.* Brown, 24 Tex. 34.

7. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413.

[a] **That plaintiff ordered the return of the execution** before the return day, when set up as a defense in a proceeding against sheriff for failure to indorse upon an execution its date of delivery, must be specially pleaded. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413.

[b] **A plea of not guilty** by the sheriff does not put in issue the fact of suretyship. Reid *v.* Planters' & Merchants' Bank, 3 Ala. 712.

8. See generally the title **"Variance and Failure of Proof."**

9. Welch *v.* Fourier, 6 Ala. 516.

10. Reid *v.* Planters' & Merchants' Bank, 3 Ala. 712.

12. Default. — As in other cases,[11] the officer or surety failing to appear when properly notified of the motion may be put in default,[12] and the plaintiff may be given leave to execute a writ of inquiry to assess the damages where uncertain.[13] The judgment should show that every material averment of the motion was proved.[14]

13. Abatement and Revival.[15] — Upon the death of the officer the proceedings abate,[16] even as against the sureties.[17] But the proceedings may be revived against the personal representatives of the officer[18] or the deceased sureties.[19]

14. Dismissal, Discontinuance and Nonsuit.[20] — The plaintiff is entitled to discontinue his proceeding as to sureties not served and prosecute his motion to judgment against the others.[21]

15. Trial or Hearing. — a. *Time for.* — The motion for summary judgment should be brought on for hearing at the time designated in the notice.[22] If not disposed of at the term stated in the notice, it may be continued to a subsequent term.[23]

b. *Jury Trial.*[24] — The proceeding is had without a jury,[25] except

11. See generally the title "**Default,**" and 14 STANDARD PROC. 773.

12. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

13. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475. See the title "**Inquiry, Writ of.**"

14. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

[a] **Where failure of the officer to pay over money** is the basis of a default against the sureties the judgment should show that proof was made that the money was collected; that the officer failed to pay it over on demand and that the parties notified of the motion and against whom the judgment was rendered were sureties of the sheriff. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

15. See generally the titles "**Revivor;**" "**Survival.**"

16. Burroughs *v.* Goodall, 2 Head (Tenn.) 29.

17. Burroughs *v.* Goodall, 2 Head (Tenn.) 29.

[a] **No step can be taken against the sureties** until the motion is revived against the personal representatives of the officer. Burroughs *v.* Goodall, 2 Head (Tenn.) 29.

18. Burroughs *v.* Goodall, 2 Head (Tenn.) 29.

19. Burroughs *v.* Goodall, 2 Head (Tenn.) 29.

20. See generally the title "**Dismissal, Discontinuance and Nonsuit.**"

21. McCrosky *v.* Riggs, 12 Smed. & M. (Miss.) 712.

22. Garey *v.* Edwards & Allen, 15 Ala. 105; Thomison *v.* Douglas & Co., 3 Baxt. (Tenn.) 74.

[a] **Day of Term.**—The motion must be docketed for trial on the third day of the term but it need not be tried on that day. Mershon *v.* Com., 2 Metc. (Ky.) 371.

[b] **The motion will be deemed abandoned** when not made at the term indicated in the notice unless some proceeding is had to keep it alive. Garey *v.* Edwards & Allen, 15 Ala. 105.

[c] **Where motion is made at a subsequent term** to that at which the notice states it will be made, the judgment is void. Thomison *v.* Douglass & Co., 3 Baxt. (Tenn.) 74.

23. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; Russell *v.* Rolfe, 50 Ala. 56.

[a] **A formal continuance** of that particular motion is not necessary. It is sufficient if a general order is made to continue all causes not disposed of at the adjournment of a term. Russell *v.* Rolfe, 50 Ala. 56.

24. See generally the title "**Juries and Jurors.**"

25. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27; Lewis *v.* Garrett's Admrs., 5 How. (Miss.) 434.

[a] **Statute is constitutional** though it authorizes judgment without a jury. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27.

where the statute provides that one may be demanded.[26] Where trial is by jury, appropriate instructions may be given,[27] and as in other trials, it is the province of the jury to pass upon issues of fact.[28] Unless the statute requires special findings, the jury may return a general verdict.[29]

16. Judgment. — a. *Joint and Several.* — A several judgment against the principal is authorized,[30] and though the proceeding against the sureties is joint, a judgment can be rendered against a less number than all who are bound.[31]

b. *Amount.* — If a penalty is imposed by statute the judgment is based thereon,[32] and is not required to be measured by the actual injury sustained by the plaintiff.[33] Where the default of the officer consists in a failure to pay over money, the judgment is for the amount thus detained[34] with interest thereon,[35] and, sometimes, damages[36] or

26. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Condry *v.* Henley, 4 Stew. & P. (Ala.) 9.

[a] **Unless specially requested** by the parties, a jury is not essential. Condry *v.* Henley, 4 Stew. & P. (Ala.) 9.

27. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594; Sharp *v.* Morgan (Tex. Civ. App.), 192 S. W. 599. See generally the title "**Instructions.**"

[a] **Must Be Based on the Pleadings.**—Sharp *v.* Morgan (Tex. Civ. App.), 192 S. W. 599.

[b] **The court may submit to jury the different theories** urged by the respective parties. Sharp *v.* Morgan (Tex. Civ. App.), 192 S. W. 599.

28. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 S. W. 413. See generally the title "**Province of Judge and Jury.**"

[a] **Whether the writ of execution was delivered** to the officer is for the jury, where evidence in dispute. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413.

[b] **Whether money was collected** by virtue of the execution described for jury, where evidence conflicting. Johnson *v.* Gray, 6 Ala. 276.

29. Welch *v.* Fourier, 6 Ala. 516.

[a] **That a demand for the money** was made of the officer need not be expressly found by the jury. A finding for the plaintiff is conclusive that such fact was proved. Welch *v.* Fourier, 6 Ala. 516.

30. Sherrell *v.* Goodrum, 3 Humph. (Tenn.) 419.

[a] **The judgment, though void as to the sureties,** may be valid as to the principal. Sherrell *v.* Goodrum, 3 Humph. (Tenn.) 419.

31. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27. See the title "**Judgments.**"

32. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594; Cox *v.* Ross, 56 Miss. 481.

[a] **The law fixes the officer's liability** and it is the duty of the court to give judgment for amount authorized thereby. Lashley *v.* Wilkinson, 2 Head (Tenn.) 482.

33. Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

34. Nash *v.* Muldoon, 16 Nev. 404; Haley *v.* Greenwood & Co., 28 Tex. 680.

[a] **For failure to turn over money collected on execution** the judgment is for the amount of the execution. **Cal.** Wilson *v.* Broder, 10 Cal. 486. **Ky.** Goodrum *v.* Root, 2 Metc. 427; Stephens *v* Lewis, 8 B. Mon. 150; O'Bannon *v.* Huffman, 1 B. Mon. 212. **Miss.** Morehead *v.* Holliday, 1 Smed. & M. 625. **Tex.**—Banner *v.* Henry (Tex. Civ. App.), 31 S. W. 1098.

35. **Cal.**—Wilson *v.* Broder, 10 Cal. 486. **Ky.**—Stephens *v.* Lewis, 8 B. Mon. 150; Mershon *v.* Com., 2 Metc. 371; O'Bannon *v.* Huffman, 1 B. Mon. 212. **Miss.**—Garrett *v.* Hamblin, 11 Smed. & M. 219, 49 Am. Dec. 53; Morehead *v.* Holliday, 1 Smed. & M. 625. **Nev.**—Nash *v.* Muldoon, 16 Nev. 404. **Tenn.**—Lashley *v.* Wilkinson, 2 Head 482. **Tex.**—Haley *v.* Greenwood & Co., 28 Tex. 680.

[a] **Interest not recoverable,** see Pitman *v.* Couts, 6 J. J. Marsh. (Ky.) 90; Jacobs *v.* Hill, 2 Leigh (29 Va.) 393.

36. **Ky.**—Terrill *v.* Cecil, 3 Metc.

a penalty[37] in addition thereto.

Costs are recoverable in accordance with the general rules respecting their allowance.[38]

c. *Recitals.* — The summary judgment if rendered by an inferior court must disclose the existence of every fact necessary to give the court jurisdiction and to authorize the judgment,[39] but it is not necessary to state the evidence by which any of the facts were proved, for if the facts be stated, it will be presumed there was sufficient testimony to authorize the court to assume their existence.[40]

d. *Vacating and Modifying.* — It is within the court's power, under

347; Goodrum *v.* Root, 2 Metc. 427; Sanders *v.* Bank of Kentucky, 2 Metc. 327. **Miss.**—Morehead *v.* Holliday, 1 Smed. & M. 625. **Nev.**—Nash *v.* Muldoon, 16 Nev. 404. **Tenn.**—Lashley *v.* Wilkinson, 2 Head 482.

[a] **If payment of the amount of the execution** has been made to the plaintiffs, the judgment can only be for the damages. Sanders *v.* Bank of Kentucky, 2 Metc. (Ky.) 327.

37. O'Bannon *v.* Huffman, 1 B. Mon. (Ky.) 212; Donley *v.* Wiggins, 52 Tex. 301.

[a] **The penalty will not be allowed when** without any excuse for delay several terms of the court are allowed to pass before proceedings against the officer are instituted. Donley *v.* Wiggins, 52 Tex. 301.

[b] **Reversal** for allowance of excessive penalty. O'Bannon *v.* Huffman, 1 B. Mon. (Ky.) 212.

38. See generally the title "**Costs.**" And see O'Bannon *v.* Huffman, 1 B. Mon. (Ky.) 212; Haley *v.* Greenwood & Co., 28 Tex. 680.

39. Reid *v.* Planters' & Merchants' Bank, 3 Ala. 712; Gunn *v.* Boone, 7 Heisk. (Tenn.) 8; Wynne *v.* Taylor, 5 Heisk. (Tenn.) 691; Curry *v.* Munford, 5 Heisk. (Tenn.) 61; *Ex parte* Savage, 4 Baxt. (Tenn.) 337.

[a] **Judgment of supreme court** not within the requirement. Bittick *v.* McEwen, 7 Heisk (Tenn.) 1.

[b] **The judgment is void** where the fact upon which jurisdiction depended is not recited therein. Wynne *v.* Taylor, 15 Heisk. (Tenn.) 691.

[c] **Defects as to the required recitals are not cured** by defendant's appearing and praying for an appeal from the judgment. *Ex parte* Savage, 4 Baxt. (Tenn.) 337.

[d] **The jurisdictional facts necessary to appear** in the judgment against a sheriff and his sureties for the delinquency of his deputy in failing to return an execution, are, the office of sheriff, the securityship of defendant, the relation of deputy, and his failure to return the execution according to law. *Ex parte* Savage, 4 Baxt. (Tenn.) 337.

[e] **That notice** was given as required by statute, should be shown. Arthur *v.* State, 22 Ala. 61; Curry *v.* Munford, 5 Heisk. (Tenn.) 61.

[f] **The notice is not part** (1) of the record (Johnson *v.* Bruster, 2 Baxt. [Tenn.] 99), unless (2) made so by bill of exceptions or is identified in the judgment entry. Garey *v.* Edwards, 15 Ala. 105.

[g] **The judgment** on which the execution issued should be recited in a judgment on motion based on nonreturn of execution. Burt *v.* Davidson, 5 Humph. (Tenn.) 425.

[h] **In whose name the execution issued** for the nonreturn of which the motion was made, should appear. Marshall *v.* Hill, 8 Yerg. (Tenn.) 101.

[i] **The return day** of an execution need not be recited in the judgment for nonreturn, where the date of issuance appears. Gunn *v.* Boone, 7 Heisk. (Tenn.) 8.

[j] **The fact of suretyship** must appear from the record to have been proved by the court. Reid *v.* Planters' & Merchants' Bank, 3 Ala. 712.

[k] **The grounds of the motion** must be shown. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

Recitals in a default judgment, see *supra,* XII, A, 11.

40. Burt *v.* Davidson, 5 Humph. (Tenn.) 425.

proper circumstances, to vacate[41] or correct[42] its judgment rendered summarily on an officer's bond.

17. Review. — The summary judgment against an officer and his sureties is reviewable by the usual methods employed in the particular jurisdiction, such as appeal[43] or writ of error.[44] The appellate court must have jurisdiction to entertain the appeal,[45] and its review is confined to questions properly presented upon the record.[46]

B. ACTIONS ON OFFICIAL BONDS. — **1. In General.** — Breaches of official duty on the part of sheriffs, constables and marshals may, as has been seen,[47] be remedied by a summary proceeding upon their bond. But the injured party is not generally obliged to resort to the speedy remedy thus provided, nor to prosecute the officer in a direct civil action,[48] for if he choses, he may seek relief by an ordinary action on the officer's official bond.[49]

41. Crumpler *v.* Governor, 12 N. C. 52.

Opening and vacating judgments generally, see 15 STANDARD PROC. 151.

[a] **A mere naked motion unsupported by affidavit** is not sufficient to warrant the vacation of the judgment. Thus the court will not vacate the judgment upon a mere motion alleging that the sheriff's bond did not appear to have been accepted by the county commissioners. State *v.* Howell, 65 N. C. 61.

42. Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672.

Amendment of judgments generally, see 15 STANDARD PROC. 98.

[a] **Mistakes Apparent on Record.** That the sheriff's term of office expired before the return day, is not ground for correcting or vacating a summary judgment against him for failure to make return of execution, when there is no recital of such fact in the record. Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672.

43. Cowan *v.* Lay (Tenn.), 42 S. W. 68.

44. Pope *v.* Com., Sneed (Ky.) 119; Morrow *v.* McKinney, Sneed (Ky.) 63; Haley *v.* Greenwood & Co., 28 Tex. 680.

45. Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

[a] **Jurisdiction Wanting Below.** The circuit court has no jurisdiction on appeal where the justice of the peace from which appeal taken, had none. Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

46. **Miss.**—Paddleford *v.* Moore, 32 Miss. 622. **Tex.**—Haley *v.* Greenwood & Co., 28 Tex. 680. **W. Va.**—Barrett *v.* Smith, 4 W. Va. 709.

[a] **In the absence of a bill of exceptions,** it will be presumed that the essential facts recited in the decree were supported by the evidence. Cowan *v.* Lay (Tenn.), 42 S. W. 68.

[b] **The validity of the bond** cannot be inquired into unless the question is presented by the record. Paddleford *v.* Moore, 32 Miss. 622.

[c] **An objection that the execution of a bond** is not shown by the record, cannot be entertained where the sheriff alone appeals. Cowan *v.* Lay (Tenn.), 42 S. W. 68.

47. See *supra*, XII, A.

48. State *v.* Nolte (Mo. App.), 187 S. W. 896. See *supra*, X.

49. **U. S.**—Lammon *v.* Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. ed. 337; State *ex rel.* Dykes *v.* Hencken, 174 Fed. 624, 98 C. C. A. 378; Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329; Harvey *v.* United States, 97 Fed. 452, 38 C. C. A. 267; Leak Glove Mfg. Co. *v.* Needles, 69 Fed. 68, 16 C. C. A. 132; Bollin *v.* Blythe, 46 Fed. 181. **Ala.** Burns *v.* George, 154 Ala. 626, 45 So. 421; Williams *v.* Ragan, 153 Ala. 397, 45 45 So. 185; Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350; Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594. **Alaska.**--United States *v.* Hillyer, 1 Alaska 47. **Ariz.** United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326. **Ark.**—Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558; Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Levy *v.* Lawson, 5 Ark. 212. **Cal.**—Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12; George H. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac.

2. For What Acts and Defaults. — Whatever amounts to a breach of official duty on the part of the officer, will warrant an action on his

694; Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766; Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80; Ghiradelli *v.* Bourland, 32 Cal. 585; Van Pelt *v.* Littler, 14 Cal. 194. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873; Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222; Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662. **Del.**—State *v.* Willard, 2 Houst. 11; State *v.* Clymer, 3 Houst. 20. **D. C.** Palmer *v.* King, 41 App. Cas. 419, Ann. Cas. 1915C, 1139. **Fla.**—Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194, 120 Am. St. Rep. 156. **Ga.**—Harris *v.* Black, 143 Ga. 497, 85 S. E. 742; McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36; Governor *v.* Raley, 34 Ga. 173; Chastain *v.* Winn (Ga. App.), 95 S. E. 473; McCollough *v.* Hand, 16 Ga. App. 484, 85 S. E. 673; Kirkland *v.* Southerland, 11 Ga. App. 538, 75 S. E. 832. **Ill.**—Mayer *v.* People, 190 Ill. 109, 60 N. E. 96; Hughes *v.* People, 82 Ill. 78; People *v.* Davis, 157 Ill. App. 438; People *v.* Title Guar. & Surety Co., 156 Ill. App. 488. **Ind.**—Nutzenholster *v.* State, 37 Ind. 457; State *v.* Leach, 10 Ind. 308; State *v.* Druly, 3 Ind. 431. **Ia.**—Gutschenritter *v.* Whitmore, 158 Iowa 252, 139 N. W. 567; Brayton *v.* Town, 12 Iowa 346. **Kan.**—Fay *v.* Edmiston, 28 Kan. 105; Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, *affirmed*, 60 Pac. 540. **Ky.**—Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634; Brand *v.* Creason, 6 J. J. Marsh. 344; Carpenter *v.* Warnock, 10 Ky. L. Rep. 934. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168; New Orleans *v.* Hozey, 2 Rob. 552; Poydras *v.* Patin, 5 La. 324; Dick *v.* Reynolds, 4 Mart. N. S. 525. **Mass.** Crocker *v.* Buttrick, 187 Mass. 461, 73 N. E. 650; Williams *v.* Kimball, 135 Mass. 411; Todd *v.* Bradford, 17 Mass. 567. **Md.**—State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417; Merryman *v.* State, 5 Har. & J. 423. **Miss.**—New Albany Wholesale Grocery Co. *v.* Wells, 114 Miss. 144, 74 So. 817. **Mo.**—Mastin *v.* McBride, 81 Mo. 349; State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502; State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44; State *v.* Nolte (Mo. App.), 187 S. W. 896; State *v.* Sondag, 15 Mo. App. 312. **Neb.**—O'Shea *v.* Kavanaugh, 65 Neb. 639, 91 N. W. 578. **N. J.**—Jersey City *v.* Schoppe, 82 N. J. L. 697, 82 Atl. 913, 39 L. R. A. (N. S.) 577; Masters *v.* Champion, 74 N. J. L. 323, 65 Atl. 899; Lewis *v.* Little, 5 N. J. L. 685; Boyd *v.* Rose, 4 N. J. L. 230; Matlock *v.* Stow, 3 N. J. L. 532. **N. Y.**—Grieb *v.* Northrup, 66 App. Div. 86, 72 N. Y. Supp. 481; Berry *v.* Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349; Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872. **N. C.**—Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545; Buckley *v.* Hampton, 23 N. C. 318. **Okla.**—A. F. Shapleigh Hdw. Co. *v.* Pritchard, 42 Okla. 252, 140 Pac. 1136; State *v.* Rader, 33 Okla. 350, 125 Pac. 726. **Pa.**—McMicken *v.* Com., 58 Pa. 213; Com. *v.* McCoy, 8 Watts 153, 34 Am. Dec. 445. **S. C.**—State *v.* Gilreath, 16 S. C. 100; Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190; Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949. **Tenn.**—Harrison *v.* Brown, 1 Swan 272; Cannon *v.* Snowdon, 4 Humph. 360. **Tex.**—Russey *v.* Wilson (Tex. Civ. App.), 202 S. W. 974; Kindell-Clark Drug Co. *v.* Myers (Tex. Civ. App.), 140 S. W. 463. **Vt.**—Treasurer of the State *v.* Holmes, 2 Aik. 48. **Va.** Grandstaff *v.* Ridgely, Hampton & Co., 30 Gratt. (71 Va.) 1; Ramsey's Admrs. *v.* McCue, 21 Gratt. (62 Va.) 349. **Wash.**—Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158; Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119. **W. Va.**—Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; Balisle *v.* Johnson, 78 W. Va. 340, 88 S. E. 1068; State *v.* Keadle, 63 W. Va. 645, 60 S. E. 798; Nebergall *v.* Tyree, 2 W. Va. 474. **Wis.** Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

[a] **The existence of a remedy by motion** to retax costs, where the sheriff has collected fees not authorized by law, does not deprive the litigant of his right to sue on the bond. O'Shea *v.* Kavanaugh, 65 Neb. 639, 91 N. W. 578.

[b] **The taking of a bond of indemnity** by an officer in case of a levy upon property does not deprive a claimant of the property levied on of his right of action upon the official bond.

bond,[50] and among other neglects and defaults for which the action has been prosecuted may be mentioned those in respect to bail,[51] wrongful arrest,[52] attachment,[53] detinue,[54] distress warrants,[55] execution,[56] re-

Lewis *v.* Mansfield, 78 Ky. 460; Cincinnati Cooperage Co. *v.* Woodyard, 21 Ky. L. Rep. 1221, 54 S. W. 831.

[c] **Until the conditions of bond are breached** the action cannot be brought. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98.

[d] **But one action** can, under the Colorado statute be brought on the constable's bond and that in the name of the people. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

[e] **In the Indian Territory** prior to statehood proceedings could be had against a United States marshal and his sureties under §3061 Mansfield's Digest Laws of Arkansas. Leak Glove Mfg. Co. *v.* Needles, 69 Fed. 68, 16 C. C. A. 132; A. F. Shapleigh Hardware Co. *v.* Pritchard, 42 Okla. 252, 140 Pac. 1136.

50. Forsythe *v.* Ellis, 4 J. J. Marsh. (Ky.) 298, 20 Am. Dec. 218.

[a] **"We cannot conceive how an action against a sheriff** for a wrongful act done by him under color and by virtue of his office, acting under a writ which by law he was permitted and authorized to execute, can be other than a breach of his bond." Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 636.

[b] **To cure a defect in the common law** the statute now extends the liability of sureties on official bonds to injuries from wrongful acts done by the officer under color of his office, as well as to the nonperformance or negligent performance of official duty. Kelly *v.* Moore, 51 Ala. 364.

51. Russey *v.* Wilson (Tex. Civ. App.), 202 S. W. 974.

[a] **Refusal of reasonable time to give bail,** before incarcerating plaintiff. Russey *v.* Wilson (Tex. Civ. App.), 202 S. W. 974.

52. U. S.—Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329. **Ala.**—Deason *v.* Gray, 192 Ala. 611, 69 So. 15. **Ariz.**—Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544. **Cal.**—Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12; Pankewicz *v.* Jess, 27 Cal. App. 340, 149 Pac. 997. **Ky.**—Jones *v.* Van Bever, 164 Ky. 80, 174 S. W. 795, L. R. A. 1915E, 172. **N. C.**—State *v.* Boyd, 120 N. C. 56, 26 S. E. 700. **Wash.**—White *v.* Jansen, 81 Wash. 435, 142 Pac. 1140.

53. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872.

[a] **Wrongful levy** of attachment. **U. S.**—Lammon *v.* Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. ed. 337; State *ex rel.* Dykes *v.* Hencken, 174 Fed. 624, 98 C. C. A. 378. **Ky.**—Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634; Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S. W. 129. **Mass.**—Slattery *v.* Schapero, 217 Mass. 71, 104 N. E. 440, Ann. Cas. 1915D, 399.

[b] **Failure To Execute Attachment.** Higdon *v.* Fields, 6 Ala. App. 281, 60 So. 594.

[c] **Refusal to surrender property to true owner** after notice of ownership. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694.

[d] **Failure To Record Attachment Lien.**—Neville *v.* Miller (Tex. Civ. App.), 171 S. W. 1109.

54. Carmichael *v.* United States Fidelity & Guaranty Co., 163 Ala. 320, 50 So. 1003.

[a] **Failure of officer to take forthcoming bond** in detinue, as required by statute. Carmichael *v.* United States Fidelity & Guaranty Co., 163 Ala. 320, 50 So. 1003.

[b] **Failure to redeliver possession** of property taken in detinue, on execution and tender to him of redelivery bond. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318.

55. McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36.

56. Ga.—Harris *v.* Black, 143 Ga. 497, 85 S. E. 742. **Miss.**—New Albany Wholesale Grocery Co. *v.* Wells, 114 Miss. 144, 74 So. 817. **N. J.**—Masters *v.* Champion, 74 N. J. L. 323, 65 Atl. 899.

See 16 STANDARD PROC. 358, note 82.

[a] **For levy of execution based on dormant judgment** when the fact that the judgment was dormant was known to the officer. Harris *v.* Black, 143 Ga. 497, 85 S. E. 742.

[b] **Failure to notify debtor of his statutory exemption rights** before levying execution. State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44.

plevin writs,[57] summons,[58] and other matters illustrated in the notes.[59]

3. Nature and Form. — a. *In General.* — The proceeding is considered in some states as one ex delicto, rather than ex contractu.[60]

[c] **For an assault** committed in levying an execution. Greenberg *v.* People, 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. (N. S.) 1223.

[d] **Failure to make return** (1) of execution (A. F. Shapleigh Hdw. Co. *v.* Pritchard, 42 Okla. 252, 140 Pac. 1136), but (2) where the statute imposing a penalty for failure to return an execution gives the injured party a summary remedy, it may exclude an action on the bond. Marcum *v.* Burgess, 67 Ala. 556; Com. *v.* Bradley, 1 Litt. (Ky.) 48.

[e] **Failure to return an indemnity bond** with return of execution as required by statute. New Albany Wholesale Grocery Co. *v.* Wells, 114 Miss. 144, 74 So. 817.

[f] **Execution Sale.**—Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558; Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

[g] **Negligence preventing redemption** from execution sale. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

[h] **For failure to advertise and sell** property on which he had levied. **Ark.** Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558. **Ga.**—Slaton *v.* Fisher, 145 Ga. 375, 89 S. E. 362. **Mo.**—State *v.* Nolte (Mo. App.), 187 S. W. 896.

[i] **Failure to pay over money** collected on execution. Brayton *v.* Town, 12 Iowa 346.

[j] **Failure to pay over proceeds of sale** of property on execution. Levy *v.* Lawson, 5 Ark. 212.

[k] **Where notice to judgment debtor** of the time and place of examination was not served, the debtor may sue the sheriff and his sureties for the neglect. Williams *v.* Kimball, 135 Mass. 411.

57. State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502.

[a] **Personal injuries** inflicted upon plaintiff in levy of writ of replevin. Palmer *v.* King, 41 App. Cas. (D. C.) 419, Ann. Cas. 1915C, 1339; State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502.

[b] **Failure of officer to take sufficient security** on replevin bond. Bispham *v.* Taylor, 2 McLean 355, 3 Fed. Cas. No. 1,443.

58. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

[a] **For False Return on Summons.** State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11; State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731.

59. See *infra*, this note.

[a] **Wrongful Killing.**—State *v.* Cunningham, 107 Miss. 140, 65 So. 115, 51 L. R. A. (N. S.) 1179; Meek *v.* Tilghman, 55 Okla. 208, 154 Pac. 1190.

[b] **Injuries caused by insane prisoner** whom the officer confined with other prisoners. Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, **L. R. A.** 1918C, 1158.

[c] **Failure of sheriff to make a quarterly report** to the board of county commissioners. State *v.* Rader, 33 Okla. 350, 125 Pac. 726.

[d] **Failure of marshal to return money** which he had received during his term for expenses of the courts. Harvey *v.* United States, 97 Fed. 452, 38 C. C. A. 267.

[e] **Unlawful Detention of Fees.** People *v.* Davis, 157 Ill. App. 438.

[f] **Embezzlement** of public funds. United States *v.* Hillyer, 1 Alaska 47.

[g] **The claimant of property wrongfully seized** may sue upon the officer's bond. Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177; Balisle *v.* Johnson, 78 W. Va. 340, 88 S. E. 1068. But see State *v.* Brown, 54 Md. 318.

60. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

[a] **Since it rests on the breached duty** instead of on the bond. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

[b] **Tort action for false imprisonment** against sheriff and his bondsmen. Deason *v.* Gray, 192 Ala. 611, 69 So. 15.

[c] **Action for trespass** against officer and his bondsmen for wrongful levy of execution. Shipp *v.* Shelton, 193 Ala. 658, 69 So. 102.

[d] **An action on bond for wrongful seizure of property** by sheriff is one in tort. Mann *v.* Martin's Admr., 82 Ky. 242.

But as a rule the action is regarded as being ex contractu.[61] Depending upon whether regarded as ex contractu or ex delicto, and in accordance with general rules elsewhere treated, the action, if formal, may be in case[62] or trespass,[63] or debt[64] or assumpsit.[65]

b. *Bill in Equity.* — Under certain circumstances a bill in equity is maintainable against the officer and his sureties on his official bond.[66] There must be present some of the well known grounds of equity jurisdiction.[67]

Transforming Action Into Equitable Proceeding. — In a proper case the court may transform the action on the bond into one in equity, as for example where such a course is necessary in order to determine conflicting interests in property rights involved.[68]

4. Joinder of Actions. — Pursuant to and subject to the limitations of the general rules as to joinder of causes of action,[69] a complaint may unite two or more causes of action upon the officer's bond, where they grow out of the same transaction or are connected with the same subject of action.[70] But a cause of action in tort for trespass against the

61. **Ark.**—Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870. **Cal.**—Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766; Ghiradelli *v.* Bourland, 32 Cal. 585. **La.**—Ballew *v.* Andrus' Exr., 10 La. 216; Poydras *v.* Patin, 5 La. 324. **Mass.**—Williams *v.* Kimball, 135 Mass. 411. **Pa.**—Com. *v.* Yeisley, 6 Pa. Super. 273. But see Com. *v.* Milnor, 23 Pa. Super. 1.

62. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350. See the title "**Case (The Action of Trespass on the).**"

63. Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177. See the title "**Trespass.**"

[a] **For Levying on Property of Stranger.**—Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177.

64. Mayer *v.* People, 190 Ill. 109, 60 N. E. 96; People *v.* Jamison, 157 Ill. App. 546; People *v.* Schwartz, 151 Ill. App. 190; People *v.* Crowe, 130 Ill. App. 349; Ramsey's Admrs. *v.* McCue, 21 Gratt. (62 Va.) 349. See the title "**Debt.**"

65. Com. *v.* Milnor, 23 Pa. Super. 1; Com. *v.* Yeisley, 6 Pa. Super. 273. See the title "**Assumpsit.**"

66. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; County Court *v.* Flanagan, 77 W. Va. 505, 87 S. E. 878.

67. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948.

[a] **Upon the ground of discovery and accounting** equity has jurisdiction to entertain a suit brought by a county court against a sheriff and several sets of sureties on several official bonds given by him during his term of office as sheriff, where it appears that such sheriff did not keep the accounts required of him by law to be kept showing his daily receipts and daily disbursements from the county funds, and where for this reason, as well as from the character, number and intricacy of the transactions, it is difficult to determine the extent of the liability of each set of sureties in such official bonds. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948.

68. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

[a] **Rights of Execution Purchasers.** Where an action is brought upon sheriff's bond to recover for loss of property sold on execution and which through the officers alleged negligence plaintiff was prevented from redeeming, the court has power to order in the execution purchaser, and others interested, cause new pleadings to be filed, and transform the action into an equitable one to quiet title, and to recover on the sheriff's bond for damages in case the title has been lost. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

69. See generally the title "**Joinder of Actions.**"

70. Phoenix Ins. Co. *v.* McEvony, 52 Neb. 566, 72 N. W. 956; Moore *v.* Smith, 10 How. Pr. (N. Y.) 361.

officer cannot be joined with one ex contractu against the sureties on his bond.[71]

5. Conditions Precedent. — Conditions precedent to plaintiff's right to maintain an action on the bond must in accordance with the general rules[72] be performed before suit is brought,[73] unless the performance of such conditions is waived by the party entitled thereto.[74] To maintain an action on the officer's bond, it is necessary, in some jurisdictions, to first recover judgment against the officer[75] and to demand payment of the same,[76] or show sufficient reason for failure to do so.[77] But usually the form and terms of the bond are such that the sureties become liable in a direct action by the party aggrieved the moment the wrongful act or default of the officer occurs,[78] and no prior adjudication upon a rule against the officer[79] or preliminary suit to establish his liability[80] is necessary before proceeding upon the bond. However, demand upon the officer for the payment of money collected

71. Ghiradelli *v.* Bourland, 32 Cal. 585.

72. **As to conditions precedent generally,** see the title, "**Suits and Actions.**".

73. **Ala.**—Williams *v.* Ragan, 153 Ala. 397, 45 So. 185. **Me.**—Dane *v.* Gilmore, 49 Me. 173. **Mass.**—Slattery *v.* Schapero, 217 Mass. 71, 104 N. E. 440, Ann. Cas. 1917D, 399; Fall River *v.* Riley, 138 Mass. 336; Tracy *v.* Merrill, 103 Mass. 280. **Pa.**—Com. *v.* Yeisley, 6 Pa. Super. 273.

[a] **Demand for Copy of Warrant.** (1) The statute requires as a condition precedent to a suit against an officer for anything done in obedience to a warrant issued by a justice of the peace, that demand for a copy of the warrant be first made upon the officer and that he refuse to furnish the same. Com. *v.* Yeisley, 6 Pa. Super. 273. (2) Where the officer acts, not in obedience to the warrant but in open contempt of it, he cannot plead the warrant as justification, and such a case is not within the letter or spirit of the statute. Lantz *v.* Lutz, 8 Pa. 405.

74. Fall River *v.* Riley, 138 Mass. 336.

[a] **No demand for property taken under execution** and which the officer fails to return when no forthcoming bond is furnished by the execution plaintiff, is necessary before suit on the officer's bond. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

75. Slattery *v.* Schapero, 217 Mass. 71, 104 N. E. 440, Ann. Cas. 1917D, 399; Fall River *v.* Riley, 138 Mass. 336; Tracy *v.* Merrill, 103 Mass. 280; Todd *v.* Bradford, 17 Mass. 567.

[a] **Rule Exists by Statute.**—Fall River *v.* Riley, 138 Mass. 336.

[b] **The condition of the bond is broken when** judgment is obtained against the officer. Fall River *v.* Riley, 138 Mass. 336.

[c] **A constable's bond** of the city of New York cannot under Act 1813 (2 Rev. St. 346, §21) be prosecuted until judgment is first obtained against the constable. Davis *v.* Kruger, 4 E. D. Smith (N. Y.) 350.

76. Slattery *v.* Schapero, 217 Mass. 71, 104 N. E. 440, Ann. Cas. 1917D, 399; Fall River *v.* Riley, 138 Mass. 336; Tracy *v.* Merrill, 103 Mass. 280.

[a] **The Requirement That Such Demand Be Made Is Based Upon Statute.**—Fall River *v.* Riley, 138 Mass. 336.

77. Fall River *v.* Riley, 138 Mass. 336.

[a] **Withdrawal from the jurisdiction** of the party entitled to the demand, dispenses with the necessity of making it, since in such case the party has rendered demand impossible. Fall River *v.* Riley, 138 Mass. 336.

78. Berry *v.* Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349.

79. McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36; Chastain *v.* Winn (Ga. App.), 95 S. E. 473; McCollough *v.* Hand, 16 Ga. App. 484, 85 S. E. 673.

80. **Ala.**—Bagby *v.* Chandler, 8 Ala. 230. **Cal.**—Van Pelt *v.* Littler, 14 Cal. 194. **Ga.**—McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36; Jefferson *v.* Hartley, 81 Ga. 716, 9 S. E. 174; Robertson *v.*

by him is generally required before suing on the bond for his failure to pay over the money,[81] though in some states such demand is not necessary,[82] unless the officer is outside the county,[83] and in any case the circumstances may excuse a failure to make demand.[84] An aggrieved party suing for an excessive levy is not obliged to move the court to set aside the levy before suing on the officer's bond.[85]

Leave To Prosecute. — It is necessary in some jurisdictions to make application before the proper court[86] for leave to prosecute the bonds of certain officers.[87]

6. Jurisdiction and Venue.[88] — The question of jurisdiction and venue in proceedings on the official bonds of sheriffs, constables and marshals is governed largely by the same rules as control in other actions generally.[89] A justice court,[90] or municipal court,[91] or a court of general jurisdiction,[92] may properly entertain the action where the amount claimed is within the cognizance of such tribunal.[93] The action has been variously maintained in the county where the breach of the

Smith, 16 Ga. App. 767, 85 S. E. 991. **Ill.**—Babka *v.* People, 73 Ill. App. 246. **Mich.**—People *v.* Lee, 65 Mich. 557, 32 N. W. 817. **N. J.**—State *v.* Leeds, 31 N. J. L. 185. **N. Y.**—Grieb *v.* Northrup, 66 App. Div. 86, 72 N. Y. Supp. 481; Berry *v.* Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349. **S. C.**—Treasury Comrs. *v.* Moore, 2 Brev. 51. **Tenn.** Jarnagin *v.* Atkinson, 4 Humph. 470. **Vt.**—Tute *v.* James, 46 Vt. 60; Hine *v.* Pomeroy, 39 Vt. 211. **Wis.**—Bartlett *v.* Hunt, 17 Wis. 214.

81. **Ala.**—Hill *v.* Fitzpatrick, 6 Ala. 314. **Ark.**—Governor *v.* Pleasants, 4 Ark. 193. **N. Y.**—Rhinelander *v.* Mather, 5 Wend. 102. **N. C.**—White *v.* Miller, 20 N. C. 55. **S. C.**—State *v.* Easterling, 1 Rich. 310. **Tex.**—De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328.

82. Nutzenholster *v.* State, 37 Ind. 457; Grandstaff *v.* Ridgely, Hampton & Co., 30 Gratt. (71 Va.) 1.

[a] **Demand upon officer for money received under execution** (1) not necessary prior to a suit on the officer's bond for failure to pay the money over (Grandstaff *v.* Ridgely, Hampton & Co., 30 Gratt. [71 Va.] 1), particularly (2) where the suit on the bond is not brought until after the return day of the execution. People *v.* Title Guar. & Surety Co., 156 Ill. App. 488.

83. Grandstaff *v.* Ridgely, Hampton & Co., 30 Gratt. (71 Va.) 1.

84. Fall River *v.* Riley, 138 Mass. 336; State *v.* Easterling, 1 Rich. (S. C.) 310.

85. State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44.

86. See *infra*, XII, B, 6.

87. **Minn.**—Litchfield *v.* McDonald, 35 Minn. 167, 28 N. W. 191. **N. Y.** *In re* Chamberlain, 42 Barb. 281; *Ex parte* Noble, 2 Cow. 590; Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872. **Wis.** State *v.* Mann, 21 Wis. 684.

[a] **Constable's Bond.**—Davis *v.* Kruger, 4 E. D. Smith (N. Y.) 350.

[b] **The court exercises a discretion** in the matter. People *ex rel.* Wehle *v.* Conner, 8 Hun (N. Y.) 533.

[c] **A proper showing** must be made that the party has a right to sue on the bond. *Ex parte* Reed, 4 Hill (N. Y.) 572; Rhinelander *v.* Mather, 5 Wend. (N. Y.) 102; State *v.* Mann, 21 Wis. 684.

88. **Equity Jurisdiction,** see *supra*, XII, B, 3, b.

89. See the titles "**Jurisdiction;**" "**Venue.**"

[a] **In Any County.**—State *v.* Green, 5 Harr. (Del.) 270.

90. Pollock *v.* Hudgens, 12 Mo. 67.

91. Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872.

[a] **Prosecution on Bond of City Marshal.**—Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872.

92. Pollock *v.* Hudgens, 12 Mo. 67, regardless of amount claimed.

93. **Amount in controversy** as determining jurisdiction, see the title "**Jurisdiction.**"

bond was committed[94] in the county of the officer[95] or the bondsmen[96] reside. Special statutory or charter provisions sometimes govern as to the courts in which proceedings may be instituted.[97]

7. Parties. — a. *Plaintiff.* — (I.) **In General.** — The action is maintainable at the instance of any person injured by the officer's default.[98] In accordance with the general requirements as to parties,[99] the action must be brought in the name of the party aggrieved[1] or interested,[2] or the "real party in interest."[3] Under these requirements the action

94. McNee *v.* Sewell, 14 Neb. 532, 16 N. W. 827. See also Fay *v.* Edmiston, 28 Kan. 105.

95. Fay *v.* Edmiston, 28 Kan. 105.

[a] **Where the sheriff of another county,** to whom execution is issued, fails to perform his official duty with reference to it, he and his sureties may be sued in the county where he resides and where the failure occurs. Fay *v.* Edmiston, 28 Kan. 105.

96. Lasater *v.* Waits, 95 Tex. 553, 68 S. W. 500.

97. See Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872.

[a] **The charter of Greater New York** provides for application for leave to sue a marshal's bond, to be made to the supreme court in the department wherein the borough of the officer's appointment is situated. And the justice of this department designates in which of the specified courts the proceedings shall be prosecuted. Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Supp. 872.

98. **Ala.**—Burns *v.* George, 154 Ala. 626, 45 So. 421. **Ga.**—Harris *v.* Black, 143 Ga. 497, 85 S. E. 742; McCollough *v.* Hand, 16 Ga. App. 484, 85 S. E. 673. **Ill.**—People *v.* Schwartz, 151 Ill. App. 190. **Ky.**—Howard *v.* Brown, 13 Ky. L. Rep. 271. **Mass.**—Crocker *v.* Buttrick, 187 Mass. 461, 73 N. E. 650; Tracy *v.* Merrill, 103 Mass. 280. **N. Y.** Berry *v.* Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349. **Pa.**—McMicken *v.* Com., 58 Pa. 213.

[a] **One joint owner** of chattels taken under execution, may sue on the bond for the officer's failure to return the property upon the execution plaintiff's failure to furnish a forthcoming bond. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

[b] **Person Not a Suitor.**—Where the officer's bond is for the "benefit of all suitors and others who may be injured or aggrieved by the official acts or misconduct," the plaintiff in the action on the bond need not have been a suitor. People *v.* Schwartz, 151 Ill. App. 190.

99. See the title "**Parties**" and 11 STANDARD PROC. 958.

1. Burns *v.* George, 154 Ala. 626, 45 So. 421; Burns *v.* George, 119 Ala. 504, 24 So. 718; Harris *v.* Black, 143 Ga. 497, 85 S. E. 742; McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36; Chastain *v.* Winn (Ga. App.), 95 S. E. 473; Kirkland *v.* Southerland, 11 Ga. App. 538, 75 S. E. 832.

[a] **Though that person is not the payee** in the bond. Kirkland *v.* Southerland, 11 Ga. App. 538, 75 S. E. 832.

[b] **One who has acquired a judgment** originally rendered for another, may sue upon the officer's bond in his own name for any default or neglect of the officer preventing the collection of the judgment. Burns *v.* George, 119 Ala. 504, 24 So. 718.

[c] **Heirs** can bring suit in their own names on the official bond for a trespass committed by the officer upon property belonging to the estate, when it appears that the administrator of the estate is dead and no other administrator appointed, that there is no necessity for any further administration, that there is no debt against the estate and that the heirs are all sui juris and have taken possession. Harris *v.* Black, 143 Ga. 497, 85 S. E. 742.

2. State *v.* White, 88 Ind. 587.

[a] **The phrase "a party interested"** is not defined or explained by statute. State *v.* White, 88 Ind. 587.

[b] **Strangers to the writ of execution** who may have suffered consequential injury from the sheriff's failure to make proper levy, are not "interested" parties within the statute. State *v.* White, 88 Ind. 587.

3. **Colo.**—Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662. **Ky.**—Howard *v.* Brown, 13 Ky. L. Rep. 271. **S. D.** Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190; Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949.

proceeds in some states in the name of the person actually injured by the officer's default,[4] and in others in the name of the payee or obligee in the bond,[5] whether such payee or obligee be the state, commonwealth or people,[6] the town,[7] or some public official[8] or board.[9] And the payee in the bond may be deemed a trustee of an express trust within the exception to the code requirement that the suit be brought in the name of the real party in interest.[10]

If the suit is in equity, the parties beneficially interested in the cause of actions are the proper plaintiffs,[11] and one who has no substantial

See the title "**Parties.**"

[a] **The person injured by the default** cannot in such jurisdictions bring the action in his own name. He is not considered the real party in interest within the meaning of the code provision requiring actions to be brought in the name of the real party in interest. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

4. Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949.

[a] **Where the bond is given to a county,** and it becomes the nominal obligee, it need not be made a party, unless injured. The suit must be brought in the name of the party in interest. Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949.

[b] **Where the bond is a covenant to the state or commonwealth,** it may nevertheless be sued in the name of the person injured. Howard *v.* Brown, 13 Ky. L. Rep. 271.

[c] **A suit upon constable's bond made payable to the commissioners of roads and revenues** cannot be brought in the name of such payees for the use of the person injured by the breach. Hopkins *v.* Watts, 141 Ga. 345, 80 S. E. 1001.

[d] **Suits on marshal's bond** may be brought (1) in the name of the party injured (Bollin *v.* Blythe, 46 Fed. 181; Hernandez *v.* Montgomery, 2 Mart. N. S. [La.] 422), or (2) in the name of the United States. United States *v.* Davidson, 1 Biss. 433, 25 Fed. Cas. No. 14,921.

5. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662; People *v.* Jamison, 157 Ill. App. 546.

[a] **The record need not show the third person** for whose use the suit is brought. People *v.* Jamison, 157 Ill. App. 546.

6. **Ill.**—Mayer *v.* People, 190 Ill. 109, 60 N. E. 96; People *v.* Jamison, 157 Ill. App. 546. **Ind.**—State *v.* White, 88 Ind. 587; State *v.* McClane, 2 Blackf. 192. **Ky.**—Com. *v.* Teal, 14 B. Mon. 29. **Md.** State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417. **Miss.**—James *v.* State, 49 Miss. 420. **Mo.**—Miller *v.* Wall, 27 Mo. 440. **Pa.**—McMicken *v.* Com., 58 Pa. 213; Campbell *v.* Com., 8 Serg. & R. 414. **Tex.**—Spradley *v.* State, 23 Tex. Civ. App. 20, 56 S. W. 114.

[a] **That the state must sue for the use** of the injured party, where the bond is given to the state, see State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417.

7. Crocker *v.* Buttrick, 187 Mass. 461, 73 N. E. 650.

8. Crocker *v.* Buttrick, 187 Mass. 461, 73 N. E. 650.

[a] **A suit in the name of the city treasurer** maintainable on a constable's bond. Crocker *v.* Buttrick, 187 Mass. 461, 73 N. E. 650; Tracy *v.* Merrill, 103 Mass. 280.

[b] **The Governor.**—Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680; Matthews *v.* Bailey, 25 Miss. 33.

9. Chastain *v.* Winn (Ga. App.), 95 S. E. 473.

[a] **In the name of commissioners of roads and revenues,** payees in the bond, for the use of another. Chastain *v.* Winn (Ga. App.), 95 S. E. 473.

10. State *v.* White, 88 Ind. 587; State *v.* Rader, 33 Okla. 350, 125 Pac. 726. See 20 STANDARD PROC. 909.

[a] **The state** may sue (1) **in its** own name upon a bond running to it though the county may be the real party in interest. State *v.* Rader, 33 Okla. 350, 125 Pac. 726. (2) Thus the state may proceed in its own name to recover the penalties imposed upon a sheriff for failure to make a quarterly report to the board of county commissioners. State *v.* Rader, 33 Okla. 350, 125 Pac. 726.

11. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; County

interest in the controversy cannot maintain the suit,[12] not even for the use of the party beneficially interested.[13]

(II.) Joinder of Parties Plaintiff. — The husband and wife may properly join in an action on the bond for negligent or wrongful acts of the officer causing injury to the wife.[14] Where the injured person is entitled to prosecute the bond in his own name, he need not join the covenantee in the bond.[15]

b. *Defendant.*[16] — The suit, in general, proceeds against the officer and his sureties,[17] but, under statute, it may be maintained against any one or more of the parties executing the bond.[18] Where the action is deemed ex contractu,[19] it survives on the death of the officer, against his administrators and sureties.[20]

Court *v.* Flanagan, 77 W. Va. 505, 87 S. E. 878. See generally 20 STANDARD PROC. 880.

[a] **For sheriff's failure to account for county court funds** (1) coming into his hands, suit against him and his sureties upon his bond payable to the state, must be brought in the name of the county court (Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; County Court *v.* Flanagan, 77 W. Va. 505, 87 S. E. 878), and (2) not in the name of the state for the use of the county court. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; County Court *v.* Flanagan, 77 W. Va. 505, 87 S. E. 878.

[b] **The equitable owner of a judgment** who became such by virtue of an assignment thereof not made in the mode prescribed by statute may sue in his own name on the officer's bond for the officer's default in levying execution on the judgment. Burns *v.* George, 154 Ala. 626, 45 So. 421.

12. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948.

13. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; County Court *v.* Flanagan, 77 W. Va. 505, 87 S. E. 878.

[a] **In Name of State for Use of Another.**—Under the rule that the party beneficially interested should bring the suit, the state cannot sue for the use of a county court. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948; County Court *v.* Flanagan, 77 W. Va. 505, 87 S. E. 878.

14. Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12. See generally the title "**Husband and Wife.**"

[a] **Wrongful Arrest of Wife.** Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

15. Howard *v.* Brown, 13 Ky. L. Rep. 271.

[a] **Thus the commonwealth** need not be joined though it is the covenantee. Howard *v.* Brown, 13 Ky. L. Rep. 271.

16. **As to joinder of parties defendant,** see generally the title "**Parties,**" and 11 STANDARD PROC. 972.

17. **Ala.**—Deason *v.* Gray, 192 Ala. 611, 69 So. 15. **Cal.**—Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766. **Colo.**—Newman *v.* People, 4 Colo. App. 46, 34 Pac. 1006. **Ga.**—Sutton *v.* Griner (Ga. App.), 95 S. E. 1004; Chastain *v.* Winn (Ga. App.), 95 S. E. 473. **Ill.**—Babka *v.* People, 73 Ill. App. 246. **Kan.** Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168. **Mo.**—State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502. **S. C.**—State Treasurers *v.* Bates, 2 Bailey 362.

18. **Idaho.**—State *v.* McDonald, 4 Idaho 468, 40 Pac. 312, 95 Am. St. Rep. 137. **Ill.**—People *v.* Jamison, 157 Ill. App. 546; Babka *v.* People, 73 Ill. App. 246. **N. C.**—Guess *v.* Barbee, 28 N. C. 279.

See 11 STANDARD PROC. 976.

[a] **At common law** the rule was that the suit on the bond signed by several must be against one or all who are living. See People *v.* Jamison, 157 Ill. App. 546, and 11 STANDARD PROC. 975.

[b] **Dismissal of some of the signers** of the bond does not deprive the court of jurisdiction over the other signers. People *v.* Jamison, 157 Ill. App. 546.

19. See *supra,* XII, B, 3, a.

20. Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870. See generally the title "**Survival.**"

c. *New Parties.* — The court may, in a proper case, order the bringing in of parties whose presence is necessary to a proper adjudication of property rights involved.[21] Upon the death of a party plaintiff, his personal representative may be substituted as party plaintiff.[22]

8. **Pleading.** — a. *Declaration, Complaint or Petition.* — (I.) **In General.**[23] — The declaration, complaint or petition must disclose a good cause of action in complainant[24] and against the defendants upon the bond executed by them.[25] To bind the sureties there must be sufficient

21. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825. See generally the title "**Parties.**"

[a] **Purchasers at Execution Sale.** Where the action is based on negligence of sheriff resulting in plaintiff's losing property through failure to redeem from execution, the court may bring in the purchasers at the execution sale, and proceed to adjust the rights of all the parties. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

22. Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12. See generally the title "**Revivor.**"

[a] **Thus where husband and wife** join in an action upon the officer's bond for wrongful arrest of the wife, upon the death of the husband, may, as his personal representative, be substituted as party plaintiff. Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

23. See generally, 4 STANDARD PROC. 496; 11 STANDARD PROC. 981; and the titles "**Declaration and Complaint;**" "**Bills and Answers.**"

24. Burns *v.* George, 119 Ala. 504, 24 So. 718.

[a] **Where one not the original owner of a judgment** sues in her own name for the officer's misfeasance preventing the collection of the judgment, she may allege her ownership of the judgment in general terms; leaving it to the evidence, upon proper issue made, to show how she acquired it and, if essential, that it was assigned to her on the records of the court. Burns *v.* George, 119 Ala. 504, 24 So. 718.

[b] **That the alleged negligence was a legal injury** to the plaintiff for which he could maintain an action, should appear from the pleading. Com. *v.* Acker, 53 Pa. Super. 54.

[c] **False Imprisonment.**—In an action for false imprisonment the mere allegation that the plaintiff had been imprisoned without warrant or authority and against his will, is a sufficient statement of a cause of action; but where the complaint shows that the imprisonment was made under a warrant, it is the duty of the plaintiff to set out in his complaint the fact that such warrant was irregular on its face. Pankewicz *v.* Jess, 27 Cal. App. 340, 149 Pac. 997.

[d] **Recovery cannot be predicated upon a wrongful taking** of property by the officer unless the complaint expressly or by fair implication charges that the taking of the property was wrongful. Manter *v.* Petrie, 123 Minn. 333, 143 N. W. 907.

[e] **A complaint for failure to sell property levied upon on execution** is sufficient which alleges in effect that one of the defendants was constable and the other defendants sureties on his official bond; that plaintiffs had recovered a judgment in a certain specified amount against A; that executions were duly issued on said judgment against the property of A and were directed to and delivered to the constable who levied on A's goods, and thereafter advertised them for sale, but neglected to sell them, and that the defendants in the execution thereafter became insolvent and that by reason of the officer's negligence the plaintiff lost his debt. Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558.

25. **Ariz.**—United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326. **Cal.**—Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504; Ghiradelli *v.* Bourland, 32 Cal. 585. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577. **Ga.**—Slaton *v.* Morrison, 144 Ga. 471, 87 S. E. 390; Harris *v.* Black, 143 Ga. 497, 85 S. E. 742. **Ind.**—Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157. **Ky.** — Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S W. 129; Howard *v.* Brown, 13 Ky. L. Rep. 271; Jolly *v.* Moore, 9 Ky. L. Rep. 858. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168. **Mo.**—State *v.*

allegations to show the existence of the relation of principal and surety[26] at the time the default or breach of duty occurred.[27] The plaintiff should allege sufficient to show due execution of the bond,[28] its acceptance and approval by the proper authorities,[29] its covenants and conditions,[30] and the penalty thereof.[31]

(II.) Breach. — It must appear from the averments that the acts or misconduct complained of amount to a breach of the conditions and covenants of the bond.[32] As in other cases the plaintiff's pleading may

Boepple, 198 Mo. App. 63, 198 S. W. 502; State *v.* Nolté (Mo. App.), 187 S. W. 896. **Okla.**—Meek *v.* Tilghman, 55 Okla. 208, 154 Pac. 1190. **Pa.**—Com. *v.* Acker, 53 Pa. Super. 54. **Tex.**—National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123.

26. Ghiradelli *v.* Bourland, 32 Cal. 585; Ferrat *v.* Adamson, 53 Mont. 172, 163 Pac. 112.

27. Ferrat *v.* Adamson, 53 Mont. 172, 163 Pac. 112.

28. Ghiradelli *v.* Bourland, 32 Cal. 585; Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634; Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S. W. 129. See 4 STANDARD PROC. 501; 11 STANDARD PROC. 983; 20 STANDARD PROC. 751.

[a] **No cause of action** against the sureties is stated where the petition does not show that the sureties had signed the bond or that it had been accepted and approved by the town council. Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S. W. 129.

[b] **But want of technical averments** concerning the signing, delivery and acceptance of the bond is waived by not properly objecting thereto. Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634.

[c] **An averment** that the bond was "Bourland's official bond" is not sufficient to show execution of the bond by him. Ghiradelli *v.* Bourland, 32 Cal. 585.

[d] **An allegation that defendants are "securities"** on the bond is a conclusion merely and not issuable. Ghiradelli *v.* Bourland, 32 Cal. 585.

29. Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634; Hogg *v.* Brown, 13 Ky. L. Rep. 783; Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S. W. 129; Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723.

[a] **"Had the plaintiff alleged that the defendants executed** the bond, it might include or cover the performance of every act essential to the making and approving of the bond." Fire Assn. of Philadelphia *v.* Ruby, 58 Neb. 730, 79 N. W. 723. The above statement of the law was approved in a subsequent appeal of the same case. See Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723.

[b] **An averment that the defendants "entered into a bond"** is equivalent to an allegation that they executed the bond, and comprehends all acts essential to its making and delivery. Fire Assn. *v.* Ruby, 60 Neb. 216, 82 N. W. 629.

30. **Cal.**—Ghiradelli *v.* Bourland, 32 Cal. 585. **Ky.**—Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634; Mann *v.* Martin's Admr., 82 Ky. 242. **Wash.**—Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119.

See 4 STANDARD PROC. 498, 504; 11 STANDARD PROC. 984, et seq.; 20 STANDARD PROC. 751.

[a] **A petition is fatally defective** unless it sets out either in terms or in substance the covenants in the bond and the breaches thereof. Howard *v.* Brown, 13 Ky. L. Rep. 271.

[b] **A contrary rule** to the effect that it is not necessary to set out the bond nor the conditions thereof is based on the fact that the law says what the conditions of the bond are and for what acts and derelictions of the officer the surety on his official bond shall be liable. Deason *v.* Gray, 192 Ala. 611, 69 So. 15.

31. State *v.* Johnson, 78 Mo. App. 569, 573.

32. **Ariz.**—Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544. **Fla.**—Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194, 120 Am. St. Rep. 156. **Ga.**—Berrie *v.* Taylor, 117 Ga. 56, 43 S. E. 411. **Ind.** State *v.* Leach, 10 Ind. 308. **Ky.**—Mann *v.* Martin's Admr., 82 Ky. 242; Lewis *v.* Crockett, 3 Bibb 196; Howard *v.* Brown, 13 Ky. L. Rep. 271. **Mo.**—State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502.

be aided by averments made in the answer.[33] It must appear from the plaintiff's pleading that the principal in the bond was a duly elected and qualified officer,[34] and that while acting in his official capacity,[35]

See 4 STANDARD PROC. 504; 20 STANDARD PROC. 751; 11 STANDARD PROC. 1006.

[a] **Manner of Charging Breaches.** The assignments of breaches of the bond should be specific and definite. People *v.* Jamison, 157 Ill. App. 546; Com. *v.* Fry, 4 W. Va. 721.

[b] **Violent Attack Upon Person of Plaintiff.**—A petition which shows that the deputy constable while levying a replevin writ made a violent attack upon the person of plaintiff against whom the writ was direct, charges a violation of the condition of the bond which required the constable "in every respect to discharge all the duties of constable according to law." State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502.

[c] **Where the condition of the bond provides for a single act** to be done, the breach is properly assigned in a declaration if it be in the words of the condition or words which impart the same thing. But where the condition of the bond requires a number of things, the omission of any one of which would constitute a breach, a particular breach should be specified in the assignment. Com. *v.* Fry, 4 W. Va. 721.

[d] **Construction of Allegations.** The allegations of breaches of the bond are to be construed most strongly against the pleader. People *v.* Jamison, 157 Ill. App. 546.

[e] **Where a sheriff seeks to hold his deputy** liable on his bond, he must fully, plainly and distinctly set forth wherein the deputy has violated its conditions and in what the breach consisted. Berrie *v.* Taylor, 117 Ga. 56, 43 S. E. 411.

[f] **No cause of action is stated** in the absence from the complaint of averments showing a breach of the bond. United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326.

[g] **Several breaches of the bond** may be alleged. State *v.* White, 88 Ind. 587. See 4 STANDARD PROC. 506.

[h] **Pleading Judgment Against Principal.**—Where a judgment to which the sureties were not parties was recovered against a marshal, it is not sufficient, in a subsequent suit upon the officer's bond, to merely plead such judgment, for it is only evidence by which a breach of the bond is to be established, and not the breach itself. And a cause of action against the sureties is not stated, unless a breach of the bond is set forth in proper averments, independent of those having reference to the judgment. United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326.

33. Manter *v.* Petrie, 123 Minn. 333, 143 N. W. 907; State *v.* Nolte (Mo. App.), 187 S. W. 896.

[a] **Allegation of Judgment Debtor's Interest.**—In a suit upon sheriff's bond for the statutory penalty for refusal to sell stock levied upon an averment in the answer that the judgment debtor had some interest in the stock levied upon, aids an insufficient statement by plaintiff of such judgment debtor's interest. State *v.* Nolte (Mo. App.), 187 S. W. 896.

[b] **But where the reply denies allegations** made in the answer that property was taken by the officer by mistake, such answer cannot help out the failure of the complaint to state that the property was wrongfully taken. Manter *v.* Petrie, 123 Minn. 333, 143 N. W. 907.

34. Jolly *v.* Moore, 9 Ky. L. Rep. 858.

[a] **The facts showing that he was elected,** or that there was a vacancy and that he was appointed as required by law, should be stated. It is not sufficient to allege merely that the principal in the bond "was a duly qualified constable." Jolly *v.* Moore, 9 Ky. L. Rep. 858.

35. **U. S.**—Chandler *v.* Rutherford, 101 Fed. 774, 43 C. C. A. 218. **Ala.** Deason *v.* Gray, 192 Ala. 611, 69 So. 15. **Cal.**—Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12; Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873. **Ind.** Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157. **Ky.**—Jones *v.* Van Bever, 164 Ky. 80, 174 S. W. 795, L. R. A. 1915E, 172. **La.**—Sanders *v.* Hum-

and in the official capacity in which he is sought to be held[36] he violated or failed to perform a duty required of him by law.[37] To charge these

phries, 143 La. 43, 78 So. 168. **Minn.** Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219. **Mo.**—State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502. **N. Y.**—Lawton *v.* Erwin, 9 Wend. 233. **Okla.** Meek *v.* Tilghman, 55 Okla. 208, 154 Pac. 1190. **Tex.**—National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123. **Wash.**—Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119. **Wis.**—Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751; State *ex rel.* Blinebury *v.* Mann, 21 Wis. 692.

[a] **The rule requires a statement of facts,** from which the court may, for itself, determine whether the act for which the officer is said to be liable constitutes an official act, or an act done by virtue of or under color of, his office. People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873.

[b] **It is necessary to allege the existence of conditions and circumstances** requiring some official action on the part of the officer. Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504; Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157.

[c] **As Dependent Upon Existence of Valid Writ.**—If the question of whether the officer was acting in his official capacity depends upon whether some valid writ or process was issued by a court of competent jurisdiction and delivered to him, and which he was in the act of executing, such matters must be alleged. **Cal.**—Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504; Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577. **Ind.**—Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157. **Wis.**—Gerber *v.* Ackley, 37 Wis. 43, 19 Am. Rep. 751.

[d] **Injury to Prisoner.**—A deputy sheriff while taking a prisoner to jail dropped a revolver which he had taken from the prisoner, thus causing the injuries for which suit on the bond was brought. The complaint failed, it was held, to show that the deputy was acting in his official capacity, in that it did not state facts showing that the deputy had made a lawful arrest or that in taking the revolver from the prisoner and carrying it with him on the train, he was acting within the duties of his office. People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873.

[e] **False Imprisonment.**—A petition for damages for false imprisonment sufficiently charges, as against a general demurrer, that the officer was acting in an official capacity where it states that B., as constable, arrested plaintiff for disturbance of the peace, charged to have been committed in the presence, hearing and view of said officer and also states that the officer took plaintiff into custody upon the plea that plaintiff was guilty of such offense. National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123.

[f] **That wrongful killing** of plaintiff's husband done by the officer while in the discharge of his official duty, sufficiently shown. Meek *v.* Tilghman, 55 Okla. 208, 154 Pac. 1190.

[g] **Where conversion of tax money** is the breach alleged, the plaintiff need not aver that the taxes were collected or received by virtue of law. People *v.* Jamison, 157 Ill. App. 546.

36. Greenius *v.* Moore, 99 Wash. 467, 169 Pac. 976.

[a] **If proceeded against as constable** it would not be sufficient to plead facts showing he was in fact acting as marshal. Greenius *v.* Moore, 99 Wash. 467, 169 Pac. 976.

37. **U. S.**—Sperring *v.* Taylor, 2 McLean 362, 22 Fed. Cas. No. 13,235. **Ala.** Deason *v.* Gray, 192 Ala. 611, 69 So. 15. **Ariz.**—Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544; United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326. **Cal.** Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504; Pankewicz *v.* Jess, 27 Cal. App. 340, 149 Pac. 997. **Ind.**—Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168. **Pa.**—Com. *v.* Acker, 53 Pa. Super. 54.

[a] **A complaint for wrongful arrest** which merely negatives certain conditions which characterize wrongful arrest, without anywhere alleging that the arrest was without warrant or even that it was unlawful, is insufficient on demurrer. Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544.

[b] **"Without Reasonable Excuse."** It has been held that in an action

matters generally is not ordinarily sufficient;[38] for it is essential that the pleading be clear in respect thereto,[39] and not leave the matter to inference and conjecture.[40] Facts, therefore, must be alleged so that the court or jury will be able to judge whether the wrongful act was a violation of official duty.[41] And allegations will not suffice which express merely the opinion or conclusion of the pleader,[42] such allega-

against a sheriff and his sureties for failure of the sheriff to return an execution, the petition should allege that such failure was "without reasonable excuse." Kelly *v.* Moody's Admr., 12 Ky. L. Rep. 389.

[c] **Failure To Levy Execution.** In an action against a sheriff upon his bond for failure to levy execution, the petition should allege that the defendant in the execution had property liable to the execution, situated in the county, out of which the debt or part thereof might have to be made, and that the sheriff could, while the execution was in his hands and in full force, by the use of proper diligence on his part have levied thereon. Howard *v.* Brown, 13 Ky. L. Rep. 271.

[d] **Money Improperly Retained.** In an action upon a marshal's bond for refusal to pay over money coming into his hands, it is not sufficient to merely charge the marshal with the retention of money received from the government though it be termed a "balance," as he may have had a right to retain it for services rendered or for money paid out and expended under warrant of law. It should be made to appear by proper averments that the marshal retained the money improperly and in violation of law. United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326.

38. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577. **Ill.**—People *v.* Wilmoth, 45 Ill. App. 73. **Ind.**—Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157.

39. People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577.

40. People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577.

41. **Cal.**—Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694. **Colo.** People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168.

[a] **"The mere allegation** in the complaint that the constable was acting in the line of his duty, claiming to have a writ or process of some kind, is not sufficient to bind the sureties on the official bond of the officer, particularly where, as here, such alleged official acts are negatived by the further statement that they were entirely without authority or warrant of law and were not done under any valid writ or process whatever." People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577.

[b] **Wrongful Shooting of Plaintiff.** An allegation that a deputy sheriff, while on duty as such and while acting as deputy, agent, servant, and employe of the sheriff, maliciously and recklessly shot and wounded the plaintiff, does not specifically charge that the wrongful act of the deputy sheriff was done in violation of an official duty or in an improper performance of an official act. Sanders *v.* Humphries, 143 La. 43, 78 So. 168.

42. **Cal.**—Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873. **Ind.**—Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157. **Ky.**—Jones *v.* Van Bever, 164 Ky. 80, 174 S. W. 795, L. R. A. 1915E, 172. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168.

[a] **"Wrongful."**—An allegation that the officer's act was "wrongful" is a conclusion of law. State *v.* Nolte (Mo. App.), 187 S. W. 896.

[b] **"According to Law."**—An allegation that the officer neglected and refused to proceed with the execution "according to law" states a conclusion merely. State *v.* Nolte (Mo. App.), 187 S. W. 896.

[c] **An allegation that arrests were made by officer in official capacity** is (1) a conclusion, and not sufficient where the subsequent allegations as to the manner and occasion of the arrest effectually negative it (Jones *v.*

tions for example as that the acts of the officer were done by color or by virtue of his office,[43] or "acting in his capacity as constable,"[44] or that the acts done were of such a character as are authorized by law,[45] or that the acts constitute his official duty.[46]

(III.) Anticipating Defenses.— As in other declarations and complaints generally,[47] the plaintiff, when declaring on an officer's bond is not called upon to anticipate defenses.[48]

(IV.) Conditions Precedent. — Conditions precedent to liability must be alleged;[49] thus demand, where a necessary condition precedent, must be averred.[50]

b. *Plea, Answer, or Affidavit of Defense.* — The plea or answer must conform to the general rules elsewhere treated.[51] A plea of general performance cannot be interposed,[52] nor can a party plead on equitable grounds a defense which is good at law.[53]

Van Bever, 164 Ky. 80, 174 S. W. 795, L. R. A. 1915E, 172), as where (2) the subsequent allegations show that the officer was acting without warrant or process of any kind or character. People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577.

43. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873. **Ill.**—People *v.* Wilmoth. 45 Ill. App. 73. **Ind.**—Hawkins *v.* Thomas, 3 Ind. App. 399, 29 N. E. 157.

[a] **But an allegation that the arrest and imprisonment** were made by the officer while "acting as constable . . . and under color of his office" and "without legal process or color thereof" held sufficient on demurrer. State *v.* Boyd, 120 N. C. 56, 26 S. E. 700.

44. Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12; Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504.

45. People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873.

46. People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873.

47. See 6 STANDARD PROC. 681; 4 STANDARD PROC. 502; 11 STANDARD PROC. 1005.

48. Waymire *v.* State, 80 Ind. 67; State *v.* Leach, 10 Ind. 308.

[a] **Averment That the Debtor Had Other Property.**—Where the complaint shows a levy upon sufficient personal property to satisfy the judgment, and a breach of duty in failing to advertise and sell, it is not necessary to also show that the debtor did not have other property out of which the judgment could have been made. Waymire *v.* State, 80 Ind. 67.

[b] **Irregularities in the Bond.** Registration of the bond, and similar matters are presumed to be regular, and any defect, if material, must be set up in the answer. State *v.* Boyd, 120 N. C. 56, 26 S. E. 700.

49. See *supra*, XII, B, 5, and generally the titles "**Bonds**;" "**Suits and Actions**;" 11 STANDARD PROC. 998.

50. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Grandstaff *v.* Ridgely, Hampton & Co., 30 Gratt. (71 Va.) 1.

[a] **Conversion of Attached Property.**—Complaint based on the sheriff's refusal to surrender attached property to the true owner on notice of such owner's claim, should allege a demand upon the sheriff for the property, although such allegation need not be made in the manner and form prescribed by §689 of the Code of Civil Procedure. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694.

51. See 4 STANDARD PROC. 509; 11 STANDARD PROC. 1010.

52. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

53. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

[a] **The statute which allows defenses on equitable grounds** was intended to permit a defendant to plead many defenses valid in equity but not previously available at law. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405. As to equitable defenses in actions at law, see the title "**Suits and Actions.**"

Affidavit of Defense. — An action on a constable's or sheriff's bond comes within the statute as to affidavit of defense,[54] and requires an affidavit of defense by defendant where the action is considered one in form and substance ex contractu,[55] but not where it is deemed ex delicto in its nature, though in form ex contractu.[56]

c. *Replication or Reply.* — The general rules in respect to replication and reply[57] should be observed in actions upon officer's bonds.[58] Unless the plaintiff by demurrer disputes the legal sufficiency of the matters set up by way of defense, he should meet the material elements of the defense by reply or replication where such is the practice,[59] and if he denies the facts relied on by defendant he should traverse them directly.[60]

d. *Rejoinder and Subsequent Pleadings.* — Defendant may in accordance with the rules governing such pleading[61] interpose a rejoinder to plaintiff's replication,[62] and the plaintiff in turn may meet the matters set up in such rejoinder by a surrejoinder.[63]

9. Objections to Pleading. — a. *How Taken.* — **(I.) Demurrer.** A party may by general demurrer dispute the legal sufficiency[64] of the

54. See generally the title "**Affidavits of Merits and Defense.**"

55. Com. *v.* Yeisley, 6 Pa. Super. 273.

[a] "**If the statement contains all the ingredients of a complete cause of action,** averred in clear and unequivocal language, and the damages are specifically set out, so that, upon a judgment by default, they may be liquidated with certainty, an affidavit must be filed to prevent judgment." Com. *ex rel.* Baldwin & Co. *v.* Yeisley, 6 Pa. Super. 273, 276.

56. Com. *v.* Milnor, 23 Pa. Super. 1, negligently allowing an escape.

57. See the title "**Replication and Reply.**"

58. See *infra*, this note and 4 STANDARD PROC. 508; 11 STANDARD PROC. 1033.

[a] **The replication should be responsive** to the plea or answer Sedam *v.* Taylor, 3 McLean (U. S.) 547, 21 Fed. Cas. No. 12,608; Brown *v.* Hamlin, 23 Miss. 392.

59. **Md.**—Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405. **Mass.** Austin *v.* Parker, 13 Pick. 222. **Miss.** Brown *v.* Hamlin, 23 Miss. 392. **S. C.** Treasurers *v.* Oswald, 2 McMull. 145; State Treasurers *v.* Wiggins, 1 McCord 568.

60. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

[a] **An argumentative and indefinite** replication is improper. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

[b] **The honesty of sheriff's belief** that the goods levied upon did not belong to the judgment debtor, where a material element to the validity of his defense made by his plea should be directly traversed. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

61. See generally the title "**Rejoinder and Subsequent Pleadings**" and 4 STANDARD PROC. 508.

62. **Ind.**—State *v.* Jones, 8 Blackf. 270. **Mass.**—Cooper *v.* Mowry, 16 Mass. 5. **N. Y.**—Andrus *v.* Waring, 20 Johns. 153; Stevens *v.* Boyce, 9 Johns. 292.

[a] **If a breach of the bond** is disclosed by the replication, the rejoinder, to be sufficient, must plead matter which would in law avoid such breach. Cooper *v.* Mowry, 16 Mass. 5.

63. Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

64. **Ariz.**—Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544. **Cal.**—Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12. **Colo.** People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873. **Fla.**—Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194, 120 Am. St. Rep. 156. **Ga.** Thurman *v.* Avera, 20 Ga. App. 802, 93 S. E. 495; Robertson *v.* Smith, 16 Ga. App. 767, 85 S. E. 991; Kirkland *v.* Southerland, 11 Ga. App. 538, 75 S. E. 832. **Idaho.**—Works *v.* Byrom, 22 Idaho 794, 128 Pac. 551. **Ind.**—State *v.* Leach,

complaint or declaration, plea or answer,[65] replication or reply,[66] or subsequent pleading.[67] It is good ground for general demurrer to the declaration or complaint that it states no cause of action upon the officer's bond,[68] as where it fails to show that the officer was acting in his official capacity when he committed the acts relied on.[69] Demurrer will also lie to such pleading where it shows on its face that the court

10 Ind. 308. **Mo.**—State *v.* Nolte (Mo. App.), 187 S. W. 896. **Okla.**—Meek *v.* Tilghman, 55 Okla. 208, 154 Pac. 1190. **Wash.**—Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119.

See the title "Demurrer."

65. See Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

66. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

[a] **A special demurrer** to the replication because of formal defects. State Treasurers *v.* Wiggins, 1 McCord (S. C.) 568.

67. Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

[a] **A rejoinder** which does not set up matter sufficient in law to avoid a breach of the bond shown by the replication is demurrable. Cooper *v.* Mowry, 16 Mass. 5.

68. **Ariz.**—Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544. **Cal.**—Ghiradelli *v.* Bourland, 32 Cal. 585. **Colo.**—People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577. **Ga.** Thurman *v.* Avera, 20 Ga. App. 802, 93 S. E. 495; Robertson *v.* Smith, 16 Ga. App. 767, 85 S. E. 991. **Ky.**—Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S. W. 129; Com. *v.* Morton, 19 Ky. L. Rep. 1882, 44 S. W. 647. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168. **Minn.**—Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219. **Mo.**—State *v.* Nolte (Mo. App.), 187 S. W. 896. **Okla.** Meek *v.* Tilghman, 55 Okla. 208, 154 Pac. 1190. **Tex.**—National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123. **Wash.**—Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119.

[a] **Failure to set out the redelivery bond** tendered by plaintiff whose goods were taken by the officer in detinue is not a ground for demurrer to a complaint for the officer's wrongful refusal to redeliver the goods upon the tender of such bond. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318.

[b] **Where no breach of the condition** of the bond is alleged, the complaint is demurrable. Bonebrake *v.* Hunt, 11 Ariz. 98, 89 Pac. 544; Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194, 120 Am. St. Rep. 156.

[c] **If several breaches of the bond are assigned** some good and some bad, a demurrer to the whole should be overruled. State *v.* White, 88 Ind. 587.

[d] **Execution and Approval of Bond.**—A petition on sheriff's bond is subject to general demurrer where it fails to show that the sureties signed the bond, or that it was accepted and approved by the town council. Baum *v.* Turner, 25 Ky. L. Rep. 600, 76 S. W. 129.

[e] **Damage to Plaintiff.**—A demurrer to a petition against a sheriff and sureties for an illegal tax sale by the former is properly sustained, where the petition, though it alleges that the sheriff sold realty to pay the taxes when sufficient personalty existed for the purpose and that the plaintiff, who had a vendor's lien on the property sold was obliged to buy in the property at the sale, does not show wherein the plaintiff was damaged by the sale of the realty, or that his lien was lost, or that the property bought by him was not of sufficient value to pay the unpaid purchase money due him as well as the tax. Com. *v.* Morton, 19 Ky. L. Rep. 1882, 44 S. W. 647.

[f] **Cause of action for unlawful arrest** by sheriff, sufficiently stated as against a general demurrer, see Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219.

69. Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504. See People *v.* Beach, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873; National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123.

[a] **A complaint sufficiently alleges the official capacity** in which the officer acted, as against a general demurrer, when it states that the officer acting in his capacity as constable, arrested and imprisoned the plaintiff on a pretended charge of grand larceny. On such a charge, one of felony, he had authority, as a peace officer to make

is without jurisdiction to entertain the action,[70] or that there is a misjoinder of causes of action,[71] or that the suit is brought in the name of the wrong party.[72] Errors in matters of form in the complaint, as for example lack of technical averments concerning the signing, delivery and acceptance of the bond,[73] or the statement of matters by way of recital rather than directly[74] may be pointed out by special demurrer, in some jurisdictions.

(II.) Motion. — Certain objections to the pleadings may, as in other cases generally be raised by motion.[75]

(III.) Exclusion of Evidence. — Insufficiency of the complaint may be taken advantage of by objections to the introduction of evidence to sustain it,[76] but only where there is an entire omission of material facts.[77]

b. *Waiver of Objections.* — Errors in the pleadings in matters of form which do not go to the jurisdiction of the court or the cause of action, are waived if not properly objected to,[78] and are cured by the verdict,[79] and cannot be taken advantage of by motion for judgment non obstante veredicto.[80]

10. Amendments. — The plaintiff should be allowed, within certain limitations,[81] to amend his pleading.[82] Thus amendments may be made

an arrest without a warrant. Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

70. Buckholts State Bank *v.* Thallman (Tex.), 196 S. W. 687; Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119.

71. Ghiradelli *v.* Bourland, 32 Cal. 585; Buckholts State Bank *v.* Thallman (Tex.), 196 S. W. 687.

72. **Cal.**—Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12. **Ga.**—Hopkins *v.* Watts, 141 Ga. 345, 80 S. E. 1001; Chastain *v.* Winn (Ga. App.), 95 S. E. 473; Kirkland *v.* Southerland, 11 Ga. App. 538, 75 S. E. 832. **W. Va.**—Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948.

[a] **A bill in name of the county court** based upon the misapplication by the sheriff of the funds of such court is not demurrable on the ground that the suit is in the name of the county court instead of in the name of the state. Raleigh County Court *v.* Cottle, 81 W. Va. 469, 94 S. E. 948.

[b] **Failure to show for whose use** the suit is brought, does not render the declaration subject to demurrer. People *v.* Jamison, 157 Ill. App. 546.

[c] **Whether states attorney is authorized** to institute suit on sheriff's bond to recover tax money owing to municipalities, cannot be raised by demurrer. People *v.* Jamison, 157 Ill. App. 546.

73. Combs *v.* Eversole, 114 Ky. 222, 70 S. W. 638.

74. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694.

75. See generally the titles "**Motions;**" "**Certainty in Pleading;**" "**Striking Out and Withdrawal.**"

76. Ferrat *v.* Adamson, 53 Mont. 172, 163 Pac. 112.

77. State *v.* Johnson, 77 Minn. 267, 79 N. W. 968. See Fire Assn. *v.* Ruby, 60 Neb. 216, 82 N. W. 629.

[a] **Repetition of objection after amendment** is unnecessary where the amended pleading still states no cause of action against the sureties. Ferrat *v.* Adamson, 53 Mont. 172, 163 Pac. 112.

78. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634.

[a] **That matters are stated by way of recital** instead of directly, waived. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694.

79. Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634; State *v.* Nolte (Mo. App.), 187 S. W. 896. See the title "**Pleading.**"

80. Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634.

81. See generally the titles "**Amendments and Jeofails;**" "**New Cause of Action or Defense;**" "**Parties.**"

[a] **New cause of action** may not be introduced by amendment, see Com. *v.* Yeisley, 6 Pa. Super. 273.

82. **Ala.**—Albright *v.* Mills, 86 Ala. 324, 5 So. 591; Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177. **Cal.**—Felon-

in respect to parties,[83] or to correct defects in the allegations,[84] or to correct or add a verification.[85]

11. Dismissal. Discontinuance and Nonsuit. — Subject to the general rules elsewhere treated,[86] the court may for proper cause dismiss the proceedings,[87] and may grant a nonsuit under proper circumstances,[88] but not where there is evidence which justifies a judgment for at least nominal damages.[89]

12. Trial. — a. *Issues and Proof.* — The issues and proof in actions of the character here discussed are governed by the general rules elsewhere treated.[90] In respect to the burden of proof, the usual rules prevail,[91] and the party holding the affirmative of the issue must prove it.[92] The plaintiff must affirmatively establish the material issues, not admitted by the pleadings or otherwise, in respect to the proper execution of the bond,[93] the official capacity in which the officer acted,[94] the failure of the officer to do his duty,[95] and damage resulting to plaintiff as a result thereof,[96] unless the law presumes that the

icher *v.* Stingley, 142 Cal. 630, 76 Pac. 504. **Ind.**—Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899. **Pa.**—Com. *v.* Yeisley, 6 Pa. Super. 273; Beeson *v.* Com., 13 Serg. & R. 249.

83. Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177. See generally the title "**Parties.**"

[a] **Misnomer of plaintiff** corrected. Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177.

[b] **But a declaration in the name of the commonwealth** cannot be amended so as to introduce the name of the individual who was injured by the acts of the officer. Dunn *v.* Com., 14 Serg. & R. (Pa.) 431. But see 20 STANDARD PROC. 366, 963, 964.

84. Albright *v.* Mills, 86 Ala. 324, 5 So. 591; Com. *v.* Yeisley, 6 Pa. Super. 273.

[a] **Acts Done in Official Capacity.** Defective allegations in respect to the acts of the officer having been done in his official capacity, may be remedied by amendment. Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504.

[b] **To aver the elements of damages with greater particularity.** Com. *v.* Yeisley, 6 Pa. Super. 273.

85. Com. *v.* Yeisley, 6 Pa. Super. 273.

[a] **Adding verification** where the law requires it. Com. *v.* Yeisley, 6 Pa. Super. 273.

86. See the title "**Dismissal, Discontinuance and Non-Suit.**"

87. **La.**—Sanders *v.* Humphries, 143 La. 43, 78 So. 168. **Neb.**—Fire Assn. *v.* Ruby, 58 Neb. 730, 79 N. W. 723. **Wash.**—Greenius *v.* Moore, 99 Wash. 467, 169 Pac. 976.

88. Braselton *v.* Patrick, 133 Ga. 167, 65 S. E. 402. See State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502, and 7 STANDARD PROC. 672.

89. **Harris *v.* Black, 143 Ga. 497,** 85 S. E. 742; State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

[a] **It is reversible error** to compel a non-suit under such circumstances. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

90. See 4 STANDARD PROC. 522; 11 STANDARD PROC. 1036; and the titles "**Confession and Avoidance;**" "**Denials;**" "**Variance and Failure of Proof.**"

91. See generally 4 STANDARD PROC. 527; and ENCY. OF EV., titles "**Burden of Proof;**" "**Officers.**"

92. New Albany Wholesale Grocery Co. *v.* Wells, 114 Miss. 144, 74 So. 817; Butler *v.* Alcus, 51 Miss. 47.

93. **Ala.**—McClure *v.* Colclough, 5 Ala. 65. **Ind.**—State *v.* Sorrels, 60 Ind. 381. **Ore.**—Baker *v.* Huntington, 46 Ore. 275, 79 Pac. 187.

94. Robertson *v.* Glenn, 3 Baxt. (Tenn.) 164.

95. **Ala.**—Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749. **Idaho.**—Robinson *v.* Kinney, 3 Idaho 479, 31 Pac. 815. **Ind.** State *v.* Harper, 120 Ind. 23, 22 N. E. 80. **Md.**—Young *v.* State, 7 Gill & J. 253. **N. C.**—White *v.* Miller, 20 N. C. 50.

96. **Ala.**—Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346. **Ga.**—Beck & Gregg Hdw. Co. *v.* Knight, 121 Ga. 287, 48

plaintiff was injured, in which latter case it is incumbent upon the defendant to show the contrary.[97] And the burden is upon defendants also to prove matters of justification,[98] or, where the officer's duty to act is shown, matters excusing his failure to do so.[99] Where the defendant avers that the bond is not binding on him,[1] or that the acts complained of are not within the covenants of the bond,[2] he must prove the same.

b. *Questions of Law and Fact.* — The province of the court and jury is the same as in actions generally.[3] The former passes upon questions of law, and the latter upon matters of disputed fact,[4] such as the negligence of the officer under the circumstances,[5] or his good faith,[6] or other questions of disputed fact.[7]

S. E. 930, 3 L. R. A. (N. S.) 420. **Tex.** Everhart *v.* O'Bannon, 1 White & W. Civ. Cas., §1288.

[a] **Loss of Attachment Lien.** Where an officer is sued upon his bond for failure to record an attachment lien, the burden is upon the plaintiff to show that he lost his lien thereby. Neville *v.* Miller (Tex. Civ. App.), 171 S. W. 1109.

97. See *infra,* this note.

[a] **In a suit for failure to execute** final process, the burden is upon the defendant to mitigate damages or show that the plaintiffs were not injured by the breach of the official duty; this burden might be shifted and the presumption that plaintiffs were damaged rebutted by proof of facts mitigating the plaintiff's damages, or by showing that the money could not have been collected on fieri facias by the exercise of reasonable diligence. Beck & Gregg H. Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. (N. S.) 420; Sutton *v.* Griner (Ga. App.), 95 S. E. 1004; Ellis *v.* Blanks (Tex. Civ. App.), 25 S. W. 309.

98. **Ala.**—Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749. **Ga.**—Smith *v.* Banks, 60 Ga. 642. **Ia.**—Wadsworth & Co. *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788. **Miss.**—Dailey *v.* State, 56 Miss. 475. **Va.**—Sage *v.* Dickinson, 33 Gratt. (74 Va.) 361.

99. Klemm *v.* Bishop, 56 Ill. App. 613.

[a] **Excuse for Failure To Execute Process.**—Governor *v.* Campbell, 17 Ala. 566; Klemm *v.* Bishop, 56 Ill. App. 613.

[b] **Excuse for Failure To Turn Over Money.**—Hardee *v.* Dunn, 13 La. Ann. 161.

1. Dobbs *v.* Justices of Inferior Court, 17 Ga. 624.

2. Faulkner *v.* State, 9 Ark. 14.

3. See the title "**Province of Judge and Jury.**"

4. **Ala.**—Shipp *v.* Shelton, 193 Ala. 658, 69 So. 102; Governor *v.* Daily, 14 Ala. 469. **Md.**—Bruce *v.* State, 11 Gill & J. 382. **Pa.**—Snively *v.* Com., 40 Pa. 75. **Tex.**—Jacobs, Bernheim & Co. *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386. **Va.**—Ramsey's Admrs. *v.* McCue, 21 Gratt. (62 Va.) 349. **Wash.** Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158.

[a] **The liability of the officer is a** question for the jury where the evidence is in dispute, and should not be withdrawn from it by a charge of the court. Shipp *v.* Shelton, 193 Ala. 658, 69 So. 102.

5. Snively *v.* Com., 40 Pa. 75; Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158. See generally the title "**Negligence.**"

[a] **Whether in confining an insane suspect** in a room with other prisoners, the officer was negligent, for jury. Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158.

6. Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158.

7. Governor *v.* Daily, 14 Ala. 469.

[a] **Alterations in Bond.**—It is for the jury to ascertain the time when, by whom and with what intent an alteration apparent upon the face of the bond was made. Ramsey's Admrs. *v.* McCue, 21 Gratt. (62 Va.) 349. See also Jacobs, Bernheim & Co. *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386.

[b] **As to the time of day when**

c. *Res Judicata.* — A judgment obtained against the officer without fraud or collusion and after notice to the sureties and opportunity to defend is binding and conclusive upon the sureties[8] and on the officer[9] in an action on the bond. Even in the absence of notice a judgment against the principal is binding upon the sureties when it is provided in the bond that the sureties will answer for any judgment or pay all damages that may be awarded in an action brought against the principal.[10] But where the engagement is to answer in general terms for the faithful performance of the officer's duties, a judgment against such officer, given in the absence of notice and opportunity to the sureties to defend, will not conclude them,[11] and is not even prima facie evidence against the sureties.[12]

A judgment against a sheriff for misconduct of a deputy may be used as evidence by the sheriff in an action by him against the deputy on his bond as to the same transaction to show that there was a judgment and for the cause alleged,[13] but it cannot be used as evidence to show the misconduct of the deputy,[14] or any other ulterior fact.[15]

d. *Instructions.* — It is the duty of the court, when requested as

the bond was renewed and whether the officer received the process in question after such renewal. Bruce *v.* State, 11 Gill & J. (Md.) 382.

8. See Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119.

9. State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731.

[a] **Not Subject to Collateral Attack.**—State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731.

10. See Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647; Slattery *v.* Schapero, 217 Mass. 71, 104 N. E. 440, Ann. Cas. 1917D, 399; Dennie *v.* Smith, 129 Mass. 143.

[a] **The reason for the rule** has been given by the California court in the following language: "There can be no doubt that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact." Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647.

11. **Cal.**—Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647. **N. Y.**—Berry *v.* Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349. **Wash.**—Larson *v.* Deering, 97 Wash. 616, 166 Pac. 1119. **Va.** Munford *v.* Overseers of the Poor, 2 Rand. (23 Va.) 313.

See also United States and Meade, 9 Ariz. 209, 80 Pac. 326, and the title "**Res Judicata.**" But see Masser *v.* Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668.

12. Berry *v.* Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349.

[a] **That the judgment against the officer is admissible** in evidence against the sureties to establish a breach of the bond, see United States *v.* Meade, 9 Ariz. 209, 80 Pac. 326.

[b] **Where a third party brings replevin** against an officer to recover property seized on attachment, the judgment rendered considered prima facie evidence of the ownership and value of the property, in a subsequent suit upon the officer's bond. State *v.* Baird (Mo. App.), 186 S. W. 587.

13. See Manor *v.* Martin's Admr., 82 Ky. 242.

14. Mann *v.* Martin's Admr., 82 Ky. 242.

15. Mann *v.* Martin's Admr., 82 Ky. 242.

[a] **The ownership of the property** which the deputy is alleged to have wrongfully seized, cannot be proved by a record of a judgment against the sheriff. Mann *v.* Martin's Admr., 82 Ky. 242.

in other cases,[16] to properly instruct the jury upon the law of the case.[17] Such instructions should be confined to and embrace all the material issues,[18] and be warranted by the evidence.[19] And the court should, as in other cases, not violate the rule as to comment upon the facts.[20]

e. *Verdict.*[21] — The verdict must be sustained by the evidence[22] and cannot be upheld where it is for an amount so excessive as to indicate passion and prejudice on the part of the jury.[23] The court has power in a proper case to correct the verdict.[24]

13. New Trial. — The court may, as in other cases,[25] upon sufficient grounds, set aside the verdict and grant a new trial.[26]

14. Judgment. — a. *In General.* — Judgment must not be con-

16. See the title "**Instructions.**"

17. State *ex rel.* Dykes *v.* Hencken, 174 Fed. 624, 98 C. C. A. 378; Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558.

[a] **Instruction upon probable cause, held a proper one.** White *v.* Jansen, 81 Wash. 435, 142 Pac. 1140.

[b] **Capacity in Which Officer Acting.**—The instructions should properly inform the jury that liability on the officer's bond would arise only if the acts complained of were done by him in his official capacity. Gomez *v.* Scanlan, 155 Cal. 528, 102 Pac. 12.

[c] **Right of Officer To Demand Indemnifying Bond.**—It is error for the court to refuse an instruction to the effect that an officer called upon to levy an execution or to make a sale under a levy already made, cannot arbitrarily demand an indemnifying bond, but that the statute authorizes him to demand such a bond only in cases where upon a due consideration of the circumstances, a doubt might arise in the officer's mind as to whether the property was subject to execution. Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558.

18. Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488, 117 S. W. 558.

[a] **Belief of Constable.**—In trespass for levying on property of a third person, it is not proper to charge the jury that if the officer in making the levy believed he was performing his duty, and that he was not actuated by malice, but merely by a desire to perform his duty, that the jury should find for the defendant. Ewton *v.* McCracken, 9 Ala. App. 619, 64 So. 177.

19. State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44; Russey *v.* Wilson (Tex. Civ. App.), 202 S. W. 974.

[a] **Instruction as to Procuring Bail Bond.**—An instruction that after the plaintiff was taken into custody it was the duty of the sheriff to allow him reasonable time within which to procure bail before incarcerating him in jail is sufficient where there was no evidence that plaintiff was at any time prior to his incarceration ready to give bond. For where the evidence does not show that plaintiff was prepared to give bond, the court need not instruct the jury that it was the duty of the sheriff to fix the amount of the appearance bond and prepare the same in accordance with the law. Russey *v.* Wilson (Tex. Civ. App.), 202 S. W. 974.

20. White *v.* Jansen, 81 Wash. 435, 142 Pac. 1140, uncontroverted fact may be stated.

21. See generally the title "**Verdict.**"

22. **Mo.**—State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502. **Wash.**—Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158. **Wis.** Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825.

23. State *v.* Boepple, 198 Mo. App. 63, 198 S. W. 502; Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158, larger verdict against the bonding company than against the officer.

24. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825. See the title "**Verdict.**"

25. See the title "**New Trial.**"

26. Williams *v.* Thrall, 167 Wis. 410, 167 N. W. 825, compromise verdict.

trary to the evidence,[27] and must be supported by the pleadings.[28] Under some statutes judgment shall be entered in favor of the state or the people,[29] and is for the benefit, not only of the person on whose relation the suit is brought, but of all others who are or may become interested in the enforcement of the bond.[30]

b. *Amount.* — Judgment under some statutes is entered for the full penalty of the bond,[31] and cannot exceed such penalty,[32] but under others it is entered for the actual damages sustained,[33] or for the full amount of money specified in the writ of execution in respect to which the officer is in default.[34] The recovery against the parties on the bond cannot exceed that against the officer for they are liable only in case of the negligence of the officer and to the same extent.[35]

Nominal Damages. — Even though no substantial damages accrued to the plaintiff on account of the officer's default the plaintiff is entitled to a judgment for nominal damages[36] which carries with it the costs of

27. National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123.

28. Kindell-Clark Drug Co. *v.* Myers (Tex. Civ. App.), 140 S. W. 463.

[a] **A judgment against the sureties on the indemnity bond** in favor of the sheriff cannot be rendered in an action against the sheriff and his sureties on his official bond, where there are no allegations of fact or prayers for relief in any pleading found in the record, sufficient to support such judgment. Kindell-Clark Drug Co. *v.* Myers (Tex. Civ. App.), 140 S. W. 463.

29. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

30. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

[a] **If others are damaged by the misfeasance** or nonfeasance of the officer, they may by the institution of proceedings which the statute prescribes, procure executions on the same judgment for the amounts severally due them; and after successive executions have exhausted the judgment the sureties are discharged. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

31. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662. See 4 STANDARD PROC. 532.

[a] **To be discharged by payment of the real damages** assessed by the jury, see Hostler's Admrs. *v.* Patterson, 2 N. C. 216.

[b] **In Colorado** judgment is entered for the full penalty in favor of the people of the state, but execution can issue only for the amount found to be due with interest and costs. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

32. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

33. **Ga.**—Harris *v.* Black, 143 Ga. 497, 85 S. E. 742. **Ill.**—People *v.* Schwartz, 151 Ill. App. 190. **Pa.**—McMicken *v.* Com., 58 Pa. 213. **Wash.** Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158.

See 4 STANDARD PROC. 537.

[a] **Where officer fails to return execution,** the judgment is limited to the damages actually sustained. State *v.* Nolte (Mo. App.), 187 S. W. 896.

[b] **Smart money,** see Harris *v.* Black, 143 Ga. 497, 85 S. E. 742.

34. State *v.* Case, 77 Mo. 247; State *v.* Nolte (Mo. App.), 187 S. W. 896; A. F. Shapleigh Hdw. Co. *v.* Pritchard, 42 Okla. 252, 140 Pac. 1136.

[a] **Interest** on the amount of the execution allowed. A. F. Shapleigh Hardware Co. *v.* Pritchard, 42 Okla. 252, 140 Pac. 1136.

[b] **The full amount of the judgment** named in the execution is recoverable where defendant fails to execute or levy the same according to law or to sell the property taken. State *v.* Nolte (Mo. App.), 187 S. W. 896.

35. Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158.

36. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11; State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731; State *v.* Dickmann, 146 Mo. App. 396, 124 S. W. 29; State *v.* Harrington, 28 Mo. App. 287.

[a] **Officer's False Return.**—"The doctrine obtains with full force when the cause of action relied upon relates

the litigation,[37] and is therefore a substantial right.[38]

Costs and Expenses. — Costs and expenses are recoverable.[39]

e. *Conclusiveness on Others.* — A judgment rendered upon a constable's bond does not conclude strangers to the proceeding and constitutes no bar to a subsequent suit on the bond by another plaintiff.[40]

15. Enforcement of Judgment.[41] — Where judgment is entered for the full penalty, execution issues for the amount due to the party injured.[42]

16. Review. — The proceedings are reviewable by appeal[43] or writ of error,[44] according to the practice of the jurisdiction. The usual rules in respect to the nature and scope of the review are applicable. It must be confined to questions presented by the record[45] and to the consideration of errors of a prejudicial nature.[46] A reversal may be granted where the verdict is so excessive as to indicate prejudice or passion on the part of the jury,[47] or for the court's action in compelling an involuntary non-suit where the plaintiff was entitled to judgment for nominal damages.[48]

to a false return of mesne process.'' State *ex rel.* Armour P. Co. *v.* Dickmann, 146 Mo. App. 396, 124 S. W. 29. See also State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731.

37. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

38. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

[a] **Reversal** for denial of nominal judgment for false return. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

39. Harris *v.* Black, 143 Ga. 497, 85 S. E. 742. See generally the title ''**Costs.**''

40. People *v.* Title Guar. & Surety Co., 156 Ill. App. 488.

41. See generally the title ''**Judgments and Decrees, Enforcement of.**''

42. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

[a] **When judgment is rendered on a United States marshal's bond** for the amount of the penalty, it stands as a security to all who may be injured by the default of the marshal. Complaints may be made subsequent to the judgment in proper form, and the amounts being ascertained on issues made to the court or jury, executions may be ordered until the penalty shall be exhausted. Wetmore *v.* Rice, 1 Biss. (U. S.) 237, 29 Fed. Cas. No. 17,468.

43. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11; Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158; Greenius *v.* Moore, 99 Wash. 467, 169 Pac. 976.

44. **Colo.**—Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076. **Ga.** McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36. **W. Va.**—State *v.* Keadle, 63 W. Va. 645, 60 S. E. 798.

45. State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44.

[a] **A question as to allowing a set-off** cannot be raised for the first time on appeal. State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44.

[b] **But the failure of the complaint to state a cause of action** upon the bond, may be raised in the appellate court though no objection made on that ground below. People *v.* Pacific Surety Co., 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577.

46. National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123.

[a] **Erroneous Ruling Upon Exceptions to Petition.**—Where defendant excepted to the allegations of the petition setting forth that the officer was acting in an official capacity, on the ground that they were mere conclusions of the pleader, any error in overruling the exceptions is harmless, where, though the statements objected to be eliminated, the petition states a good cause of action. National Surety Co. *v.* Masters (Tex. Civ. App.), 200 S. W. 1123.

47. Kusah *v.* McCorkle, 100 Wash. 318, 170 Pac. 1023, L. R. A. 1918C, 1158.

48. State *v.* Fralick, 154 Mo. App. 690, 136 S. W. 11.

Law of the Case. — The general rules as to law of the case[49] are applicable to this class of cases.[50]

XIII. CRIMINAL PROCEEDINGS AGAINST. — A. In General. A sheriff, constable or marshal may so conduct himself in office as to render himself liable to criminal prosecution.[51] Thus a criminal proceeding may be instituted against him for failing to perform his duty in preventing public offenses,[52] or for his negligence or default in permitting an escape,[53] or in executing and returning civil[54] or criminal[55] process, or for his failure to account for money collected,[56] or his falsely obtaining money under cover of his office,[57] or any other criminal neglect or misconduct in office.[58]

B. Indictment, Information or Complaint. — **1. In General.** The criminal act of the officer may be prosecuted, as other misdemeanors and felonies generally,[59] by indictment,[60] information[61] or complaint,[62] according to the practice in the particular jurisdiction.

49. See the title "**Law of the Case.**"

50. Greenius *v.* Moore, 99 Wash. 467, 169 Pac. 976, adjudication as to official capacity.

51. **U. S.**—United States *v.* Evans, 1 Cranch C. C. 55, 25 Fed. Cas. No. 15,064. **Ala.**—Doyle *v.* State, 49 Ala. 28. **Ark.**—Bledsoe *v.* State, 130 Ark. 122, 197 S. W. 17; State *v.* Williams, 109 Ark. 465, 161 S. W. 159. **Ga.** Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383. **Ill.**—Kruse *v.* People, 84 Ill. App. 620. **Ind.**—Stewart *v.* State, 4 Blackf. 171; State *v.* Williams, 4 Ind. 393. **Ky.** Fields *v.* Com., 14 Ky. L. Rep. 207. **Me.**—State *v.* Darling, 89 Me. 400, 36 Atl. 632. **Md.**—Mohler *v.* State, 120 Md. 325, 87 Atl. 671. **N. Y.**—People *v.* Weston, 4 Park. Cr. 226. **N. C.** State *v.* Berry, 169 N. C. 371, 85 S. E. 387; State *v.* Garland, 134 N. C. 749, 47 S. E. 426; State *v.* Johnston, 2 N. C. 293; State *v.* Joyce, 2 N. C. 43. **Pa.** Com. *v.* Shields, 50 Pa. Super. 1. **Tex.** Pippin *v.* State, 36 Tex. 696. **Va.**—Old *v.* Com., 18 Gratt. (59 Va.) 915.

52. See *infra*, this note.

[a] **Failure To Seize Gambling Paraphernalia.**—Bledsoe *v.* State, 130 Ark. 122, 197 S. W. 17; State *v.* Williams, 109 Ark. 465, 161 S. W. 159.

53. See the title "**Prisons and Prisoners.**"

54. State *v.* Berry, 169 N. C. 371, 85 S. E. 387.

[a] **For Failure To Return an Execution.**—State *v.* Berry, 169 N. C. 371, 85 S. E. 387.

[b] **Levying on Exempt Property.** Pippin *v.* State, 36 Tex. 696.

55. Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383; State *v.* Furguson, 76 N. C. 197.

[a] **Warrant of Arrest.** — **Ga.** — Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383. **Ind.**—Stewart *v.* State, 4 Blackf. 171. **N. Y.**—People *v.* Weston, 4 Park. Cr. 226.

56. **Ark.**—Mahar *v.* State, 28 Ark. 207. **Ill.**—Kruse *v.* People, 84 Ill. App. 620. **Ind.**—State *v.* Longley, 10 Ind. 482. **Pa.**—Com. *v.* Shields, 50 Pa. Super. 1.

57. Mohler *v.* State, 120 Md. 325, 87 Atl. 671.

58. See *infra*, this note.

[a] **Unlawfully Speculating in County Claims.**—Fields *v.* Com., 14 Ky. L. Rep. 207; State *v.* Garland, 134 N. C. 749, 47 S. E. 426.

[b] **For receiving a bribe for the nonperformance of a duty pertaining to his office.** Old *v.* Com., 18 Gratt. (59 Va.) 915.

59. See generally the title "**Indictment and Information.**"

60. **Ark.**—Bledsoe *v.* State, 130 Ark. 122, 197 S. W. 17. **Ga.**—Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383. **Ill.** Kruse *v.* People, 84 Ill. App. 620. **Ky.** Fields *v.* Com., 14 Ky. L. Rep. 207. **Md.**—Mohler *v.* State, 120 Md. 325, 87 Atl. 671. **N. Y.**—People *v.* Weston, 4 Park. Cr. 226. **N. C.**—State *v.* Berry, 169 N. C. 371, 85 S. E. 387; State *v.* Garland, 134 N. C. 749, 47 S. E. 426. **Pa.**—Com. *v.* Shields, 50 Pa. Super. 1.

61. See generally 12 Standard Proc. 83.

62. State *v.* Darling, 89 Me. 400, 36

2. Sufficiency of. — The indictment, information or complaint should charge the elements of the crime,[63] laying the charge directly and positively and not inferentially.[64] It is ordinarily sufficient if the offense is set forth in the terms and language of the statute creating it.[65] An indictment for official negligence in not executing a warrant of arrest must set out a warrant legal upon its face,[66] and show that the justice who issued the writ had jurisdiction.[67]

Intent. — A criminal or corrupt intent upon the part of the officer should be alleged[68] unless the crime is complete without such intent.[69]

Joinder of Offenses. — Several related acts of the same nature so connected that they form one criminal transaction may be charged in one count of the indictment,[70] even though separately considered they are distinct offenses.[71]

Atl. 632. See generally 12 STANDARD PROC. 122, 286, 488, 565.

63. **Ala.**—Doyle *v.* State, 49 Ala. 28. **Ill.**—Kruse *v.* People, 84 Ill. App. 620. **Ind.**—State *v.* Williams, 4 Ind. 393; Stewart *v.* State, 4 Blackf. 171. **Md.** Mohler *v.* State, 120 Md. 325, 87 Atl. 671.

[a] **That moneys were received by the officer in his official capacity** must be averred in an indictment against him for failure to account for moneys received. Doyle *v.* State, 49 Ala. 28.

64. State *v.* Darling, 89 Me. 400, 36 Atl. 632; People *v.* Weston, 4 Park. Cr. (N. Y.) 226.

[a] **Charging a Failure To Make Arrest.**—Where the officer is charged with violating his duty in neglecting to arrest parties for violating the law, there should be a specific averment that the parties, or some of them, were guilty of a violation of the law. State *v.* Darling, 89 Me. 400, 36 Atl. 632.

[b] **Alleging Knowledge.**—The allegation of knowledge on the part of the officer that the parties whom he is charged with failure to arrest were violators of the law is not directly and positively averred by an allegation "with knowledge that" they "were violators of the law." State *v.* Darling, 89 Me. 400, 36 Atl. 632.

65. Kruse *v.* People, 84 Ill. App. 620. See 12 STANDARD PROC. 447.

66. Stewart *v.* State, 4 Blackf. (Ind.) 171; People *v.* Weston, 4 Park. Cr. (N. Y.) 226.

67. People *v.* Weston, 4 Park. Cr. (N. Y.) 226.

[a] **The facts conferring jurisdiction upon the justice of the peace** or other inferior court to issue the warrant must be pleaded. It must appear that a complaint was made before him, on oath, that the criminal offense had been committed, that he examined the complainant on oath, and found that there was cause to suspect the person named in the warrant as having committed the offense, and therefore issued it. People *v.* Weston, 4 Park. Cr. (N. Y.) 226. But see Stewart *v.* State, 4 Blackf. (Ind.) 171, holding such allegations unnecessary.

68. State *v.* Williams, 4 Ind. 393; Mohler *v.* State, 120 Md. 325, 87 Atl. 671. See 12 STANDARD PROC. 397.

69. State *v.* Berry, 169 N. C. 371, 85 S. E. 387. See 12 STANDARD PROC. 400.

[a] **An indictment for failure to return process** in a civil action need not charge intent. State *v.* Berry, 169 N. C. 371, 85 S. E. 387.

70. Mohler *v.* State, 120 Md. 325, 87 Atl. 671. See 12 STANDARD PROC. 499, et seq.

[a] **A count is not bad for duplicity** which charges that the constable wrongfully accused one of crime, obtained a warrant for his arrest, took him before a justice of the peace, and there coerced him to pay a sum of money where none was due. "The particular misconduct with which the appellant was charged was that he corruptly obtained money under cover of his office. This was clearly the charge he was called upon to meet. The other averments in the count, although they may have charged distinct and separate offenses, were only recitals of the means taken by him to accomplish the end." Mohler *v.* State, 120 Md. 325, 87 Atl. 671, 672.

71. Mohler *v.* State, 120 Md. 325, 87 Atl. 671.

XIV. REMOVAL FROM OFFICE.[72] — The statute may authorize the removal of the sheriff or constable from office for misconduct or neglect of duty.[73] Consequently the court may, upon petition of the state,[74] order the removal of a sheriff or constable who fails to perform his required duty in preventing public offenses,[75] such as breaches of the law against the sale of intoxicating liquor.[76]

XV. PROCEEDINGS BY THE OFFICER. — A. To Recover or Protect Possession of Property. — **1. In General.** — A sheriff, constable or marshal has a special title in property held by him under legal process, to protect which he may maintain appropriate proceedings in the courts.[77] His actionable interest in such property attaches only upon levy thereon[78] under valid process,[79] pursuant to

72. See generally the title "**Officers.**"

73. State *ex rel.* Thompson *v.* Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889, *construing* ch. 11, Acts 1915.

74. State *ex rel.* Thompson *v.* Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889. See 20 Standard Proc. 788.

[a] **Petition in chancery** filed by the attorney general of the state. State *ex rel.* Thompson *v.* Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889.

75. State *ex rel.* Thompson *v.* Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889.

76. State *ex rel.* Thompson *v.* Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889.

[a] **It is no defense** to a petition for removal of the sheriff for failure to prevent the sale of intoxicating liquors, that the state was proceeding against the offenders by injunction suits, or that the officials of the criminal court were derelict in the discharge of their duties in enforcing the law against such offenders. State *ex rel.* Thompson *v.* Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889.

77. **Ill.**—Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. 396; Mulheisen *v.* Lane, 82 Ill. 117; Gates *v.* People, 6 Ill. App. 383. **Ind.**—Dunkin *v.* McKee, 23 Ind. 447. **Ky.**—Williams *v.* Herndon, 12 B. Mon. 484, 54 Am. Dec. 551. **Me.** Walker *v.* Foxcroft, 2 Me. 270. **Mass.** Polley *v.* Lenox Iron Works, 4 Allen 329; Ladd *v.* North, 2 Mass. 514; Dearborn *v.* Kelley, 3 Allen 426. **Minn.** Clark *v.* Norton, 6 Minn. 412. **N. Y.** Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628. **N. C.**—Hampton *v.* Brown, 35 N. C. 18. **Ohio.**—Wadsworth *v.* Parsons, 6 Ohio St. 449. **Pa.**—Longenecker *v.* Zeigler, 1 Watts 252, 302. **S. C.**—Alexander *v.* Collins, 3 Rich. L. 62. **Utah.** Burton *v.* The Winsor Utah Silver Min. Co., 2 Utah 240. **Vt.**—Wheeler *v.* Selden, 62 Vt. 310, 20 Atl. 197; West *v.* Thompson, 27 Vt. 613; Stanton *v.* Hodges, 6 Vt. 64. **Wis.**—Tronson *v.* Robson, 37 Wis. 353; Martin *v.* Watson, 8 Wis. 315.

[a] "**The reason** why the sheriff has the action is, that the debtor is discharged and the sheriff becomes liable to the value of the goods and therefore the law vests the property in him." Robins *v.* Brown, 32 La. Ann. 430; Hampton *v.* Brown, 35 N. C. 18. To same effect, Ladd *v.* North, 2 Mass. 514; Collins *v.* Smith, 16 Vt. 9.

[b] **Consequently the right of action in the officer is limited by the degree of responsibility** which may result to him by reason of injury to, or loss of, the property and this responsibility may be diminished or prevented altogether where after the property is attached the creditor settles with the debtor. Robins *v.* Brown, 32 La. Ann. 430.

78. Mulheisen *v.* Lane, 82 Ill. 117; Brian *v.* Strait, Dudley (S. C.) 19.

[a] **The mere right to levy** upon property gives the officer no right in the property itself and until he has reduced it to possession by levy, he cannot maintain actions in respect thereto. Mulheisen *v.* Lane, 82 Ill. 117.

79. Clark *v.* Norton, 6 Minn. 412.

[a] **If the process be void,** he acquires no title and cannot be liable over to the plaintiff at whose suit the process issued, and consequently cannot be permitted to maintain an action

which he acquires actual or constructive possession.[80]

2. Form of Remedy. — Against one who disturbs his possession of property thus held by him under process of the law, the officer may proceed in trespass for damages,[81] or in trover for its value if converted,[82] or he may recover the specific property itself in replevin,[83] but he cannot have the wrongdoer proceeded against for contempt.[84]

3. Parties.[85] — The action is properly brought in the name of the officer whose property in, or possession of, the goods is disturbed,[86] even though his incumbency may have terminated.[87] A deputy who has possession of property under process may sue in his own name to protect his interest,[88] but according to some decisions the deputy

for the recovery of the property or its value. Clark *v.* Norton, 6 Minn. 412.

80. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

[a] **For property in the constructive possession** (1) of the officer when converted he may maintain the suit. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329. (2) Thus where the officer attached bulky property and instead of keeping actual possession of it, deposited a copy of the writ and the return of the attachment in the town clerk's office in accordance with the statute, he may maintain conversion in respect thereto. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

81. **Ill.**—Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. 396; Garner *v.* Willis, 1 Ill. 368; Gates *v.* People, 6 Ill. App. 383. **La.**—Paul *v.* Hoss, 28 La. Ann. 852. **Me.**—Walker *v.* Foxcroft, 2 Me. 270. **Mass.**—Brownell *v.* Manchester, 1 Pick. 232; Ladd *v.* North, 2 Mass. 514. **N. Y.** Earl *v.* Camp, 16 Wend. 562. **N. C.** Hampton *v.* Brown, 35 N. C. 18. **Vt.** Fletcher *v.* Cole, 26 Vt. 170; Stanton *v.* Hodges, 6 Vt. 64. **Wis.**—Martin *v.* Watson, 8 Wis. 315.

See generally the title "**Trespass.**"

82. **Mass.** — Polley *v.* Lenox Iron Works, 4 Allen 329; Ladd *v.* North, 2 Mass. 514. **Nev.**—Foulks *v.* Pegg, 6 Nev. 136. **N. H.**—Rochester Lumb. Co. *v.* Locke, 72 N. H. 22, 54 Atl. 705; Johnson *v.* Grand Trunk Ry., 44 N. H. 626; Lathrop *v.* Blake, 23 N. H. 46. **N. Y.**—Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539; Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628. **N. C.** Hampton *v.* Brown, 35 N. C. 18. **Ohio.** Wadsworth *v.* Parsons, 6 Ohio 449. **S. C.**—Alexander *v.* Collins, 3 Rich. L. 62. **Utah.**—Burton *v.* The Winsor Utah Silver Min. Co., 2 Utah 240. **Vt.** Wheeler *v.* Selden, 62 Vt. 310, 20 Atl. 197; West *v.* Thompson, 27 Vt. 613; Collins *v.* Smith, 16 Vt. 9; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711. **Wis.**—Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408; Tronson *v.* Robson, 37 Wis. 353.

See generally the title "**Trover and Conversion.**"

[a] **Trover Against a Receiptor.** Williams *v.* Herndon, 12 B. Mon. (Ky.) 484; Phelps *v.* Gilchrist, 30 N. H. 171.

83. **Ill.**—Mulheisen *v.* Lane, 82 Ill. 117. **Ind.**—Dunkin *v.* McKee, 23 Ind. 447; Fitch *v.* Dunn, 3 Blackf. 142. **Mass.** Gordon *v.* Jenney, 16 Mass. 465. **Minn.** Clark *v.* Norton, 6 Minn. 412. **N. Y.** Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628; Rue *v.* Perry, 63 Barb. 40. **Ohio.** Pugh *v.* Calloway, 10 Ohio St. 488.

See generally the title "**Replevin.**"

84. Gates *v.* People, 6 Ill. App. 383.

85. See generally the title "**Parties,**" and titles dealing with the particular form of action in question.

86. Smith *v.* Wadleigh, 18 Me. 95.

[a] **The creditor** has no such interest in the property as will enable him to sue in his own name. Ladd *v.* North, 2 Mass. 514.

87. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

[a] **Where the officer attaches property and resigns** before recovery of judgment in the suit he may sue in his own name for a conversion of such property while in his possession and before judgment. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

88. **Me.**—Walker *v.* Foxcroft, 2 Me. 270. **Mass.**—Gordon *v.* Jenney, 16 Mass. 465; Polley *v.* Lenox Iron Works, 4 Allen 329. **Utah.**—Burton *v.* The Winsor Utah Silver Min. Co., 2 Utah 240. **Vt.**—West *v.* Thompson, 27 Vt. 613; Stanton *v.* Hodges, 6 Vt. 64.

acquires no special title in goods seized by him; his acts are considered the acts of his principal and the latter alone can maintain the proceeding.[89]

Joinder of Parties. — Where the officer and his deputy are jointly and severally liable for the acts of the deputy, they may join in an action to recover or protect property levied upon by the deputy.[90] Two officers cannot join in an action for the conversion of property seized by them under separate executions.[91]

4. Pleading. — The pleadings are in a general way governed by the rules elsewhere discussed in titles dealing with trespass,[92] trover and conversion,[93] and actions for the specific recovery of property.[94] A right in plaintiff to maintain the action must appear from his pleading,[95] and he must show not only that he held the property under a process regular on its face,[96] but also that the court or officer had jurisdiction to issue the same.[97]

B. To Recover Money Paid Out. — Where the officer has through mistake or coercion paid out money which he holds by virtue of his office, he is entitled to recover the same in an appropriate proceeding,[98] such as an action for money had and received.[99] Such action is maintainable in the name of the sheriff or constable although the money was paid out by a deputy.[1]

C. Collection of Fines.[2] — An officer who takes a note in payment of a fine which it is his duty to collect, may prosecute an action for the collection of the note.[3]

D. Suits in Aid of Process. — A sheriff or constable may maintain an equitable proceeding to enable him to reach money or other effects fraudulently disposed of by a debtor against whom he holds a writ of attachment, execution or other similar process,[4] but he has no stand-

89. Hampton *v.* Brown, 35 N. C. 18. See also Terwilliger *v.* Wheeler, 35 Barb. (N. Y.) 620.

[a] **The deputy is not a bailee** of the sheriff in the sense of having a possession of his own, but merely the servant of his superior and holds for him. Hampton *v.* Brown, 35 N. C. 18.

90. Burton *v.* The Winsor Utah Silver Min. Co., 2 Utah 240.

91. Warne *v.* Rose, 5 N. J. L. 809.

92. See generally the title **"Trespass."**

93. See generally the title **"Trover and Conversion."**

94. **See the titles "Detinue;" "Replevin."**

95. Kelley *v.* Breusing, 32 Barb. (N. Y.) 601; Smith *v.* Joiner, 1 D. Chipm. (Vt.) 62.

[a] **It is cause for demurrer** that the pleading shows on its face that plaintiff has no right to maintain the action. Smith *v.* Joiner, 1 D. Chip. (Vt.) 62.

[b] As where it is brought by the deputy sheriff instead of by the sheriff. Smith *v.* Joiner, 1 D. Chip. (Vt.) 62.

96. Clark *v.* Norton, 6 Minn. 412.

97. Clark *v.* Norton, 6 Minn. 412.

98. Britton *v.* Frink, 3 How. Pr. (N. Y.) 102, 4 How. Pr. 144.

99. Britton *v.* Frink, 3 How. Pr. (N. Y.) 102, 4 How. Pr. 144. See generally the titles **"Assumpsit;" "Money Counts."**

[a] **An excess of costs paid to an attorney** on the settlement of a suit may be recovered by the officer in an action for money had and received. Britton *v.* Frink, 3 How. Pr. (N. Y.) 102, 4 How. Pr. 144.

1. Britton *v.* Frink, 3 How. Pr. (N. Y.) 102, 4 How. Pr. 144.

2. **As to enforcement of fines** generally, see the title **"Penalties, Forfeitures and Fines."**

3. Wilson *v.* Chaney, 117 Ark. 287, 174 S. W. 564.

4. Kelly *v.* Lane, 42 Barb. (N. Y.)

ing in court to institute a creditor's suit to reach the proceeds of property assigned for the benefit of creditors, which he could not otherwise attach as the debtor's property,[5] nor can he maintain an action in his own name to recover a sum owing to the attachment debtor by a third party.[6]

E. To Enforce Purchase of Property. — An officer has power in a proper case to compel compliance with terms of a sale made by him.[7] He must, however, have a real and actual interest in the matter in controversy,[8] and a proceeding to enforce the purchaser to comply with the sale cannot be maintained by an officer whose agency in the matter has terminated by reason of his having returned the writ under which he acted.[9]

F. Action Upon Indemnity Bonds. — The remedy which sheriffs, constables and marshals have upon indemnity bonds is treated elsewhere in this article.[10]

594, 18 Abb. Pr. 229, 28 How. Pr. 128. See also Mechanics' & Traders' Bank *v.* Dakin, 51 N. Y. 519; Kelly *v.* Breusing, 33 Barb. (N. Y.) 123.

[a] **There is no distinction in principle** between the rule which permits the sheriff to impeach the title of a fraudulent assignee of a debtor in an attachment, in order to maintain his seizure of property belonging to such debtor, in an action brought against the sheriff and permitting the affirmative assertion of fraud in an action brought by the sheriff to recover debts, credits or effects of the debtor under a title fraudulent as against creditors. Kelley *v.* Lane, 42 Barb. (N. Y.) 594, 18 Abb. Pr. 229, 28 How. Pr. 128.

5. Lawrence *v.* Bank of Republic, 35 N. Y. 320, 31 How. Pr. 502.

6. Sublette *v.* Melhado, 1 Cal. 104.

7. Succession of Caldwell, 15 La. Ann. 617. See 16 Standard Proc. 197, 827, 830.

8. Succession of Caldwell, 15 La. Ann. 617.

9. Succession of Caldwell, 15 La. Ann. 617.

[a] **A rule to show cause** why purchasers at a sheriff's sale should not comply with the terms and conditions of the sale cannot be maintained by the sheriff after he executed the deed, delivered the notes of the purchaser to the party entitled to them, and returned the writ into court. Succession of Caldwell, 15 La. Ann. 617.

10. See *supra*, X.

SHERIFF'S SALE. — See **Judgments and Decrees, Enforcement of; Judicial Sales.**

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CROSS-REFERENCES:

Admiralty;
Collision;
Customs Duties;
Freight Carriers;
Insurance;
Maritime Liens;
Navigable Waters;
Passengers;
Penalties, Forfeitures and Fines;
Salvage;
Seamen;
Wharves.

For forms, see 9 STANDARD PROC. 1149, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROCEEDINGS GENERALLY BY OR AGAINST VESSEL OR OWNER.[1] — A. ACTIONS EX CONTRACTU. — 1. **Generally.** — Admiralty has jurisdiction of contracts which are maritime in their nature,[2] and suits for their enforcement follow the rules and principles elsewhere discussed.[3]

1. **As to jurisdiction and procedure generally** in proceedings to enforce maritime liens against vessels, see the title "**Admiralty.**"

Attachment of vessel under state statute, see 3 STANDARD PROC. 279.

As to proceedings in collision cases, see the title "**Collision.**"

As to proceedings for seamen's wages, see the title "**Seamen.**"

2. See 1 STANDARD PROC. 383, et seq.

3. See the title "**Admiralty**" and *infra,* this article.

2. Actions Based on Necessaries Furnished. — Proceedings to recover for supplies or necessaries furnished a vessel are generally in rem to enforce the lien.[4] By act of congress it is now provided that any person furnishing supplies, repairs, or other necessaries to a vessel, whether foreign or domestic, shall have a maritime lien enforceable in rem, and that it shall not be necessary to allege or prove that credit was given to the vessel,[5] but this lien may be waived or otherwise lost and a personal action, in the nature of assumpsit,[6] brought against the owner or owners in admiralty or in a state or common law court.[7] In an action against the pro hac vice owner of a vessel for supplies, the real owner is not a necessary party defendant.[8] The general rules applicable to actions in personam, in the state courts or in admiralty as the case may be, must be followed in such actions.[9]

3. Tonnage Duties and Overcharges. — When the collector of a port permits the departure of a vessel without collecting its tonnage duties, the government may recover the same in an action in admiralty[10] against the owner[11] or the vessel.[12] In case of the collection of an erroneous amount, the owner may appeal from the collector, on

4. See the title "**Maritime Liens.**"

5. Act June 23, 1910, c. 373, §1; 36 St. at L. 604; Comp. St. 1916, §7783. See also The Rupert City, 213 Fed. 263.

6. See Act June 23, 1910, c. 373, §4; 36 St. at L. 605, Comp. St., 1916, §7786; Willinks *v.* Hollingsworth, 6 Wheat. (U. S.) 240, 5 L. ed. 251.

[a] **Giving credit to owner of ship** for the supplies furnished to it waives the right to a lien. The Lucille, 208 Fed. 424.

[b] **Pleading Waiver.**—See The Transit, 217 Fed. 87.

7. **U. S.**—Henslee *v.* West Kentucky Coal Co., 241 Fed. 609, 154 C. C. A. 367. See Borland *v.* Zittlosen, 27 Fed. 131. **La.**—State *v.* Voorhies, 39 La. Ann. 499, 2 So. 37, 4 Am. St. Rep. 274. **Mass.**—Luce *v.* Hadley, 119 Mass. 229; Bass *v.* O'Brien, 12 Gray 477. **N. C.**—Kornegay *v.* Farmers' & M. S. B. Co., 107 N. C. 115, 12 S. E. 123. **Pa.**—Lincoln *v.* Wright, 23 Pa. 76, 62 Am. Dec. 316. **Wis.**—Weston *v.* Morse, 40 Wis. 455.

Admiralty jurisdiction, see 1 STANDARD PROC. 388.

As to personal actions against a master for supplies, see *infra*, III.

[a] **The fact that the owner has remitted to his agent** money to pay for such supplies, does not prevent the materialman from suing. Berwind *v.* Schultz, 28 Fed. 110.

8. Scott *v.* Grand Trunk Ry. Co., 51 N. Y. 655.

9. See *infra* this note, and the title "**Admiralty.**"

[a] **The fact that the vessel was chartered** and under the exclusive control of the charterer at the time the materials and supplies were furnished does not have to be pleaded to be available as a defense. Fish *v.* Sullivan, 40 La. Ann. 193, 3 So. 730. See also Pontchartrain R. Co. *v.* Heirne, 2 La. Ann. 129.

[b] **Province of Judge and Jury.** What are necessaries is a question of fact for the jury. Burquin & Co. *v.* Flinn, 1 McCord (S. C.) 316.

[c] **Instructions** must be in accordance with the law applicable to the case. Bliss *v.* Ropes, 9 Allen (Mass.) 339.

10. The George T. Kemp, 2 Low. 477, 10 Fed. Cas. No. 5,341.

11. United States *v.* Hathaway, 3 Mason 324, 26 Fed. Cas. No. 15,326.

[a] **Consignee.**—An action to recover tonnage duties will not lie against a mere consignee who has no proprietary interest in the vessel. United States *v.* Hathaway, 3 Mason 324, 26 Fed. Cas. No. 15,326.

12. The George T. Kemp, 2 Low. 477, 10 Fed. Cas. No. 5,341.

his refusal to correct the error, to the commissioner of navigation,[13] and if dissatisfied with the commissioner's decision, which is final in his department, its correctness may be tested in an action to recover the overcharge.[14]

B. ACTIONS EX DELICTO. — **1. Jurisdiction.** — Locality alone seems to be the sole test of admiralty jurisdiction in tort cases.[15] The "saving clause" of the judiciary act, however, operates to give concurrent jurisdiction to non-maritime courts,[16] and as amended this act makes available to suitors the state workmen's compensation acts,[17] thereby nullifying, in part, the effect of recent decisions by the supreme court greatly restricting the operative effect of the saving clause.[18]

2. Procedure. — a. *Generally.* — The pleadings and procedure in tort cases involving ships, follow the rules elsewhere discussed.[19]

b. *Hearing or Trial.* — The trial or hearing proceeds according to the rules elsewhere treated.[20] Disputed questions of fact, in case of a trial by jury, are for the jury to determine,[21] such as the defendant's negligence,[22] contributory negligence of the plaintiff,[23] and proximate or remote cause.[24]

13. In re Laidlaw, 42 Fed. 401.

14. Laidlaw *v.* Abraham, 43 Fed. 297; Ripley *v.* Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

15. See Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. ed. 1208, 51 L. R. A. (N. S.) 1157. *Compare* 1 STANDARD PROC. 394.

16. Judicial Code sec. 256; U. S. Comp. St., 1916, §1233, amended by Act Oct. 6, 1917, c. 97, §2.

17. Act Oct. 6, 1917, c. 97, §2. See the title "**Seamen.**"

18. See Chelentis *v.* Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. ed. 1171; Southern Pac. Co. *v.* Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. ed. 1086, Ann. Cas. 1917E, 900, L. R. A. 1918C, 451.

19. See the titles "**Admiralty;**" "**Death by Wrongful Act;**" "**Injuries to Persons and Property;**" "**Negligence.**"

As to injuries to seamen, see the title "**Seamen.**"

In collision cases, see the title "**Collision.**"

As to injuries to passengers, see *infra,* IV, B.

[a] **The particulars of an alleged defective construction** should be averred in an action by a stevedore for injury caused by a defective hatch cover. The Saranac, 132 Fed. 936.

[b] **A particular act of negligence,** in an action for damages caused by fire set by sparks from a passing steamer, to be available as a ground of recovery, should be distinctly averred. Cheboygan Lumber Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630.

20. See the titles "**Admiralty;**" "**Trial;**" and the cross-references there found.

21. See the title "**Province of Judge and Jury.**"

22. **U. S.** — Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212; Kellogg *v.* Milwaukee & St. P. Ry. Co., 5 Dill. 537, 14 Fed. Cas. No. 7,664, *affirmed,* 94 U. S. 469, 24 L. ed. 256. **Mass.**—McGivern *v.* Wilson, 160 Mass. 370, 35 N. E. 864. **Mich.**—Butterfield *v.* Arnold, 131 Mich. 583, 92 N. W. 97; Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722. **N. Y.**—O'Reilly *v.* New Brunswick, etc. Co., 28 Misc. 112, 59 N. Y. Supp. 261, *reversed,* 26 Misc. 195, 55 N. Y. Supp. 1133; Rooney *v.* Campagnie Generale Transatlantique, 10 Daly 241. **Pa.** Scott *v.* Hunter, 46 Pa. 192, 84 Am. Dec. 542. **Wis.**—Castello *v.* Landwehr, 28 Wis. 522.

23. **U. S.** — Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212. **Mich.**—Butterfield *v.* Arnold, 131 Mich. 583, 92 N. W. 97. **N. Y.**—Rexter *v.* Starin, 73 N. Y. 601.

24. Kellogg *v.* Milwaukee & St. P.

Instructions.[25] — The instructions must be in accordance with the law applicable to the case,[26] and the particular circumstances involved,[27] must not be inconsistent,[28] or misleading,[29] or over-emphasize particular facts in evidence.[30]

The verdict, if there be a jury trial, must conform to the general rules governing verdict.[31]

C. MANDAMUS TO COMMON CARRIERS BY WATER. — Subject to the general principles regulating the issuance of a mandamus to compel common carriers to perform the duties imposed upon them by law,[32] mandamus is the proper remedy to compel the performance of such duties by navigation companies or individuals engaged in the carriage of passengers or freight by water.[33]

II. OWNERSHIP OF VESSEL AND PROCEEDINGS BY CO-OWNERS. — A. ACTIONS BY COOWNERS.[34] — **1. Between Themselves.** Coowners of a vessel, in order to settle any disputed question of account, such, *e. g.*, as may be involved in the record of a ship's earnings and disbursements,[35] may have recourse to the ordinary remedy of an accounting,[36] which, according to the circumstances of the case, may be in equity,[37] or at law.[38] Jurisdiction in such cases is ordinarily

Ry. Co., 5 Dill. 537, 14 Fed. Cas. No. 7,664, *affirmed,* 94 U. S. 469, 24 L. ed. 256.

25. See the title "**Instructions.**"

26. **Mich.**—Burrows *v.* Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468; Cheboygan Lumb. Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630. **Mo.**—Walsh *v.* Mississippi Val. Transp. Co., 52 Mo. 434. **N. Y.** New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877.

27. Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

28. Cheboygan Lumber Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630.

29. Carpenter *v.* Eastern Transp. Co., 71 N. Y. 574.

30. Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212.

31. See the title "**Verdict.**"

[a] **A directed verdict** (1) for defendant is proper on the plaintiff's own showing of contributory negligence in an action by a workman for an injury caused through falling into an open hatch while engaged in making repairs on the vessel. Claus *v.* Northern S. S. Co., 89 Fed. 646, 32 C. C. A. 282. (2) Likewise on a failure to prove defendant negligent when relied upon to recover in an action for injuries received while unloading a vessel. West *v.* Brakelow S. S. Co., 124 Ga. 658, 52 S. E. 888. (3) Or when the uncontradicted evidence shows that the vessel was chartered to another and under his control at the time of the plaintiff's injury. Anderson *v.* Boyer, 156 N. Y. 93, 50 N. E. 976, *reversed,* 13 App. Div. 258, 43 N. Y. Supp. 87.

Jury trial in admiralty, see 1 STANDARD PROC. 538.

32. See the titles "**Mandamus;**" "**Public Service Corporations.**"

33. Board of Canal and Locks Comrs. *v.* The Willamette Transp. & Locks Co., 6 Ore. 219.

34. **Admiralty jurisdiction** generally, see 1 STANDARD PROC. 401.

35. Ferem *v.* Olson, 176 Cal. 652, 169 Pac. 386; Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; True *v.* McGilvery, 43 Me. 485; Maguire *v.* Pingree, 30 Me. 508.

36. Ferem *v.* Olson, 176 Cal. 652, 169 Pac. 386; Galvin *v.* Ryan, 108 N. Y. Supp. 574.

See generally the title, "**Account and Accounting.**"

37. **Me.**—Knowlton *v.* Reed, 38 Me. 246. **Md.**—Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **N. Y.**—Whiton *v.* Spring, 74 N. Y. 169.

38. **Mich.**—Sheehan *v.* Dalrymple, 19 Mich. 239. **Me.**—True *v.* McGilvery, 43 Me. 485. **N. H.**—Gilman *v.* Leavitt, Smith 304. **N. Y.**—Sturges *v.* Judson, 1 N. Y. City Ct. 256. **Eng.**—Helme *v.*

in the state courts, not in admiralty,[39] though admiralty would have jurisdiction to enforce a lien for repairs in favor of a part owner.[40]

2. Restraining Use of Vessel. — When the parties in interest disagree as to the further employment of a vessel, one may restrain the other from using the vessel until proper security is given,[41] and pending the trial of a case between part owners concerning the disposition of the ship a special injunction may issue to restrain its removal from the court's jurisdiction;[42] but a minority part owner cannot enjoin the continued use of a vessel by the other parties in interest who have given a sufficient bond to protect his interest.[43]

B. By or Against Third Persons. — An action on a contract with third parties by coowners of a vessel, according to the nature of the contract, must be joint,[44] or several.[45] Thus, part owners should join for the recovery of freight,[46] except when the action is brought in the name of the vessel.[47] But a coowner, who is a dormant partner, need not be joined,[48] nor a coowner whose share of the demand on which the action is based, has been paid.[49]

III. ACTIONS BY OR AGAINST MASTER. — A. In General. The jurisdiction of admiralty[50] over suits for a master's wages, and the nature of the action,[51] have been treated elsewhere in this work. Admiralty, being without equity jurisdiction, cannot entertain a libel the sole purpose of which is to compel the owners to carry out a master's contract of employment;[52] the master's remedy is at law for breach of the contract.[53] Until the lien for freight is satisfied the master may bring trover for the conversion of any part of the cargo,[54]

Smith, 7 Bing. 709, 5 Moo. & P. 744, 20 E. C. L. 316, 131 Eng. Reprint 274.

39. Ward *v.* Thompson, 22 How. (U. S.) 330, 16 L. ed. 249; The Orleans, 11 Pet. (U. S.) 175, 9 L. ed. 677; The Larch, 2 Curt. 427, 14 Fed. Cas. No. 8,085.

40. Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524; The Charles Hemje, 5 Hughes 359, 19 Fed. Cas. No. 11,047a.

41. Paynter *v.* Paynter, 7 Phila. (Pa.) 336.

42. Paynter *v.* Paynter, 7 Phila. (Pa.) 336.

43. Dunham *v.* Jarvis, 8 Barb. (N. Y.) 88.

44. **U. S.**—Richmond *v.* New Bedford Copper Co., 2 Lowell 315, 20 Fed. Cas. No. 11,800. **Ark.**—Phillips *v.* Pennywit, 1 Ark. 59. **Me.**—White *v.* Curtis, 35 Me. 534. **N. H.**—Gilman *v.* Leavitt, Smith 304. **N. Y.**—Bucknam *v.* Brett, 13 Abb. Pr. 119, 35 Barb. 596, 22 How. Pr. 233.

45. **Me.**—Gray *v.* Buck, 78 Me. 477, 7 Atl. 16. **Pa.**—Hopkins *v.* Forsyth, 14 Pa. 34, 53 Am. Dec. 513. **Eng.** Servante *v.* James, 10 B. & C. 410, 5 Man. & Ry. 299, Ll. & W. 54, 21 E. C. L. 177, 109 Eng. Reprint 502.

46. **Me.**—Robinson *v.* Cushing, 11 Me. 480. **Md.**—Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681. **N. Y.**—Donnell *v.* Walsh, 33 N. Y. 43, 88 Am. Dec. 361; Merritt *v.* Walsh, 32 N. Y. 685.

47. The Beardstown *v.* Goodrich, 16 Mo. 153.

48. Phillips *v.* Pennywit, 1 Ark. 59.

49. **N. H.**—Gilman *v.* Leavitt, Smith 304. **N. Y.**—Bishop *v.* Edmiston, 16 Abb. Pr. 466. **Eng.**—Sedgworth *v.* Overend, 7 T. R. 279, 101 Eng. Reprint 974; Addison *v.* Overend, 6 T. R. 766, 101 Eng. Reprint 816.

50. See 1 Standard Proc. 385.

51. See 1 Standard Proc. 385, 416, note.

52. Montgomery *v.* Henry, 1 Dall. (U. S.) 49, 1 L. ed. 32, 1 Am. Dec. 223.

53. Clayton *v.* The Eliza B. Emery, 4 Fed. 342.

54. Ingersoll *v.* Van Bokkelin, 7 Cow. (N. Y.) 670. See *infra*, III, B.

but trover cannot be maintained against him for holding a cargo under such lien.[55]

B. PARTIES. — The owners,[56] as well as a passenger,[57] may maintain an action in admiralty against the master for damages flowing from his wrongful acts, and one who waives or otherwise loses his lien on a vessel for supplies may proceed against the master in an action in personam.[58] A master, in the absence of the owners, may maintain a libel in admiralty in their behalf,[59] and when his control over the vessel and cargo is absolute, as when he may be termed the owner pro hac vice,[60] he may sue in his own name, without joining the owners, for an injury to or wrongful interference with the vessel or cargo,[61] or to recover freight,[62] or for breach of a contract of affreightment.[63]

C. PROCEDURE. — The procedure in such cases follow the general rules elsewhere treated.[64]

IV. CARRIAGE BY WATER. — A. PROCEEDINGS ARISING OUT OF THE CARRIAGE OF GOODS. — 1. **Remedies Upon Breach of Contract of Affreightment.** — Jurisdiction and nature of the remedy for a breach of contract of affreightment[65] have been treated elsewhere in other titles, dealing with particular classes of cases or particular aspects of procedure.

[a] **Pleading Condition Subsequent.** In an action by a master for damages for a breach of contract of employment, conditioned on defendants not selling the vessel, the master need not set up in his declaration whether or not the vessel was sold, this being a condition subsequent, available as a defense. Carney *v.* Ionia Transf. Co., 157 Mich. 54, 121 N. W. 806.

[b] **Questions of Law and Fact.** (1) Any disputed question of fact is for the jury to determine (Stearns *v.* Doe, 12 Gray [Mass.] 482, 74 Am. Dec. 608), such as (2) whether or not a master's contract of employment was renewed for the following season (Carney *v.* Ionia Transp. Co., 157 Mich. 54, 121 N. W. 806), whether (3) a trade custom gave certain profits to the master (Wilcocks *v.* Phillips, 1 Wall. Jr. 47, 29 Fed. Cas. No. 17,639), the existence (4) of circumstances justifying a master's sale of his vessel (Orange *v.* McKay, 5 Nova Scotia [Can.] 444), or (5) cargo. Caldwell *v.* Western Marine & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667; Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355.

55. Hodgson *v.* Woodhouse, 1 Cranch C. C. 549, 12 Fed. Cas. No. 6,571; Keyser *v.* Harbeck, 3 Duer (N. Y.) 373.

56. Dean *v.* Angus, Bee 369, 7 Fed. Cas. Nos. 3,702, 3,703.

57. Chamberlain *v.* Chandler, 3 Mason 242, 5 Fed. Cas. No. 2,575. See *infra*, IV, B, 1.

58. Henslee *v.* West Kentucky Coal Co., 241 Fed. 609, 154 C. C. A. 367; Ames *v.* Swett, 33 Me. 479.

Admiralty jurisdiction, see 1 STANDARD PROC. 388.

As to actions against the owners for supplies, see *supra*, I, A, 1.

59. The Sally, 1 Gall. 401, 21 Fed. Cas. No. 12,258.

60. Manter *v.* Holmes, 10 Metc. (Mass.) 402. See 1 STANDARD PROC. 429.

61. **Ga.**—Tuells *v.* Torras, 113 Ga. 691, 39 S. E. 455. **Minn.**—Houghton *v.* Lynch, 13 Minn. 85. **Eng.**—Pitts *v.* Gainee, 1 Ld. Raym. 558, 91 Eng. Reprint 1272.

62. **U. S.**—Hus *v.* Kempf, 10 Ben. 231, 12 Fed. Cas. No. 6,943. **Minn.** Houghton *v.* Lynch, 13 Minn. 85. **N. Y.** Kennedy *v.* Eilau, 17 Abb. Pr. 73.

See also *infra*, IV, A, 2.

63. Disney *v.* Furness, Withy & Co., 79 Fed. 810; Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184.

64. See the title "**Admiralty,**" and

65. See 1 STANDARD PROC. 385, 416.

When executory, contracts of affrightment are not enforceable *in rem.* See 1 STANDARD PROC. 416.

this work; likewise joinder of,[66] and parties to actions.[67]

2. To Recover Freight. — a. *In General.* — An action to recover freight on goods carried by water, whether in rem,[68] or in personam,[69] is maintainable by the shipowners, but may be maintained by the master in their behalf.[70] Such action will not lie in favor of the owners of the vessel for freight earned by the master while operating the vessel on shares,[71] unless their agreement or other facts render them the owners of such freight.[72] All of several owners should join in such action,[73] but a master who has no legal interest in the ship or the charter party should not be joined in an action of attachment against the charterer for freight.[74] Tender is a matter not for the libelant but the defendant or claimant to plead.[75]

b. *Enforcement of Lien.* — A common carrier by water cannot enforce his lien for freight without the intervention of legal process for the purpose.[76] Such a lien may be enforced in admiralty[77] by a proceeding in rem,[78] providing possession of the goods is retained,[79] the rule being satisfied in case of a conditional delivery;[80] but when an unconditional delivery is made the lien is lost and consequently cannot be so enforced.[81] A claim for dead freight is not properly the basis of an action in rem.[82]

3. Remedies of Shipper for Loss of or Injury to Goods. — a. *In*

66. See 1 STANDARD PROC. 440, and The Prussia, 100 Fed. 484.

67. See the titles "**Admiralty;**" "**Freight Carriers;**" "**Parties.**"

By assignee for purpose of suit, see 1 STANDARD PROC. 431.

By the master, see *supra,* III, B.

68. See *infra,* IV, A, 2, b.

69. Thatcher *v.* McCulloh, Olc. 365, 23 Fed. Cas. No. 13,862; Dedekam *v.* Vose, 3 Blatchf. 44, 7 Fed. Cas. Nos. 3,729, 3,732.

70. See Thatcher *v.* McCulloh, Olc. 365, 23 Fed. Cas. No. 13,862. See *supra,* III, B.

71. Manter *v.* Holmes, 10 Metc. (Mass.) 402.

72. Sims *v.* Howard, 40 Me. 276.

73. Merritt *v.* Walsh, 32 N. Y. 685.

[a] **Release by Part-Owner.**—One part-owner of a vessel used by all for their mutual profit cannot release freight earned in satisfaction of a personal obligation without express authority to do so, and where this is done and the act is not ratified by the other owners a joint action in admiralty may be maintained by all the owners to recover such freight. Donovan *v.* Dymond, 3 Woods 141, 7 Fed. Cas. No. 3,993.

74. Ward *v.* Whitney, 8 N. Y. 442, Seld. Notes 144.

75. Mott *v.* Frost, 45 Fed. 897.

[a] **A sufficient tender before suit** entitles the defendant to costs. Dedekam *v.* Vose, 3 Blatchf. 44, 7 Fed. Cas. Nos. 3,729, 3,732. See generally 1 STANDARD PROC. 577.

76. Sullivan *v.* Park, 33 Me. 438; Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

77. New York & Cuba S. S. Co. *v.* Maldonado & Co., 225 Fed. 353, 140 C. C. A. 377. See 1 STANDARD PROC. 385.

78. 4,885 Bags of Linseed, 1 Black (U. S.) 108, 17 L. ed. 35; Costello *v.* 734,700 Laths, 44 Fed. 105; 630 Casks of Sherry, 14 Blatchf. 517, 22 Fed. Cas. No. 12,918. See 1 STANDARD PROC. 385.

79. Cranston *v.* A Cargo of 250 Tons of Coal, 22 Fed. 614.

80. New York & Cuba Mail S. S. Co. *v.* Maldonado & Co., 225 Fed. 353, 140 C. C. A. 377; Costello *v.* 734,700 Laths, 44 Fed. 105; Healy *v.* 219,399 Ft. of Dressed Yellow Pine Lumber, 2 P. R. Fed. 399.

81. 4,885 Bags of Linseed, 1 Black. (U. S.) 108, 17 L. ed. 35; Cranston *v.* A Cargo of 250 Tons of Coal, 22 Fed. 614; Wilcox *v.* 500 Tons of Coal, 14 Fed. 49.

82. Hagan *v.* Cargo of Lumber, 163 Fed. 657.

General. — The shipper, when entitled to recover for the loss of or injury to his goods, may proceed in admiralty[83] against the vessel in rem[84] or its owners in personam,[85] or such personal action may be maintained in a state or common law court.[86]

b. *Parties.* — The proper parties plaintiff in a proceeding for loss of or injury to goods carried by water, in accordance with the general rules relating to parties,[87] are, as a rule, the owners, or real parties in interest, whether such interest rests in them originally, or by virtue of the contract of shipment, or by legal or equitable assignment,[88] for example, the consignor,[89] although the bill of lading is issued to another party;[90] or the consignee;[91] or the trustee of an

83. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. ed. 969; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; The Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. ed. 772; Bucknor *v.* The Gilbert Green, 4 Fed. Cas. No. 2,099. See 1 STANDARD PROC. 385, 397.

84. The Humarock, 234 Fed. 716; The Queen of the Pacific, 61 Fed. 213; The Leonidas, Olc. 12, 15 Fed. Cas. No. 8,262.

[a] **A chartered vessel** is under like liabilities when sailed by the charterer, as by her owner. McCullough *v.* The Echo, 16 Fed. Cas. No. 8,740a.

[b] **A suit in rem will lie** against the vessel if the performance of the contract by the master has been commenced, and for this purpose it is not always necessary that the goods ever reach the vessel. Therefore, where the master receives the goods at the wharf, giving a regular bill of lading, but they are lost by an accident while being conveyed by a lighterman to the vessel, a suit *in rem* against the vessel will be sustained. Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599.

85. McNeil Higgins Co. *v.* Old Dominion S. S. Co., 235 Fed. 854, 149 C. C. A. 166; Galle *v.* Hamburg A. P. A. Gesellschaft, 233 Fed. 424, 147 C. C. A. 360; Benner Line *v.* Pendleton, 217 Fed. 497, 133 C. C. A. 349; The Leonidas, Olc. 12, 15 Fed. Cas. No. 8,262.

86. **U. S.**—The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; Bucknor *v.* The Gilbert Green, 4 Fed. Cas. No. 2,099. **Ind.**—Coplinger *v.* The David Gibson, 14 Ind. 480. **Ky.**—Bassett *v.* Aberdeen Coal & Min. Co., 120 Ky. 728, 88 S. W. 318. **La.**—Pitkin *v.* Rousseau, 14 La. Ann. 511. **Mo.** Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342. **N. Y.**—Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93; Goodwin *v.* Baltimore & O. R. Co., 58 Barb. 195; Guiterman *v.* Liverpool etc. S. S. Co., 9 Daly 119; D'Arsi *v.* Navigazione Alta Italia, 91 Misc. 10, 154 N. Y. Supp. 158. **Ore.**—Rosenwald *v.* Oregon City Transp. Co., 84 Ore. 15, 163 Pac. 831, 164 Pac. 189. **Pa.**—Reed *v.* Dick, 8 Watts 479. **Tenn.**—Johnson *v.* Friar, 4 Yerg. 48, 26 Am. Dec. 215. **Tex.** Mallory S. S. Co. *v.* G. A. Bahn D. & O. Co. (Tex. Civ. App.), 154 S. W. 282.

See generally the title **"Freight Carriers."**

[a] **Auction Sale.**—Prior to the commencement of an action for damages to freight, it has been required that such goods be disposed of at an auction sale, when they are not totally destroyed or valueless. Elkins & Co. *v.* N. Y. & New Orleans S. S. Co., 14 La. Ann. 647.

[b] **Time of Commencing Suit.** Where a vessel is detained in its port of departure by ice and while there the cargo is damaged, the consignors cannot, without rescinding the contract of carriage, libel the vessel for a breach of that contract before the term for its performance has expired. Jones *v.* The Floating Zephyr, 13 Fed. Cas. No. 7,462.

87. See the titles **"Admiralty"** and **"Parties."**

88. See the cases cited *infra.*

89. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

90. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

91. Dollner *v.* Garcia, 7 Fed. Cas. No. 3,970; Bucknor *v.* The Gilbert

express trust;[92] or the carrier, as bailee, against any one liable for injury to or destruction of the goods;[93] or an assignee;[94] or an insurer who has paid the loss or accepted an abandonment;[95] or a reinsurer, who has paid the insurer its proportion of the loss, the insurer having fully satisfied the owner.[96] The action may be against the master on his undertaking, or the owners, or the vessel,[97] but the shippers, when entitled to possession of the goods, may maintain a joint action against the vessel and the master to recover its possession,[98] or against the vessel and its owner for damages resulting from a loss of the cargo,[99] or may intervene in a suit against the vessel by other parties.[1]

c. *Pleading.* — **(I.) Libel or Complaint.** — In a proceeding to recover for loss of or injury to goods carried by water the general rules of pleading must be followed,[2] such as showing the necessary jurisdic-

Green, 4 Fed. Cas. No. 2,099; Brower *v.* The Water Witch, 19 How. Pr. 241, 4 Fed. Cas. No. 1,971.

[a] **Carrier's Contract With Port Collector Not Available.**—But the owners or consignees of goods destroyed by fire after unloading and before delivery cannot sue the carrier on the latter's agreement with the collector of the port, such contract being for the collector's protection and available to him alone. The Egypt, 25 Fed. 320.

92. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230. See The Ask, 156 Fed. 678.

93. The Nonpareil, 149 Fed. 521; Irving *v.* Hagerman, 22 U. C. Q. B. 545.

[a] **The charterer,** as carrier and bailee of the cargo, may sue the shipowners on their liability. Pendleton *v.* Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. ed. 770, *affirming* (C. C. A.) 217 Fed. 497, *mod.* 210 Fed. 67; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; The New York, 93 Fed. 495.

[b] **Action Not in Carrier's Trade-Name.**—It is no objection to such action that it is brought in the real name of the carrier and not in the fictitious name under which he does business. The Nonpariel, 149 Fed. 521.

94. Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93.

95. The Sydney, 27 Fed. 119; The Keokuk, 1 Biss. 522, 14 Fed. Cas. No. 7,721. See The Ocean Wave, 5 Biss. 378, 18 Fed. Cas. No. 10,417.

[a] **On behalf of the insurer,** after payment of the loss, the action may be maintained by the carrier (The Nonpariel, 149 Fed. 521) or owner. The Centennial, 7 Fed. 601.

96. The Ocean Wave, 5 Biss. 378, 18 Fed. Cas. No. 10,417.

97. The Leonidas, Ole. 12, 15 Fed. Cas. No. 8,262.

98. The Director, 26 Fed. 708.

Joint action against vessel and master generally, see 1 STANDARD PROC. 440.

99. The Ask, 156 Fed. 678.

1. The Humarock, 234 Fed. 716.

[a] **Insurer May Intervene.**—See The Ocean Wave, 5 Biss. 378, 18 Fed. Cas. No. 10,417.

2. See the titles **"Admiralty;" "Freight Carriers;" "Implied and Express Agreements."**

[a] **Anticipating Defenses.**—Notice of claim for loss or damage, even though required by the bill of lading, need not be averred in the libel, since failure to give such notice is a matter of defense. The Tampico, 151 Fed. 689.

[b] **Estoppel.**—Where the defendant carrier, when presented with a claim of damages for injury to the shipper's goods, refused the claim and suggested that the damage was caused by sea water, it was not prevented thereby from changing its position to the extent of alleging in its answer that the injury was caused by leakage from a tank of fresh water. Galle *v.* Hamburg A. P. A. Gesellschaft, 233 Fed. 424, 147 C. C. A. 360.

[c] **Amendments.** — The pleadings may be amended to conform to the proof, as where an answer fails to contain as a plea of special defense exceptions in the bill of lading and the

tional facts,[3] a common liability when the action is against more than one owner jointly,[4] and that the defendant was a common carrier, when the action is in personam,[5] but not when in rem.[6] In an action to recover the possession of goods to which they are entitled, the shippers need not allege ownership thereof.[7]

(II.) Answer or Plea. — Special defenses must ordinarily be pleaded to be available.[8] Thus it must be specially pleaded that the case was within exceptions in the bill of lading,[9] or that the damage was caused by a peril of the sea, an act of God, or the public enemy.[10]

Set-off. — Loss or damage may be recouped or set off, in admiralty, in an action for the freight.[11]

d. *Trial, Judgment, Appeal and Costs.* — In proceedings to recover for injury to or loss of goods by a carrier by water, in common law, state, or admiralty court, the general rules as to trial,[12] and also as to

proof of same is not objected to. The Solveig, 217 Fed. 805.

3. See Coplinger *v.* The David Gibson, 14 Ind. 480.

4. See Montell *v.* The Wm. H. Rutan, 17 Fed. Cas. No. 9,724.

5. Seller *v.* The Pacific, Deady 17, 21 Fed. Cas. No. 12,644.

6. Seller *v.* The Pacific, Deady 17, 21 Fed, Cas. No. 12,644.

7. The Director, 26 Fed. 708. See generally the title "**Replevin.**"

8. See 1 STANDARD PROC. 531; 10 STANDARD PROC. 252; 11 STANDARD PROC. 1010, et seq.; the titles "**Answers;**" "**Confession and Avoidance;**" "**Denials;**" and titles dealing with particular pleas and defenses.

9. **U. S.**—The Solveig, 217 Fed. 805; The Erskine M. Phelps, 209 Fed. 141. **N. Y.**—Guiterman *v.* Liverpool, etc. S. S. Co., 9 Daly 119, damage due to pilot's negligence. **Fla.**—Clyde Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. 349.

See 10 STANDARD PROC. 252. *Compare* 10 STANDARD PROC. 245, 249.

[a] **The allegation must state the facts** relied on to bring the case within the exception. The Erskine M. Phelps, 209 Fed. 141.

10. Clyde Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. 349.

11. Dedekam *v.* Vose, 3 Blatchf. 44, 7 Fed. Cas. Nos. 3,729, 3,732. See also Thatcher *v.* McCulloh, Olc. 365, 23 Fed. Cas. No. 13,862; Humphreys *v.* Reed, 6 Whart. (Pa.) 435; 10 STANDARD PROC. 482; and the title "**Set-Off, Counterclaim and Recoupment.**"

12. See the titles "**Admiralty**" and "**Trial**" and cross-references thereunder.

[a] **Election Between Defenses.** Where the defenses pleaded are that the loss was occasioned by the negligence of another vessel and by dangers of navigation and the act of God, a motion made after the impanelling of the jury to require the defendant to elect between the inconsistent defenses comes too late. Rosenwald *v.* Oregon City Transp. Co., 84 Ore. 15, 163 Pac. 831, 164 Pac. 189.

[b] **Striking Entire Defense.**—Under the code, in an action to recover for damage to goods carried by sea, it is improper to strike from the answer an entire defense as redundant, the statute applying merely to redundant matter contained in a pleading. Burnside *v.* Indra Line, 80 Misc. 414, 141 N. Y. Supp. 238.

[c] **Questions of Law and Fact.** (1) Any disputed question of fact relating to the loss of or injury to the goods is for the jury (See McNeil Higgins Co. *v.* Old Dominion S. S. Co., 235 Fed. 854, 149 C. C. A. 166; Knox *v.* Rives, Battle & Co., 14 Ala. 249, 48 Am. Dec. 97), such as (2) the carrier's negligence (**U. S.**—McNeil Higgins Co. *v.* Old Dominion S. S. Co., 235 Fed. 854, 149 C. C. A. 166; Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230. **N. Y.**—Castiglione *v.* Austro-Americana S. S. Co., 180 App. Div. 354, 167 N. Y. Supp. 989. **Ore.** Rosenwald *v.* Oregon City Transp. Co., 84 Ore. 15, 163 Pac. 831, 164 Pac. 189. **Pa.**—Humphreys *v.* Reed, 6 Whart. 435. **Tenn.**—Johnson *v.* Friar, 4 Yerg. 48, 26 Am. Dec. 215); (3) the plaintiff's contributory negligence (Goodwin *v.* Baltimore & O. R. Co., 58 Barb. (N. Y.) 195), (4) the delivery of the

judgment,[13] appeal,[14] and costs[15] should be observed.

B. Proceedings Arising Out of the Carriage of Passengers.

1. In General. — The jurisdiction of admiralty extends to a passenger's contract of carriage on the high seas and navigable waters,[16] but when the action is in personam the jurisdiction of admiralty is

goods to the defendant (Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310), (5) the agent's authority to issue bills of lading (Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310), (6) whether there is a particular usage or custom (The Sultana *v.* Chapman, 5 Wis. 454), (7) whether or not a collision with a rock was a peril of the sea (Humphreys *v.* Reed, 6 Whart. [Pa.] 435), (8) whether an injury was caused by perils of the sea or unseaworthiness of the vessel (Galle *v.* Hamburg A. P. A. Gesellschaft, 233 Fed. 424, 147 C. C. A. 360); (9) whether defendant is or was a common carrier (Bassett *v.* Aberdeen Coal & Min. Co., 120 Ky. 728, 88 S. W. 318); and (10) the nature of the loss, whether total or partial. McNeil Higgins Co. *v.* Old Dominion S. S. Co., 235 Fed. 854, 149 C. C. A. 166.

[d] **Instructions** must properly state (1) the law applicable to the case (**U. S.**—Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310; Taylor *v.* Brigham, 3 Woods 377, 23 Fed. Cas. No. 13,781. **N. Y.**—Guiterman *v.* Liverpool, etc. S. S. Co., 9 Daly 119. **Tex.**—Mallory S. S. Co. *v.* G. A. Bahn D. & O. Co. [Tex. Civ. App.] 154 S. W. 282), and (2) be applicable to the evidence (Mallory S. S. Co. *v.* G. A. Bahn D. & O. Co., [Tex. Civ. App.] 154 S. W. 282), (3) give the proper measure of damages (Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230), and (4) define what constitutes a common carrier when that question is an issue in the case. Bassett *v.* Aberdeen Coal & Min. Co., 120 Ky. 728, 88 S. W. 318.

13. See the titles "**Admiralty;**" "**Judgments;**" "**Decrees.**"

[a] **Judgment on the Issues.** Where the plaintiff bases his action to recover for injury to his goods on improper stowage, he cannot recover on the ground of unseaworthiness. Tweedie Trading Co. *v.* Sangstad, 180 Fed. 691, 103 C. C. A. 657.

14. See the titles "**Admiralty;**" "**Appeals.**"

[a] **Change of Theory.**—(1) Where a party in an action by a shipper for damage to goods shipped assumes the burden of proving a fact, he will not be heard on appeal to assert that the burden was on the other party. Mallory S. S. Co. *v.* G. A. Bahn D. & O. Co. (Tex. Civ. App.), 154 S. W. 282. (2) Where plaintiff sues and claims on the trial as assignee, he cannot on appeal assert a claim other than that given by the assignment. Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93.

15. See the titles "**Admiralty;**" "**Costs.**"

[a] **Effect of a Tender on Costs.** (1) An accepted tender entitles the libelee to costs (The Ask, 156 Fed. 678), but (2) when refused and a judgment for more than the tender is recovered the libelant is entitled to costs. The Ask, 156 Fed. 678. (3) A shipper who pleads damage to the goods as a set-off in an action against him for their freight, by making a sufficient tender of the balance and paying the amount into court is entitled to costs by receiving a judgment on the plea. Dedekam *v.* Vose, 3 Blatchf. 44, 7 Fed. Cas. Nos. 3,729, 3,732.

16. See 1 Standard Proc. 385.

Nature of the Action.—When ex contractu or ex delicto. See 1 Standard Proc. 385, 396, 398, 416.

[a] **Suits for assault** to be in personam only. See Admiralty Rule 16; The Vueltabajo, 163 Fed. 594; Smith *v.* The Challenger, 2 Wash. Ter. 447, 7 Pac. 851.

Death by Wrongful Act.—Jurisdiction. See 1 Standard Proc. 398; 6 Standard Proc. 383. Suits in rem and in personam. See 1 Standard Proc. 398, 418, 419, 423, notes 32, 43, 73; 6 Standard Proc. 384.

not exclusive and the injured party may resort to the proper state or common law court.[17]

2. Pleading. — In accordance with the general rules of pleading, which must be observed in an action by a passenger on a vessel for injuries, neglect, or breach of contract generally,[18] the allegations of the libel or complaint should be sufficient to charge the defendant with the liability incidental to the relation of passenger and carrier,[19] and a plea of assumption of risk should allege knowledge or obvious danger.[20]

3. Province of Judge and Jury. — In such action any question of fact on contradictory evidence is for the jury,[21] as for instance, the shipowner's negligence,[22] the passenger's contributory negligence,[23] the necessity of disciplining a passenger,[24] and whether or not the discipline given a passenger was excessive.[25]

4. Instructions, Verdict and Appeal. — The general rules, in an

17. See the cases cited *infra.*

18. See the titles "**Admiralty;**" "**Injuries to Persons and Property;**" "**Negligence;**" "**Passengers.**"

[a] **A complaint is sufficient** which avers actionable neglect on the voyage and a breach of the contract of carriage in failing to provide sufficient food and lodging, whereby the plaintiff became sick and permanently deaf. Larsen *v.* Allan Line S. S. Co., 37 Wash. 555, 80 Pac. 181. As to a sufficiently definite and certain allegation of negligence by defendant, see Croft *v.* Northwestern S. S. Co., 20 Wash. 175, 55 Pac. 42.

[b] **For sufficiency of answer** to averment (1) in complaint of the existence of the relation of passenger and carrier, see Cook *v.* Houston Direct **Nav.** Co., 76 **Tex.** 353, 13 S. W. 475, 18 Am. St. Rep. 52. (2) As to injury caused by plaintiff's negligence, see Freeman *v.* The Engelmann Transp. Co., 36 Wis. 571.

19. Van Loon *v.* R. Lawrence Smith, 176 App. Div. 547, 163 N. Y. Supp. 621. See the title "**Passengers.**"

20. See North German Lloyd S. S. Co. *v.* Roehl (Tex. Civ. App.), 144 S. W. 322.

21. Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278.

22. **U. S.** — Compagnie Generale Transatlantique *v.* Bump, 234 Fed. 52, 148 C. C. A. 68; Wilmington Steamboat Co. *v.* Walker, 120 Fed. 97, 56 C. C. A. 49. **Ky.**—Louisville & C. P. Co. *v.* Mulligan, 25 Ky. L. Rep. 1287, 77 S. W. 704; Louisville & E. Mail Co. *v.* Gilliland, 24 Ky. L. Rep. 2081, 72 S. W. 1101. **Md.**—Baltimore C. & A. R. Co. *v.* Moon, 118 Md. 380, 84 Atl. 536. **Mass.**—Hanley *v.* Eastern S. S. Corp., 221 Mass. 125, 109 N. E. 167, Ann. Cas. 1917D, 1034. **N. Y.** Miller *v.* Ocean S. S. Co., 118 N. Y. 199, 23 N. E. 462; Cleveland *v.* New Jersey Steamboat Co., 44 Hun 626, 7 N. Y. St. 598. **Pa.**—American S. S. Co. *v.* Landreth, 108 Pa. 264, 102 Pa. 131, 48 Am. Rep. 196.

23. **U. S.** — Compagnie Generale Transatlantique *v.* Bump, 234 Fed. 52, 148 C. C. A. 68. **Ky.**—Memphis & C. Packet Co. *v.* Buckner, 108 Ky. 701, 57 S. W. 482. **Md.**—Baltimore C. & A. R. Co. *v.* Moon, 118 Md. 380, 84 Atl. 536. **Mass.**—Rizzo *v.* Winnismmet Co., 217 Mass. 19, 104 N. E. 363, Ann. Cas. 1915C, 1003; Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Simmons *v.* New Bedford V. & N. S. S. Co., 97 Mass. 361, 93 Am. Dec. 99. **N. Y.** Gannon *v.* Union Ferry Co., 29 Hun 631. **Pa.**—American S. S. Co. *v.* Landreth, 108 Pa. 264. **Tex.**—Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Gillum *v.* New York & T. S. S. Co. (Tex. Civ. App.), 76 S. W. 232. **Vt.**—Sullivan *v.* Delaware & H. Canal Co., 72 Vt. 353, 47 Atl. 1084.

24. Bennett *v.* Austro-Americana S. S. Co., 161 App. Div. 753, 147 N. Y. Supp. 193.

25. Bennett *v.* Austro-Americana S. S. Co., 161 App. Div. 753, 147 N. Y. Supp. 193.

action by a ship's passenger, are applicable to instructions,[26] verdict,[27] and appeal.[28]

V. ACTIONS ON CHARTER PARTIES. — A. In General. While maritime contracts in general are a subject of admiralty jurisdiction,[29] including charter parties,[30] an action to enforce a bond, given to secure the performance of a charter party, cannot be maintained in a court of admiralty,[31] though there is authority to the contrary.[32] An action by a charterer for breach of a charter party may be brought in rem against the vessel or in personam against the owner.[33]

B. Parties. — An action in personam for the breach of a valid charter party should be brought by or against the parties to the instrument,[34] and where it appears that the charter party has been

26. See the title "**Instructions.**"

[a] **Applicable to the Evidence. Ala.**—Central of Ga. R. Co. *v.* Knight, 3 Ala. App. 436, 57 So. 253. **Ky.**—Louisville & E. Mail Co. *v.* Barnes' Admr., 117 Ky. 860, 79 S. W. 261, 111 Am. St. Rep. 273, 64 L. R. A. 574. **Md.** Baltimore C. & A. R. Co. *v.* Moon, 118 Md. 380, 84 Atl. 536.

[b] **Not Misleading.**—Trabing *v.* California Nav. & Imp. Co., 133 Cal. xx, 65 Pac. 478.

[c] **Must State Correctly the Law Applicable to the Case.—Cal.**—Hampton *v.* Occidental & Oriental S. S. Co., 139 Cal. 706, 73 Pac. 579. **Mass.** Dodge *v.* Boston & B. S. S. Co., 148 Mass. 207, 19 N. E. 373, 12 Am. St. Rep. 541, 2 L. R. A. 83; Simmons *v.* New Bedford V. & N. S. S. Co., 100 Mass. 34. **N. Y.**—Bartlett *v.* New York & S. B. F. & S. T. Co., 25 Jones & S. 348, 8 N. Y. Supp. 309, 29 N. Y. St. 357.

27. See the titles "**Admiralty;**" "**Verdict.**"

[a] **The Verdict Must Be in Harmony With or Supported by the Evidence.**—Levy *v.* Providence & Stonington S. S. Co., 123 Fed. 347.

[b] **A peremptory instruction** in an action for the wrongful death of a passenger in favor of defendant is improper in the face of evidence for the plaintiff that death was caused by defendant's negligence. Louisville & E. Mail Co. *v.* Barnes' Admr., 117 Ky. 860, 79 S. W. 261, 111 Am. St. Rep. 273, 64 L. R. A. 574.

28. See the titles "**Admiralty;**" "**Appeals.**"

[a] **Appealable Decisions.**—An order, to be appealable, must affect a substantial right of the party against whom it is made. So, where an answer avers that plaintiff's intestate was lost because he insisted upon remaining on a sinking vessel, while all who took to the small boats were saved, an order striking the latter part of the answer is not appealable, since the saving of all who took to the small boats is a part of the *res gesta* which may be proved without being pleaded. Freeman *v.* The Engelmann Transp. Co., 36 Wis. 571.

29. See 1 Standard Proc. 383.

30. Paterson *v.* Dakin, 31 Fed. 682.

31. Pacific Surety Co. *v.* Leatham & Smith T. & W. Co., 151 Fed. 440, 80 C. C. A. 670; Eadie *v.* North Pac. S. S. Co., 217 Fed. 662.

32. Haller *v.* Fox, 51 Fed. 298.

33. Paterson *v.* Dakin, 31 Fed. 682; The J. F. Warner, 22 Fed. 342.

When executory, not enforceable in rem, see 1 Standard Proc. 416.

34. Bangs *v.* Lowber, 2 Cliff. 157, 2 Fed. Cas. No. 840. See generally the titles "**Admiralty;**" "**Implied and Express Agreements;**" "**Parties.**"

[a] **A master** (1) who executes a charter-party in his own name, in which the charterer agrees to pay the charter money to the master, may sue the charterer to recover the charter money, in his own name without joining the owner of the vessel. Baker *v.* Ward, 3 Ben. 499, 2 Fed. Cas. No. 785. (2) In such a case it has been held that the owner cannot maintain an action of attachment against the charterer for a breach of the charter-party Clark *v.* Wilson, 3 Wash. C. C. 560, 5 Fed. Cas. No. 2,841. (3) But where the charter-party is executed by

executed by some of the owners it is not necessary to join the others.[35] Nor should the master, who is not a party to the contract, be joined,[36] especially when the action is for a breach of a charter party by his predecessor.[37]

C. PLEADING.— The pleadings in an action on a charter party, whether brought in a state court or court of admiralty, must conform to the general rules of pleading.[38] Thus the declaration must state the facts essential to the plaintiff's cause of action.[39] In an action for money due on the charter party it must appear that the money is due,[40] but in an action for damages for breach of a charter party the freight rate agreed upon, where non-essential, need not be stated.[41]

D. TRIAL. — **1. Questions of Law and Fact.** — The question of a charterer's negligence, under conflicting evidence, in an action for damage to a chartered vessel, is for the jury,[42] as is likewise the owner's contributory negligence,[43] and any other question of fact.[44]

2. Instructions. — The general rules relating to instructions should be observed in such actions.[45]

3. Findings. — Likewise the findings, in an action on a charter party, must be in harmony with the general rules relating to that subject.[46]

the owners and there is a breach by the master refusing to perform the duty of giving the charterer a clear bill of lading, the action by the charterer should be against the owners or the vessel and not against the master. Paterson *v.* Dakin, 31 Fed. 682.

[b] **An insurer as assignee of the owner,** on payment of a loss, may sue in his own name on the charter-party to enforce the liabilities of the charterer. White *v.* Upper Hudson Stone Co. (C. C. A.), 248 Fed. 893.

35. Bangs *v.* Lowber, 2 Cliff. 157, 2 Fed. Cas. No. 840.

36. Chiesa *v.* Conover, 40 Fed. 496.

37. Chiesa *v.* Conover, 40 Fed. 496.

38. See the titles **"Admiralty;" "Answers;" "Declaration and Complaint;" "Denials;" "Implied and Express Agreements."**

39. See Lorent *v.* Potts, 4 N. C. 86; Stone & Co. *v.* Patterson, 6 Call (10 Va.) 71.

40. Stoddard *v.* Gates, 2 Root (Conn.) 157.

41. Borden Min. Co. *v.* Barry, 17 Md. 419.

42. Schoonmaker *v.* Henry Steers, 128 App. Div. 655, 113 N. Y. Supp. 257; Parker *v.* Washington Tug & Barge Co., 85 Wash. 575, 148 Pac. 896.

43. Schoonmaker *v.* Henry Steers, 128 App. Div. 655, 113 N. Y. Supp. 257.

44. **U. S.**—Barreda *v.* Silsbee, 21 How. 146, 16 L. ed. 86; Tyson *v.* Belmont, 24 Fed. Cas. No. 14,316. **Ala.** Murrell *v.* Whiting, 32 Ala. 54. **Mich.** Lyon *v.* Tiffany, 76 Mich. 158, 42 N. W. 1098. **N. Y.**—Almgren *v.* Dutilh, 5 N. Y. 28; Schoonmaker *v.* Henry Steers, 128 App. Div. 655, 113 N. Y. Supp. 257. **S. C.**—Bulow *v.* Goddard, 1 Nott. & McC. 45, 9 Am. Dec. 663.

45. See the title **"Instructions."**

[a] **Instructions Not To Be Misleading.**—While instructing on the measure of a charterer's duty in caring for a chartered vessel, it is not misleading to use the phrase "responsible skill and care" when subsequently in the same instruction it is said that the exercise of "reasonable care and caution and maritime skill" is all that can be required. Parker *v.* Washington Tug & Barge Co., 85 Wash. 575, 148 Pac. 896.

46. See the title **"Findings and Conclusions."**

As to findings of a referee in admiralty, see 1 STANDARD PROC. 544, et seq.

[a] **The Findings Must Harmonize With the Proof.**—See The Gazelle & Cargo, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. ed. 496.

[b] **The Findings Must Support the Judgment.**—Thus where the liability of a charterer for the loss incidental to

VI. ENFORCEMENT OF BOTTOMRY BONDS.[47] — A. IN GENERAL. — A suit on a bottomry bond, except in certain cases,[48] must be in rem against the property hypothecated or its proceeds.[49]

B. PARTIES AND PLEADING. — The assignee of a bottomry bond may maintain a suit in admiralty in his own name, or in the name of his assignor.[50] The libel should contain an averment or showing of the necessity for giving the bond,[51] but need not allege that the master communicated with the owner of the vessel; this, if available under the circumstances as a defense, must be pleaded by the claimant.[52]

C. TRIAL. — The trial of a proceeding on a bottomry bond proceeds in accordance with the general rules.[53]

D. PREMIUM, INTEREST AND COSTS. — The decree may include, besides the amount actually loaned, the premium agreed upon in the bond.[54] Interest may be recovered from the commencement of the suit,[55] even though the proceeds from a sale of the vessel have been

wrecking and sinking a vessel hinges upon the question whether he willfully or negligently caused the damage, a finding is insufficient which merely states that such vessel was wrecked and sunk while under his control. J. M. Brown *v.* W. P. Fuller & Co., 28 Cal. App. 676, 153 Pac. 960.

47. **Jurisdiction of admiralty,** see 1 STANDARD PROC. 390.

48. Snow *v.* 180¾ Tons Scrap Iron, 11 Fed. 517. See Admiralty Rule 18.

49. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117; Snow *v.* 180¾ Tons Scrap Iron, 11 Fed. 517.

[a] **Assumpsit** (1) for money had and received on a bottomry bond has been upheld where the vessel was captured, but its value, with interest, was returned to the owner. Appleton *v.* Crowninshield, 8 Mass. 340. (2) But debt on the bond cannot be sustained under such circumstances. Appleton *v.* Crowninshield, 3 Mass. 443.

[b] **What Law Governs.**—The rule that a bottomry bond is governed by the law of the ship's flag is without force in a case where the vessel is sailing under a charter-party executed in accordance with, and adopting, the law of another country. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

50. Burke *v.* The M. P. Rich, 1 Cliff. 308, 4 Fed. Cas. No. 2,161.

As to proceedings by assignee in admiralty generally, see 1 STANDARD PROC. 430.

51. The Edward Albro, 10 Ben. 668, 8 Fed. Cas. No. 4,290.

[a] **Necessity Shown by Account.** The libel should show, or contain an exhibit showing an account of the items for which the bond is granted in order that its necessity may be apparent. See The Aurora, 1 Wheat. (U. S.) 96, 107, 4 L. ed. 45; The Bridgewater, Olc. 35, 4 Fed. Cas. No. 1,865.

52. The Edward Albro, 10 Ben. 668, 8 Fed. Cas. No. 4,290.

53. See the title "**Admiralty,**" and Admiralty Rule 18.

[a] **A reference** may be ordered to determine the actual constituents of a bottomry lien, the validity of which is contested. Furniss *v.* The Magoun, Olc. 55, 9 Fed. Cas. No. 5,163.

[b] **Intervention.**—(1) A mortgagee of a vessel may intervene in a suit by the holder of a bottomry bond and contest the validity of the bottomry or its priority of lien, as against his mortgage. Furniss *v.* The Magoun, Olc. 55, 9 Fed. Cas. No. 5,163. (2) This is likewise true of creditors generally who have obtained decrees against the proceeds of a vessel, where bottomry creditors come in and arrest the fund. French *v.* The Superb, 9 Fed. Cas. No. 5,103a.

54. The Grapeshot, 2 Woods 42, 10 Fed. Cas. No. 5,703.

[a] **But where there is no risk,** only the ordinary rate will be allowed. Deguilder *v.* Depeister, 1 Vern. 263, 23 Eng. Reprint 458. See also Bradley *v.* Cargo of Lumber, 29 Fed. 648.

55. The Grapeshot, 2 Woods 42, 10 Fed. Cas. No. 5,703.

[a] **After remand** by an appellate court, interest, if not a part of the judgment, cannot be added if the judg-

in the court's registry during such period and not at interest.[56] Costs, in the discretion of the court, may be denied the libelant on a bottomry bond who sues without giving the claimant a chance to determine the validity of the bond.[57]

VII. PROCEEDINGS TO ENFORCE GENERAL AVERAGE.

A. In General. — While actions to enforce the doctrine of general average are usually brought in a court of admiralty,[58] by a proceeding in rem to enforce the lien,[59] or in personam when the lien is waived,[60] a promise, express or implied, based upon the liability to contribute, may be enforced, according to the circumstances of the case, at common law[61] or in equity.[62]

B. Parties. — In cases involving general average all parties in interest should be made parties to the suit.[63] The proceeding or action may be maintained by any one entitled to a general average contribution against any one or any thing liable to such contribution;[64] as, for instance, by the owners of the vessel against the owners of the cargo saved;[65] or against assignees of the thing subject to contribution;[66] against the owners and master when the latter voluntarily releases a cargo subject to a general average lien without receiving payment or security;[67] by the master in assumpsit against the owners of goods subject to general average whose share he has paid;[68] and

ment is affirmed, but may if reversed. The Grapeshot, 2 Woods 42, 10 Fed. Cas. No. 5,703.

56. The Grapeshot, 2 Woods 42, 10 Fed. Cas. No. 5,703.

57. The Edward Albro, 10 Ben. 668, 8 Fed. Cas. No. 4,290.

As to costs in admiralty generally, see 1 Standard Proc. 570, et seq.

58. **Admiralty jurisdiction,** see 1 Standard Proc. 403.

[a] **Adjustment.**—An action to enforce a lien for general average is not maintainable until an average adjustment is made. Commercial Union Ins. Co. *v.* Proceeds of the Allinca, 64 Fed. 871, *affirmed,* 79 Fed. 989, 25 C. C. A. 292.

59. See 1 Standard Proc. 414, n. 7.

60. Pittsburg & Erie Coal Co. *v.* George Urban Milling Co., 239 Fed. 271, 152 C. C. A. 259.

61. **Ala.**—Eckford *v.* Wood, 5 Ala. 136. **Conn.**—Lyon *v.* Alvord, 18 Conn. 66. **Ill.**—Gillett *v.* Ellis, 11 Ill. 579. **Mass.**—Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436. **Mich.**—Backus *v.* Coyne, 35 Mich. 5. See Rossiter *v.* Chester, 1 Doug. 154. **N. Y.**—Sherwood *v.* Ruggles, 2 Sandf. 55. **Pa.**—Broadnax *v.* Cheraw & S. R. Co., 157 Pa. 140, 27 Atl. 412. **Eng.** Schloss *v.* Heriot, 14 C. B. (N. S.) 59, 108 E. C. L. 59, 143 Eng. Reprint 366.

62. Sturgess *v.* Cary, 2 Curt 59, 23 Fed. Cas. No. 13,572; Backus *v.* Coyne, 35 Mich. 5.

63. The Congress, 1 Biss. 42, 6 Fed. Cas. No. 3,099.

As to parties generally, see the titles "**Admiralty;**" "**Parties.**"

64. The Santa Ana, 154 Fed. 800, 84 C. C. A. 312. See also the cases cited *infra,* this section.

[a] **Property of Government.** — A general average claim may be enforced against the United States or any other sovereignty. United States *v.* Wilder, 3 Sumn. 308, 28 Fed. Cas. No. 16,694; Brown's Admr. *v.* United States, 15 Ct. Cl. 392.

65. Pittsburg & Erie Coal Co. *v.* George Urban Milling Co., 239 Fed. 271, 152 C. C. A. 259.

66. Dike *v.* The St. Joseph, 6 McLean 573, 7 Fed. Cas. No. 3,908.

67. **U. S.**—The Santa Ana, 154 Fed. 800, 84 C. C. A. 312; Heye *v.* North German Lloyd, 33 Fed. 60, 2 L. R. A. 287. **Ill.**—Gillett *v.* Ellis, 11 Ill. 579. **Eng.**—Crookes *v.* Allan, 49 L. J. Q. B. 201, 5 Q. B. D. 38, 4 Asp. M. C. 216, 41 L. T. N. S. 800, 28 Wkly. Rep. 304.

68. Eckford *v.* Wood, 5 Ala. 136.

by a connecting carrier in whose hands goods are when they become subject to a general average charge.[69]

C. PLEADING. — The pleadings are framed in accordance with the general rules elsewhere treated.[70] A plea alleging that other persons liable to contribution have not been made parties should specifically state who such parties are.[71] Where an adjustment is relied upon as a defense it must be pleaded,[72] which is also true of any defense exonerating the defendant from the obligation to contribute.[73] A claim for contribution may be pleaded as a set-off in an action for damages to the cargo.[74]

D. TRIAL AND REVIEW. — The trial[75] and review[76] in proceedings for average contribution proceed in the ordinary way.

VIII. ACTIONS FOR DEMURRAGE. — A. IN GENERAL. — Demurrage may be recovered in admiralty in proceedings in rem[77] or in personam.[78] The personal action in such case may also be brought in a state or common law court.[79] But a suit in rem against a cargo for demurrage cannot be maintained after an unconditional delivery to the consignee.[80] An action for damages for wrongful detention is proper where an action for demurrage is not maintainable because not reserved in the contract.[81]

69. The Morning Mail, 17 Fed. 545.

70. See the title "**Admiralty.**"

71. Hennen *v.* Monroe, 4 Mart. N. S. (La.) 449.

72. Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436.

73. Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436.

74. The Oquendo, 3 Asp. M. C. 558, 38 L. T. N. S. 151. See generally 1 STANDARD PROC. 482.

75. See the title "**Admiralty.**"

[a] **Instructions** must be based upon the law applicable to the case and in harmony with the evidence produced. So, where the evidence is conflicting, it would be improper to give an instruction on the burden of proof as to the vessel's seaworthiness or unseaworthiness which assumes conclusive evidence one way or the other. Broadnax *v.* Cheraw & S. R. Co., 157 Pa. 140, 27 Atl. 412.

[b] **Province of Judge and Jury.** In an action of assumpsit for general average by a vessel's owners against the consignees of its cargo, the question of seaworthiness when disputed is for the jury. Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55.

76. See the title "**Admiralty.**"

[a] **Objections Must Be Specific.** (1) Where a claim for general average includes items not properly involved, but the objection of the defendant at the trial goes to the whole claim, a judgment covering the entire expense will not be reversed. Lyon *v.* Alvord, 18 Conn. 66. (2) And under a general objection the appellant cannot urge on appeal that the referee was in error as to certain items. Jones *v.* Bridge, 2 Sweeny (N. Y.) 431.

77. Salisbury *v.* 70,000 Feet of Lumber, 68 Fed. 916; Hawgood *v.* 1310 Tons of Coal, 21 Fed. 681.

Admiralty jurisdiction, see 1 STANDARD PROC. 386.

78. Dewar *v.* Mowinckel, 179 Fed. 355, 102 C. C. A. 539; The William Marshall, 29 Fed. 328.

79. See the state cases cited, *infra.*

[a] **Assumpsit.**—The common law form of action may be special assumpsit. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255.

80. Dewar *v.* Mowinckel, 179 Fed. 355, 102 C. C. A. 539; A Cargo of Fertilizer, 88 Fed. 984; Egan *v.* A Cargo of Spruce Lath, 43 Fed. 480; Riley *v.* A Cargo of Iron Pipes, 40 Fed. 605; Winslow *v.* 400 Bbls. of Salt, 1 Biss. 459, 30 Fed. Cas. No. 17,881.

81. Franklin Transit Co. *v.* Federal Sugar Refining Co., 242 Fed. 43, 154 C. C. A. 635.

B. PARTIES. — In actions to recover demurrage the master and owners may join when both are interested,[82] otherwise the proceeding may be maintained by the master in the name of the owners,[83] or in his own name when he is pro hac vice owner of the vessel.[84] The action is not maintainable against the bill-of-lading consignors who are known by the master to be acting merely as agents.[85]

C. PLEADING. — The pleadings follow the general rules, depending upon whether the proceeding is in a maritime or non-maritime court.[86] Thus the libel must state facts sufficient to warrant the granting of the relief therein prayed for.[87] Thus when the suit is against a consignee, his obligation to receive the goods on which demurrage is claimed, must be shown;[88] when the suit is against a vessel, the allegations must disclose a maritime lien upon it for demurrage;[89] and the number of days, with their dates, for which demurrage is claimed should be stated.[90]

Negligence of the plaintiff as cause for the delay must be pleaded in admiralty to be available as a defense.[91]

D. PROVINCE OF JUDGE AND JURY, INSTRUCTIONS AND APPEAL. — In such proceedings questions of law and fact,[92] instructions,[93] as well as

82. Jones *v.* Freeman, 29 Md. 273. See generally the titles "**Admiralty**;" "**Parties.**"

83. Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757.

84. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Hunt *v.* Barker, 64 Me. 344.

85. Stafford *v.* Watson, 1 Biss. 437, 22 Fed. Cas. No. 13,276.

86. See the titles "**Admiralty**;" "**Implied and Express Agreements**;" and numerous titles dealing with particular phases of pleading.

87. Dunwody *v.* The Campbell, 106 Fed. 542, 45 C. C. A. 464; Merritt & Chapman D. & W. Co. *v.* Vogeman, 127 Fed. 770.

[a] **Matters of evidence** should not be pleaded. So, where the libel states sufficient facts to hold the defendant liable for the detention it is not necessary to go further and plead whose duty it was, under the charter-party or bill of lading, to discharge the cargo. Mott *v.* Frost, 45 Fed. 897.

[b] **Under a prayer for general relief**, the libel setting forth all the material facts ultimately found by the court, it is proper in a court of admiralty to award the full amount found due for freight, demurrage and expenses, although the libel makes claim for only demurrage and expenses. The Gazelle & Cargo, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. ed. 496.

88. Merritt & Chapman D. & W. Co. *v.* Vogeman, 127 Fed. 770.

89. Dunwody *v.* The Campbell, 106 Fed. 542, 45 C. C. A. 464.

90. The Cargo of the Jos. W. Brooks, 122 Fed. 881.

91. Hagar *v.* Elmslie, 107 Fed. 511, 46 C. C. A. 446.

Pleading negligence, see the title "**Negligence.**"

92. See the title "**Province of Judge and Jury.**"

[a] **Questions of Law and Fact.** (1) What is a reasonable time for a consignee to provide a place for the reception of goods is a question of fact to be determined in accordance with the circumstances of each case. Fulton *v.* Blake, 5 Biss. 371, 9 Fed. Cas. No. 5,153. (2) The question of unreasonable delay is also one of fact. Scholl *v.* Albany & R. I. & S. Co., 101 N. Y. 602, 5 N. E. 782; Dayton *v.* Parke, 67 Hun 137, 22 N. Y. Supp. 613, 51 N. Y. St. 542.

93. See the title "**Instructions.**"

[a] **Not To Mislead or Misstate the Law.**—Where the facts of a case show that the consignee had plenty of time to unload before severe weather conditions set in and prevented a discharge of the cargo until spring, it is proper to refuse an abstract charge

appeal,[94] follow the general rules elsewhere treated.

IX. PILOTAGE, RECOVERY OF. — A. In General. — Proceedings for the recovery of pilotage may be in rem or in personam in admiralty,[95] or in personam in a non-maritime court.[96] In some ports the boards of navigation commissioners have a limited jurisdiction of pilotage claims.[97]

B. Pleading. — Suits to recover pilotage follow the general rules of pleading.[98] Thus, for services never rendered, the libel should aver a due tender and refusal,[99] and where the amount of pilotage is measured by the vessel's tonnage, its tonnage should be averred.[1] An exemption from liability for the payment of pilotage fees should be pleaded to be available as a defense.[2]

C. Costs. — Costs in admiralty, in the court's discretion, may be awarded against a pilot who prevails in his proceeding against a vessel.[3]

to the effect that the master should have protected the cargo from the weather. Ulster Brick Co. *v.* Murtha & Schmohl Co., 169 App. Div. 151, 154 N. Y. Supp. 834.

94. See the titles "**Admiralty;**" "**Appeals.**"

[a] **Rehearing.**—Where a judgment for demurrage is rendered against the defendant consignee on the ground of his negligence, and it is afterwards discovered and with reasonable dispatch brought to the attention of the court that the delay was caused by the negligence of third parties for whose acts the defendant is not responsible, a rehearing will be granted. Van Etten *v.* Newton, 15 Daly 538, 7 N. Y. Supp. 663, 28 N. Y. St. 169.

95. Reardon *v.* Arkell, 59 Fed. 624; Clark *v.* The Ruth, 39 Fed. 128; The William Law, 14 Fed. 792. See Admiralty Rule 14.

[a] **For services refused,** although tendered according to statute. The Alzena, 14 Fed. 174.

[b] **Failure to comply with rules,** made by a board of navigation, for which he may have his license revoked, does not bar a pilot from maintaining an action or proceeding to recover for services rendered, or duly offered and refused, for until his license is revoked he is entitled to his fees. The Alcalde, 30 Fed. 133; Davis *v.* Heide & Co., 161 N. C. 476, 77 S. E. 691.

96. **Ala.**—Beckwith *v.* Baldwin, 12 Ala. 720. **La.**—Henning *v.* The St. Helena, 5 La. Ann. 349. **Mass.**—Martin *v.* Hilton, 9 Metc. 371. **N. Y.** Shepherd *v.* Mitchill, 10 Johns. 112; Wilson *v.* Mills, 10 Abb. Pr. (N. S.) 143. **N. C.**—Davis *v.* Heide & Co., 161 N. C. 476, 77 S. E. 691.

97. The Alcalde, 30 Fed. 133; Davis *v.* Heide & Co., 161 N. C. 476, 77 S. E. 691, $60,000.

98. See the title "**Admiralty.**"

[a] **Redundancy.**—Having alleged a valid tender of services and a refusal, the libelant need not go further and excuse his failure to perform. Beckwith *v.* Baldwin, 12 Ala. 720.

[b] **Anticipating Defenses.** — It is unnecessary to state whether the vessel is coastwise or foreign, in an action for services tendered but refused, since if it belongs to a class exempted from the payment of pilotage fees, this is a defense which need not be anticipated. Hagan *v.* Townsend, 118 Ga. 682, 45 S. E. 478.

99. The Harriet S. Jackson, 32 Fed. 110.

1. The Lud Keefer, 49 Fed. 650, *mod.* 51 Fed. 44, 2 C. C. A. 95.

2. Hagan *v.* Townsend, 118 Ga. 682, 45 S. E. 478.

3. The S. & B. Small, 8 Ben. 523, 21 Fed. Cas. No. 12,291b.

As to costs generally, see the titles "**Admiralty;**" "**Costs.**"

[a] **Vessel Not at Fault.**—Costs will not be awarded against a vessel in a suit based on a tender of services where the action is forced upon it by two contending pilots whose conflicting claims it is unable to determine. The S. & B. Small, 8 Ben. 523, 21 Fed. Cas. No. 12,291b.

X. TOWAGE. — A. PROCEEDINGS TO RECOVER COMPENSATION. The jurisdiction of admiralty extends to contracts of towage,[4] but is not exclusive of the jurisdiction of a state or common law court.[5] When the service is performed on the credit of the vessel, or under any other circumstances giving rise to a maritime lien, the proceeding may be in rem,[6] otherwise it should be in personam.[7] Such lien is generally enforced by the owner of the tug,[8] but the proceeding may be instituted and maintained by his assignee,[9] or by a mortgagee in possession of the vessel rendering the service.[10]

In such proceedings the general rules are applied as to pleading,[11] and costs.[12]

B. PROCEEDINGS FOR NEGLIGENT TOWING. — **1. Jurisdiction and Nature of Action.** — A proceeding to recover damages for a loss or injury resulting from the negligent performance of a towage contract may be in rem in a court of admiralty,[13] or in personam in admiralty or in a state or common law court.[14]

2. Parties. — In accordance with elementary general principles an action for negligent towing may be maintained by the real party in interest, *i. e.*, the party entitled to damages,[15] as for example, by the owner of a chartered tow for an injury before the expiration[16] of the

4. See 1 STANDARD PROC. 386.

5. Knapp, S. & Co. *v.* McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921, *affirming* 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290. See Nelson *v.* Yates, 37 Hun (N. Y.) 52; Crawford *v.* Collins, 45 Barb. 269, 30 How. Pr. 398.

6. Mack S. S. Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57; The John Cuttrell, 9 Fed. 777; The Emma L. Coyne, 8 Fed. Cas. No. 4,466.

[a] **When executory** a contract of towage cannot be enforced by a proceeding in rem. See 1 STANDARD PROC. 416, and The Benefactor, 242 Fed. 582.

[b] **A lien given by a local statute** for services rendered by a tug may be enforced in admiralty in a proceeding in rem. Mack S. S. Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57.

7. Mack S. S. Co. *v.* Thompson, 176 Fed. 499, 100 C. C. A. 57.

8. The John Cuttrell, 9 Fed. 777.

9. The Emma L. Coyne, 8 Fed. Cas. No. 4,466.

10. Kearney *v.* A Pile-Driver & Stage, 3 Fed. 246.

11. See the titles **"Admiralty;" "Implied and Express Agreements;"** and numerous other titles dealing with particular phases of pleading.

[a] **Pleading Essential Facts.**—The libel, if in rem, must state sufficient facts to show the existence of a lien on the vessel, such as the existence of a state statute creating a lien, or that the services were rendered on the credit of the vessel. The Mame, 189 Fed. 419.

12. See the titles **"Admiralty;" "Costs."**

[a] **Effect of a Sufficient Tender.** The Raven, 27 Fed. 470.

[b] **Where Tender Excused.** — The Sebastian Bach, 12 Fed. 172.

[c] **Payment Restrained.**—Kearney *v.* A Pile-Driver & Stage, 3 Fed. 246.

13. See The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. ed. 969; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83; The Gladiator, 223 Fed. 381; The Temple Emery, 122 Fed. 180; Pope *v.* The Pacific, 3 Hawaii Dist. Ct. 201.

Admiralty jurisdiction, see 1 STANDARD PROC. 386.

A tort action, see 1 STANDARD PROC. 386.

14. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488. See Worthington Live Stock Co. *v.* Consolidated Coal Co., 169 Mo. App. 230, 152 S. W. 392.

15. See the titles **"Admiralty;" "Parties."**

16. Monk *v.* Cornell Steamboat Co., 175 Fed. 271.

charter-party; or the owner, even though the tow was insured;[17] or an insurer, after payment of the loss;[18] or the bailees of the injured tow;[19] the owners of the tow and cargo jointly,[20] or separately.[21] Where the injury is due to the fault of other vessels and the tug, all may be united in one proceeding.[22]

3. Pleading. — The pleadings in such actions follow the general rules elsewhere treated.[23] Thus, in pleading negligence, the particular acts of negligence and wherein they were negligent should be stated in a libel in admiralty,[24] and this is especially so when the operation alleged to be an act of negligence is a necessary act.[25]

4. Province of Judge and Jury. — In accordance with general principles, in such an action negligence of the tug,[26] or the tow,[27] is ordinarily a question of fact.

5. Instructions.[28] — As in any other action, instructions must be in harmony with the law applicable to the case,[29] and the evidence adduced at the trial.[30] An instruction on a question already disposed of by a prior instruction is properly refused.[31]

17. White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

18. The Frank G. Fowler, 8 Fed. 360; The Liberty No. 4, 7 Fed. 226.

19. The Venture, 18 Fed. 462; White *v.* Bascom, 28 Vt. 268.

20. The City of Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930.

21. The City of Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930; The Liberty No. 4, 7 Fed. 226.

22. The Marshall, 12 Fed. 921.

23. See the titles "**Admiralty;**" "**Injuries to Persons and Property;**" "**Negligence.**"

[a] **Amendments** may (1) be permitted at any time as to matters of form (The Enterprise, 3 Wall. Jr. 58, 8 Fed. Cas. No. 4,500), or (2) to make the petition or libel conform to the evidence (Worthington Live Stock Co. *v.* Consolidated Coal Co., 169 Mo. App. 230, 152 S. W. 392), or (3) to make the libel conform to the issue of negligence, where such issue has not been properly pleaded. The Deer, 4 Ben. 352, 7 Fed. Cas. No. 3,737. (4) An amendment, not prejudicial to the other party, and aiming at substantial justice, may be permitted in the discretion of the court at any time during the progress of the case. The Morton, 17 Fed. Cas. No. 9,864.

24. The Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382; The Quickstep *v.* Byrne, 9 Wall. (U. S.) 665, 19 L. ed. 767; Pope *v.* The Pacific, 3 Hawaii Dist. Ct. 201.

[a] **Insufficient Averment of Negligence.**—See The Deer, 4 Ben. 352, 7 Fed. Cas. No. 3,737.

25. Pope *v.* The Pacific, 3 Hawaii Dist. Ct. 201.

26. **U. S.**—Bust *v.* Cornell Steamboat Co., 24 Fed. 188. **Ind.**—Neal *v.* Scott, 25 Ind. 440. **N. Y.**—Tebo *v.* Jordan, 67 Hun 392, 22 N. Y. Supp. 156, 51 N. Y. St. 319; Carpenter *v.* Eastern Transp. Line, 67 Barb. 570; Leo *v.* Cornell Steamboat Co., 85 N. Y. Supp. 1073.

See the titles "**Negligence;**" "**Province of Judge and Jury.**"

27. Bust *v.* Cornell Steamboat Co., 24 Fed. 188; Delaware & C. Steam Towboat Co. *v.* Starrs, 69 Pa. 36.

28. See the title "**Instructions.**"

29. **U. S.**—Bust *v.* Cornell Steamboat Co., 24 Fed. 188. **Ind.**—Neal *v.* Scott, 25 Ind. 440. **N. Y.**—Tebo *v.* Jordan, 73 Hun 218, 25 N. Y. Supp. 1070, 57 N. Y. St. 149, *affirmed*, 147 N. Y. 387, 42 N. E. 191; Arctic Fire Ins. Co. *v.* Austin, 66 Barb. 257.

30. Worthington Live Stock Co. *v.* Consolidated Coal Co., 169 Mo. App. 230, 152 S. W. 392.

31. Wagner *v.* Buffalo & R. Transit Co., 59 App. Div. 419, 69 N. Y. Supp. 113, *affirmed*, 172 N. Y. 634, 65 N. E. 1123. See also Worthington Live Stock Co. *v.* Consolidated Coal Co., 169 Mo App. 230, 152 S. W. 392.

6. Costs. — Costs in a proceeding in admiralty for negligent injury to a tow are awarded, in accordance with the general rules on the subject, to the prevailing party,[32] or to the party who, in the discretion of the court, is justly entitled thereto, irrespective of the disposition of the case,[33] or they may be apportioned between the parties when the circumstances indicate that action to be just and proper,[34] as in a case where the damages are divided.[35]

XI. PROCEEDINGS FOR LIMITATION OF LIABILITY. — A. IN GENERAL. — A proceeding to obtain the benefit of the statute,[36] limiting the liability of shipowners, while partaking of the nature of an action in personam, and having some of the characteristics of a suit in equity, is neither an action in rem nor in personam, but is a proceeding sui generis.[37] The statute may be invoked whether there be a plurality of claims or only one,[38] though the amount of the claim presented does not equal the admitted value of the vessel, where there is a probability that there may be others,[39] but not if it does not appear that there might be other claims the aggregate amount of which would exceed the value of the res involved.[40]

B. REMEDIES RESERVED. — The procedure indicated by the admiralty rules is not intended to prevent an owner from availing himself of any other remedy which the law itself entitles him to adopt,[41] and, while the regular course of proceeding is by libel or petition,[42] in personam or in rem,[43] the question may be raised and determined upon exception to the pleadings in an action against the vessel or the owners,[44] or by answer.[45]

C. JURISDICTION AND VENUE. — Admiralty has exclusive jurisdiction of the limitation proceedings provided by the admiralty rules.[46]

32. See 1 STANDARD PROC. 570, et seq.; and *infra*, this section.

33. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314; Richter *v.* The Olive Baker, 40 Fed. 904; The James A. Garfield, 21 Fed. 474; O'Hare *v.* The Brilliant, 3 Fed. 719.

34. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314.

35. The Gladiator, 223 Fed. 381.

36. U. S. Rev. St., §§4283-4285; 7 U. S. Comp. St., 1916, §§8021-8023. See Admiralty Rules 54-58.

37. See the following cases: *In re* Morrison, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60; Briggs *v.* Day, 21 Fed. 727; The City of Norwich, 6 Ben. 330, 5 Fed. Cas. No. 2,762.

38. White *v.* Island Transp. Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. ed. 993; Strong *v.* Holmes, 238 Fed. 554, 151 C. C. A. 490; The Hoffmans, 171 Fed. 455; *In re* Starin, 124 Fed. 101.

39. The Defender, 201 Fed. 189.

40. Shipowners' & Merchants' Tugboat Co. *v.* Hammond Lumb. Co., 218 Fed. 161, 134 C. C. A. 575 (*affirmed*, 212 Fed. 455); The Tug No. 16, 237 Fed. 405; The Defender, 201 Fed. 189.

41. *Ex parte* Slayton, 105 U. S. 451, 26 L. ed. 1066; The Enterprise, 196 Fed. 404. See also The Ethelstan, 246 Fed. 187, as to following the details of the outlined procedure.

42. Admiralty Rule 54.

43. The Rochester, 230 Fed. 519.

44. See The Enterprise, 196 Fed. 404.

45. The Scotland, 105 U. S. 24, 26 L. ed. 1001; The Rosa, 53 Fed. 132.

46. See 1 STANDARD PROC. 403.

[a] **Effect of Certain Issues.**—The admiralty jurisdiction is not ousted by a damage claimant putting in issue the petitioner's allegation that the loss was incurred without his privity or knowledge. White *v.* Island Transp. Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. ed. 993.

[b] **Employers' Liability Act.**—The exclusive jurisdiction of admiralty over proceedings for limitation of liability

Prior to the commencement of an action against the vessel or owner, the jurisdiction of proceedings to limit the owner's liability belongs to the federal district court of the district in which is situated the vessel,[47] or its proceeds;[48] but if an action has been instituted against the owner in another district, the proceeding may be brought in either district,[49] though it has been held to the contrary that in such case the owner must resort to the district where he is sued.[50] On the other hand, when a suit has been commenced against the vessel, the owner must proceed in the same court;[51] and the rule is not changed if, when he files his petition, the suit against the vessel is pending in a higher court on appeal.[52]

D. Commencement of Proceedings and Matter in Bar. — As already indicated[53] a proceeding for limitation of liability may be commenced either before[54] or after[55] a libel against the vessel or owner has been filed, but it is otherwise in collision cases where both vessels are at fault, the rule of limited responsibility not being applicable until the liability of one party to the other has been ascertained.[56] One is not precluded by an allegation in his petition that he is without liability,[57] or by failure to assert the right in a collision case,[58] or by contesting all liability whatever for the collision,[59] or by prior litigation in a state court,[60] unless he acts in such a way as

is not affected by the federal employers' liability act. The Passaic, 190 Fed. 644, *affirmed*, 204 Fed. 266, 122 C. C. A. 466.

[c] **Invoking Statute in State Court.** While the jurisdiction of admiralty over the limitation proceedings outlined by the admiralty rules is exclusive, the statute on limitation of liability by shipowners may be invoked by answer in a state court in a damage claimant's suit. The Rosa, 53 Fed. 132. See also Loughin *v.* McCaulley, 186 Pa. 517, 40 Atl. 1020, 65 Am. St. Rep. 872, 48 L. R. A. 33. *Contra*, Saginaw Bay Transp. Co. *v.* Portage Entry Quarries Co., 16 Ohio C. C. (N. S.) 216, *affirmed*, 82 Ohio St. 434, 92 N. E. 1122.

47. The John Bramall, 10 Ben. 495, 13 Fed. Cas. No. 7,334. See 1 Standard Proc. 425.

48. *In re* Leonard, 14 Fed. 53.

[a] **The Statute Construed. —** The Enterprise, 196 Fed. 404.

49. The John K. Gilkinson, 150 Fed. 454. See also Strong *v.* Holmes, 238 Fed. 554, 151 C. C. A. 490; Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100; *In re* Louisville & Cincinnati Packet Co., 223 Fed. 185.

[a] **Vessel in District Temporarily.** To be within the court's jurisdiction, it is sufficient if the vessel be in the district temporarily, but in the regular course of its business. The John K. Gilkinson, 156 Fed. 868.

50. The Enterprise, 196 Fed. 404.

51. The Alpena, 10 Biss. 436, 8 Fed. 280.

52. The Luckenback, 26 Fed. 870.

53. See *supra*, XI, C.

54. *Ex parte* Slayton, 105 U. S. 451, 26 L. ed. 1066; Black *v.* So. Pac. R. Co., 39 Fed. 565; The Alpena, 10 Biss. 436, 8 Fed. 280. See Admiralty Rule 57.

55. The S. A. McCaulley, 99 Fed. 302; Black *v.* So. Pac. R. Co., 39 Fed. 565.

56. The North Star, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. ed. 91; The Ethelstan, 246 Fed. 187. See also *In re* Piper Aden Goodall Co., 86 Fed. 670.

57. The John Bramall, 10 Ben. 495, 13 Fed. Cas. No. 7,334.

58. Monongahela River C. C. & C. Co. *v.* Hurst, 200 Fed. 711, 119 C. C. A. 127.

59. New York & W. S. S. Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351, *reversed*, 4 Ben. 44, 18 Fed. Cas. No. 10,200; *In re* Piper Aden Goodall Co., 86 Fed. 670.

60. The City of Boston, 159 Fed.

to effectively bar himself, as, *e. g.*, by giving a supersedeas bond on appeal.[61] But the giving of a supersedeas bond in an admiralty court in a collision case is not a bar or waiver,[62] nor is the filing of an undertaking for release of the vessel.[63]

E. PARTIES.[64] — A proceeding to obtain the benefit of the statute may be maintained by any owner of the vessel involved who is not a privy to the loss or damage incurred,[65] *e. g.*, a part owner,[66] a railroad company,[67] an insurer, to whom a vessel has been abandoned,[68] a charterer, as owner pro hac vice,[69] but not a lighterman employed by the owner to transfer a cargo from one ship to another,[70] as the act does not apply to personal contracts.[71] Part owners of a vessel may maintain a proceeding for limitation of liability either jointly,[72] or severally.[73] In collision cases an owner liable to contribution should be brought in.[74] Only those parties who have filed claims for damages in a proceeding to limit liability may answer the petition.[75]

257; The Ocean Spray, 117 Fed. 971; *In re* Meyer, 74 Fed. 881.

61. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

62. Monongahela River C. C. & C. Co. *v.* Hurst, 200 Fed. 711; 119 C. C. A. 127.

63. The Rochester, 230 Fed. 519; Eldridge *v.* The Rose Culkin, 52 Fed. 328; *In re* New York & W. S. S. Co., 4 Ben. 44, 18 Fed. Cas. No. 10,200; The City of Norwich, 6 Ben. 330, 5 Fed. Cas. No. 2,762.

64. See generally the titles "Admiralty;" "Parties."

65. *Ex parte* Slayton, 105 U. S. 451, 26 L. ed. 1066; *In re* Eastern Dredging Co., 138 Fed. 942; The John Bramall, 10 Ben. 495, 13 Fed. Cas. No. 7,334.

[a] **Effect of Insurance.**—The fact that the owner has recovered insurance does not affect his right to invoke the statute. The Pere Marquette 18, 203 Fed. 127.

[b] **Owners of a foreign vessel** may (1) invoke the statute for limitation of liability (The Titanic, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. ed. 1171, L. R. A. 1916B, 637; Deslions *v.* La Compagnie Generale Transatlantique, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; The Scotland, 105 U. S. 24, 26 L. ed. 1001), although (2) the limitation laws of such foreign country are unlike those of the United States (The Titanic, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. ed. 1171, L. R. A. 1916B, 637), and (3) where it appears that the laws of the foreign country to which such vessel belongs are different from those of the United States relating to limitation of liability, nevertheless the laws of the United States will be enforced. The Titanic, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. ed. 1171, L. R. A. 1916B, 637, *reversed*, 209 Fed. 501.

66. The S. A. McCaulley, 99 Fed. 302; Thorp *v.* Hammond, 23 Fed. Cas. No. 14,004.

67. The San Rafael, 134 Fed. 749.

68. Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. ed. 886, *affirmed*, 26 Fed. 798.

69. Thorp *v.* Hammond, 12 Wall. (U. S.) 408, 20 L. ed. 419. See also The Paraiso, 226 Fed. 966.

[a] **When Charterer Is Deemed Owner.**—See U. S. Rev. St., §4286; U. S. Comp. St., 1916, §8024.

70. The Loyal, 204 Fed. 930, 123 C. C. A. 252; Smith *v.* Booth, 110 Fed. 680, *affirmed*, 122 Fed. 626, 58 C. C. A. 479.

71. Pendleton *v.* Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. ed. 770, *affirmed* (C. C. A.), 217 Fed. 497, *reversed*, 210 Fed. 67.

72. The S. A. McCaulley, 99 Fed. 302.

73. The S. A. McCaulley, 99 Fed. 302.

74. The City of Boston, 182 Fed. 171. See Admiralty Rule 59.

75. The Klotawah, 210 Fed. 677; The Pere Marquette 18, 203 Fed. 127; *In re* Providence & N. Y. S. S. Co., 6 Ben. 258, 20 Fed. Cas. No. 11,452.

F. JOINDER AND CONSOLIDATION OF PROCEEDINGS.[76] — Where the owners of two vessels equally at fault in a collision case file separate petitions to limit their liability, the two proceedings will not be consolidated on the motion of a damage claimant in the absence of a showing of advantage gained by such an action.[77]

G. PLEADING. — **1. Libel and Petition.** — A petition for limitation of libility is to all intents and purposes a libel in admiralty,[78] and the general rules relating to the form and sufficiency of such libel must be followed.[79] The petitioner must set forth facts showing the peculiar and exclusive jurisdiction of the court of admiralty,[80] and entitling the petitioner to the relief sought.[81] It is unnecessary to aver that the amount of the claims against the vessel is in excess of its value,[82] nor need it be alleged that there is more than one claim against the vessel.[83] The libel should contain the allegation that the loss or damage was occasioned or incurred without the privity or knowledge of the owner.[84] When the petitioner, in addition to his prayer for limited liability, requests the privilege of contesting the liability of the vessel or owner, he should state in his petition the facts upon which exemption is claimed.[85]

76. See the title "**Admiralty.**"

Joinder of parties, see *supra,* XI, E.

77. The City of Boston, 182 Fed. 171.

78. The Murrell, 188 Fed. 727.

79. *In re* Davidson S. S. Co., 133 Fed. 411. See generally the title "**Admiralty.**"

[a] **Limiting and Contesting Liability.**—A petition to limit the liability of a vessel's owner may have the two-fold aspect of a petition to limit liability and leave to contest the liability of vessel or owner. The Sacramento, 131 Fed. 373.

[b] **Interrogatories.**—The rule which permits the plaintiff to attach interrogatories to his libel directed to the defendant and require him to answer them applies to a petition to limit liability and such interrogatories may be directed to a damage claimant who has commenced an action to recover for injuries received. The Murrell, 188 Fed. 727.

[c] **Amendments.**—Where a petition to limit liability is filed before an action is commenced by a damage claimant, when he does commence his action the owner may amend his petition by adding interrogatories thereto addressed to such damage claimant (The Murrell, 188 Fed. 727), or to show the residence of libelant. The John Bramall, 10 Ben. 495, 13 Fed. Cas. No. 7,334.

80. Shipowners' & Merchants' Tugboat Co. *v.* Hammond Lumb. Co., 218 Fed. 161, 134 C. C. A. 575.

81. *In re* Davidson S. S. Co., 133 Fed. 411. See *In re* Eastern Dredging Co., 138 Fed. 942; Place *v.* The City of Norwich, 1 Ben. 89, 19 Fed. Cas. No. 11,202.

82. The Garden City, 26 Fed. 766. See The Tug No. 16, 237 Fed. 405. But see Shipowners' & Merchants' Tugboat Co. *v.* Hammond Lumb. Co., 218 Fed. 161, 134 C. C. A. 575.

83. See White *v.* Island Transportation Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. ed. 993.

84. The North Star, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. ed. 91; *In re* Davidson S. S. Co., 133 Fed. 411. See White *v.* Island Transportation Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. ed. 993; *In re* Eastern Dredging Co., 138 Fed. 942.

85. The Sacramento, 131 Fed. 373. See Admiralty Rule 56.

[a] **Waiver.**—Where certain cross-suits and proceedings to limit liability growing out of a collision are consolidated by stipulation, and the court is required to adjudicate the entire controversy, the libelant waives whatever technical rights might otherwise have been based upon exceptions to

2. Claim and Answer. — A claim and an answer to a petition for limitation of liability, should conform to the general rules of admiralty pleading.[86] A denial of the petitioner's allegation that the loss was incurred without his privity or knowledge is unnecessary,[87] but where it is denied, with the intention of raising an issue of fact and offering evidence thereon, the particular facts showing such privity or knowledge should be averred,[88] though it has been held that proof of such facts is admissible without being alleged.[89]

H. TRANSFER OF VESSEL, STIPULATION, ETC. — Upon filing a petition for limitation of liability the petitioner is required to transfer the vessel and its pending freight to a trustee appointed by the court, or at his option pay into court its appraised value, with the pending freight, or give a stipulation therefor.[90] The stipulation, as a rule, should not be accepted in the absence of a due appraisement.[91] Notice

the sufficiency of the petition for limitation of liability by reason of a failure to state the facts upon which exemption from liability is claimed. The Trader, 129 Fed. 462.

86. *In re* Davidson S. S. Co., 133 Fed. 411. See generally the title "Admiralty."

[a] **The claim is a pleading in the nature of a libel** and must set out the various allegations of facts upon which the claimant relies to establish the indebtedness of the owner. *In re* Davidson S. S. Co., 133 Fed. 411.

[b] **A claim may be amended** in the same manner as a libel. Thus it is not improper to permit a claimant who sues as an administratrix to amend her claim and sue as a widow, where the facts and law make such a change expedient. The Saginaw, 139 Fed. 906.

87. The John H. Starin, 191 Fed. 800, 112 C. C. A. 286; The Murrell, 188 Fed. 727.

88. The Pere Marquette 18, 203 Fed. 127; The Murrell, 188 Fed. 727; *In re* Davidson S. S. Co., 133 Fed. 411. See Deslions *v.* La Compagnie Generale Transatlantique, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; Saginaw Bay Transp. Co. *v.* Portage Entry Quarries Co., 16 Ohio C. C. (N. S.) 216, *affirmed*, 82 Ohio St. 434, 92 N. E. 1122.

89. The John H. Starin, 191 Fed. 800, 112 C. C. A. 286 (*reversed*, 175 Fed. 527, 173 Fed. 721, but see dissenting opinion); The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366.

90. Ohio Transp. Co. *v.* Davidson S. S. Co., 148 Fed. 185, 78 C. C. A. 319; The H. F. Dimock, 186 Fed. 662; The C. H. Northam, 181 Fed. 985; The U. S. Grant, 45 Fed. 642; The Doris Eckhoff, 30 Fed. 140; Place *v.* The City of Norwich, 1 Ben. 89, 19 Fed. Cas. No. 11,202.

[a] **Surrender of Two Vessels.** When two vessels under one ownership are being used at the time of the loss in such a way that they may be regarded as a single instrumentality, both should be surrendered by the owner in proceedings for limitation of liability. Thompson Towing & Wrecking Assn. *v.* McGregor, 207 Fed. 209, 124 C. C. A. 479. See The Transfer No. 21 (C. C. A.), 248 Fed. 459.

[b] **Sale of Vessel.**—Where it appears that a vessel will be greatly damaged and its value materially impaired if held until the proceedings for limitation of liability are concluded, it may be sold, even though attachment proceedings are pending in a state court. The Mendota, 14 Fed. 358.

[c] **Deposit of Judgment in Collision Case.**—Where the owner of a vessel damaged or lost in a collision recovers, he is not entitled to the benefit of the limited liability act until he deposits in court the amount recovered for the benefit of the vessel's creditors. O'Brien *v.* Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. ed. 469, *reversed*, 67 Fed. 605, 14 C. C. A. 566, *affirmed*, 59 Fed. 621.

91. The H. F. Dimock, 52 Fed. 598.

[a] **Sale Without Appraisal.**—While the procedure outlined by the statute should be followed, it is not exclusive,

of such appraisement to damage claimants is not essential,[92] and an ex parte appraisement, while irregular, is not void.[93] A stipulation should carry a provision for the payment of interest from the date of its execution,[94] but when the proceeding is unduly delayed by claimants the rate or amount of interest may be reduced accordingly.[95] When a charterer joins with the owner in a petition for limitation of liability, his stipulation need not be for more than his interest in the vessel or freight, the stipulation for the vessel's value being required only from the owner.[96]

I. Restraining Other Suits. — The proceedings in the admiralty court for limitation of liability supersede all other actions and suits in the state or federal courts for damages growing out of the same transaction and such actions and suits may be restrained by injunction.[97] But an action in which all the rights of the owner may be protected will not be enjoined,[98] nor will an injunction be permitted to stand without modification until the claims affected by it are barred by limitation.[99] An injunction should not prohibit the collection of taxable costs in an action sought to be enjoined.[1]

J. Trial or Hearing. — In a proceeding for limitation of liability the petition and answer on the one hand and the claims for damages on the other present distinct issues which, although they may be litigated in the same proceeding,[2] are separately adjudicated in the

and a sale without an appraisal may be approved and is not necessarily a ground for dismissal of the petition. The Ethelstan, 246 Fed. 187.

92. Morrison *v.* District Court, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60.

93. Morrison *v.* District Court, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60.

94. The Geo. W. Roby, 111 Fed. 601, 49 C. C. A. 481; *In re* Harris, 57 Fed. 243, 6 C. C. A. 320; The Battler, 58 Fed. 704; The Favorite, 11 Biss. 283, 12 Fed. 213.

95. The Perry G. Walker, 216 Fed. 423.

96. The Paraiso, 226 Fed. 966.

97. Metropolitan Redwood Lumber Co. *v.* Doe, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. ed. 473, Ann. Cas. 1913D, 1221; Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. ed. 1038; New York & W. S. S. Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351; Societe Napthes Transports *v.* Bisso Towboat Co., 241 Fed. 463, 154 C. C. A. 295; The City of Boston, 159 Fed. 257.

[a] **Transfer of the vessel, or filing a stipulation** for its value, may be required before issuance of a restraining order, the value of the vessel being its value at the end of the voyage on which the liability was incurred, not its value at the end of a subsequent voyage. The Americana, 230 Fed. 853.

98. The Rosa, 53 Fed. 132.

[a] **Where there is but one claim** for damage and no probability of more, and an action on such claim has been commenced in a state or common law court, the owner may assert his right to limited liability in an answer, and as his remedy at common law is complete a court of admiralty will not enjoin the action. The Rosa, 53 Fed. 132.

99. *In re* Oceanic Steam Nav. Co., 204 Fed. 295.

1. *In re* Norwich & N. Y. Transp. Co., 10 Ben. 193, 18 Fed. Cas. No. 10,361.

2. Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. ed. 1038; The Benefactor, 103 U. S. 239, 26 L. ed. 351; *In re* Eastern Dredging Co., 159 Fed. 541; The Annie Faxon, 66 Fed. 575, *modifying* 75 Fed. 312, 21 C. C. A. 366.

order named.[3] The general rules relating to the hearing of a proceeding in admiralty are ordinarily observed in a proceeding for limitation of liability.[4]

K. JUDGMENT OR DECREE.[5] — A decision in proceedings for limitation of liability does not apply to claims already satisfied.[6] A final judgment or decree rendered in a state or federal court against a shipowner prior to his commencement of limitation proceedings is conclusive in such proceedings on all issues involved in the former action.[7] Thus final adjudications as to liability and amount of damages in a collision case cannot be relitigated in a limitation proceeding,[8] and when determined in such proceedings, in which all damage claimants are cited to appear and given an opportunity to be heard, the decision is conclusive as to all damage claimants whether they appear or not.[9]

A decree will not be reopened in favor of claimants not parties to the limitation proceedings, their remedy, if not concluded by the decree, being an independent suit.[10]

3. *In re* Davidson S. S. Co., 133 Fed. 411.

[a] **Appraisal and Stipulation To Be Approved.**—The petitioner's liability and right to limitation of liability will not be determined before approval of an appraisal of the vessel and stipulation for its value. The Klotawah, 210 Fed. 677.

[b] **Individual Claims.**—Where there are several damage claimants, and the petitioner does not admit liability, his liability generally will be decided before the individual claims are determined. La Bourgoyne, 106 Fed. 232.

4. See the title "**Admiralty.**"

[a] **Withdrawal of Claim.**—A claim may be withdrawn upon payment of the costs incurred by filing it, where no rights of the petitioner are affected thereby, in accordance with the general rule for the voluntary dismissal of an action without prejudice, and it is immaterial what the claimant's purpose may be for doing so. Thus a claimant against a foreign vessel may withdraw, and it is not a good ground for denying the privilege that he intends to prosecute his claim against the vessel in its own country. The Titanic, 225 Fed. 747, 141 C. C. A. 19.

[b] **Questions of Law and Fact.**—In a proceeding for limitation of liability, as in any other proceeding, the question of whether a cargo was injured by perils of the sea is one of fact to be determined upon the circumstances of the case. The Governor Powers, 243 Fed. 961.

5. See generally the title "**Admiralty.**"

6. The Benefactor, 103 U. S. 239, 26 L. ed. 351.

7. *In re* P. Sanford Ross, 204 Fed. 248, 122 C. C. A. 516 (*reversing* 196 Fed. 921); Monongahela River C. C. & C. Co. *v.* Hurst, 200 Fed. 711, 119 C. C. A. 127; *In re* Old Dominion S. S. Co., 115 Fed. 845. See also The City of Boston, 182 Fed. 174.

8. Monongahela River C. C. & C. Co. *v.* Hurst, 200 Fed. 711, 119 C. C. A. 127; The Maria & Elizabeth, 12 Fed. 627.

9. The City of Boston, 159 Fed. 261.

[a] **But when the owner of two boats in collision, equally at fault,** surrenders only his interest in the ship that was lost, the decision limiting his liability as owner of that ship, is not a bar to a subsequent action against him on account of the negligence of the other ship, by one whose same claim had been presented and allowed in the limitation proceedings. However, the amount paid the claimant under the first proceedings should be deducted from the amount of the judgment in the subsequent action. Hall *v.* North Pacific Coast R. Co., 134 Fed. 309.

10. Dowdell *v.* District Court, 139 Fed. 444, 71 C. C. A. 288.

L. APPEAL. — A final order or decree in a proceeding for limitation of liability is appealable,[11] and the proceedings on such appeal are governed by the general rules applicable to other appeals in admiralty.[12] Thus, a decree in favor of damage claimants is generally several as to them, and an appeal may be prosecuted by one or more without notifying the others;[13] a damage claimant, who was a party to a former appeal, is precluded from reviewing the question of the validity of other claims existing at the time of the first appeal but not raised either then or on remand of the case;[14] and on the reversal and remand of a decree determining solely the question of the right to limited liability, the court below must still determine the question of the existence of liability and the amounts to which damage claimants are entitled.[15]

M. COSTS. — Costs, in a proceeding for limitation of liability, as in admiralty cases generally, rest in the court's discretion,[16] and may be awarded against a shipowner who contests his liability,[17] or whose petition for limitation of liability is denied.[18] As a general rule they fall upon the losing party for every contested issue,[19] but for none other,[20] so that a petitioner cannot recover costs from a claimant on the issue of his right to limit liability when such right is not contested.[21] On appeal, as in the lower court, taxable costs may be assessed against the shipowner who has appeared and contested his liability.[22]

XII. OFFENSES AGAINST NAVIGATION LAWS, PENALTIES AND FORFEITURES. — A. PROSECUTION FOR OFFENSES. — **1. In General.** — Prosecutions for offenses against the navigation laws are generally in charge of the secretary of the department having supervision thereof and it is for him to determine whether or not to prosecute a reported case.[23] The fact that a penalty may be recovered in

11. See the cases cited, *infra.*

12. See generally the titles "**Admiralty;**" "**Appeals.**"

13. Short *v.* The Columbia, 73 Fed. 226, 19 C. C. A. 436, *reversing* 67 Fed. 942, 15 C. C. A. 91.

14. Oregon R. & Nav. Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

Questions that might have been raised on former appeal, see generally the title "**Law of the Case.**"

15. The Tommy, 168 Fed. 563.

As to proceedings on remand of the case, see generally the title "**Mandate and Proceedings Thereafter.**"

16. The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. ed. 175. See 1 STANDARD PROC. 574, et seq.

[a] **When the owner is slow to invoke the admiralty jurisdiction** and the claimant has proceeded against him in a state court, he may be required to pay the costs incurred by the plaintiff in the state court. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100; The Ocean Spray, 117 Fed. 971; The S. A. McCaulley, 99 Fed. 302.

17. The Wanata, 95 U. S. 600, 24 L. ed. 461.

18. The Longfellow, 104 Fed. 360, 45 C. C. A. 379; *In re* Harris, 57 Fed. 243, 6 C. C. A. 320; The Giles Loring, 48 Fed. 463.

19. The W. A. Sherman, 167 Fed. 976, 93 C. C. A. 228; The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123. See also 1 STANDARD PROC. 578.

20. The Vernon, 36 Fed. 113.

21. The W. A. Sherman, 167 Fed. 976, 93 C. C. A. 228.

22. The Wanata, 95 U. S. 600, 24 L. ed. 461.

23. Findlay *v.* United States, 225 Fed. 337, 139 C. C. A. 207.

[a] **The secretary of the department of Commerce and Labor** has charge of

a proceeding against a vessel for an indictable offense does not preclude the indictment and prosecution of the owner for the same offense.[24]

2. Indictment. — The general rules for drawing an indictment should be observed in prosecutions for violations of the navigation laws.[25] Thus a presumption which necessarily follows from the facts stated, such as knowledge that a ship's officer was not licensed, need not be stated in an indictment for employing an unlicensed officer.[26] An indictment, under a state statute, against a pilot for violating the state quarantine laws, should aver that the defendant is a pilot of the port where the offense is committed,[27] but need not aver the presence of the vessel at an infected port.[28]

3. Trial. — At the trial of a pilot indicted under a state law for operating without a license, the question of whether the contract was one for pilotage or towage is for the jury under proper instructions, and if for towage whether the contract was a colorable one only.[29]

prosecutions for violations of the passenger act. Findlay *v.* United States, 225 Fed. 337, 139 C. C. A. 207.

[b] **Revocation of Officer's License.** The statute (U. S. Rev. St., §4449, U. S. Comp. St., 1916, §8211) relating to the inspection of steam vessels, and providing for the revocation or suspension of an officer's license for failure to serve after having signed articles or while employed on any vessel, is a remedial, not a penal, statute, and the revocation of a license as therein provided may be viewed rather as a remedy to insure better efficiency in the steamboat inspection service than as a punishment for an offense. 24 Op. Atty. Gen. 136.

24. United States *v.* Nash, 111 Fed. 525, navigating power-propelled vessel without a licensed engineer.

25. See generally the title "**Indictment and Information.**"

[a] **Words of the Statute.**—United States *v.* McAvoy, 4 Blatchf. 418, 18 How. Pr. 380, 26 Fed. Cas. No. 15,654.

[b] **Violation of the bill-of-lading provisions** of the Harter Act, see United States *v.* Cobb, 163 Fed. 791.

[c] **Negligent pilotage,** — sufficient allegation of negligence, see Wilson *v.* Pilots' Assn., 55 Fed. 1000.

[d] **Watchmen on passenger-steamers,**—sufficiency of indictment for neglect to comply with the statute, see United States *v.* Beacham, 29 Fed. 284.

[e] **Use of Term "Passenger."** Under a statute against operating a steam vessel for the carriage of passengers or freight without a licensed engineer, the use of the term "passenger" implies a service for hire and it is not necessary to allege that a passenger was carried for hire. Commonwealth *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536.

[f] **An indictment for conspiracy to defraud the United States** by evading the regulations for the inspection of steam vessels need not aver that the vessel was not a public vessel although such vessels are excepted from the operation of the act. United States *v.* Stone, 135 Fed. 392.

[g] **An indictment against an owner for running his own vessel before an inspection,** if not within the statute, should aver that such act is prohibited by a duly established regulation of the general board of inspectors. United States *v.* Nash, 111 Fed. 525.

[h] **Destruction of Vessel.**—Under a federal statute making it an indictable offense to wilfully destroy a vessel of another person on the high seas, the indictment must show that the offense was committed on the high seas. United States *v.* Wilson, 3 Blatchf. 435, 28 Fed. Cas. No. 16,731.

26. United States *v.* Sims, 9 Fed. 443.

27. Bloom *v.* State, 57 Miss. 752.

28. Bloom *v.* State, 57 Miss. 752.

29. Com. *v.* Sheriff, 13 Phila. (Pa.) 446.

Summary trials for certain minor offenses against navigation laws are provided for by statute,[30] which places them on substantially the same footing as civil cases.[31]

B. PROCEEDINGS FOR PENALTIES AND FORFEITURES.[32] —**1. In General.** — The proper procedure in case of a non-indictable offense against the navigation laws by a ship's officer is an action in the name of the official having charge of the subject matter of the offense, for the benefit of the United States, against such ship's officer, to recover the penalty provided by statute.[33] The common law form of action in such case is debt.[34]

2. Jurisdiction and Venue. — Proceedings to enforce a forfeiture, or to recover a penalty, when of a maritime nature, are subject to the jurisdiction of admiralty.[35] In such cases the general rules relating to jurisdiction and venue must be observed.[36]

30. U. S. Rev. St., §§4300-4305; 7 U. S. Comp. St., 1916, §§8046-8051.

31. United States *v.* Smith, 17 Fed. 510.

[a] **Previous Indictment Is Not Necessary.**—U. S. Rev. St., §4301; 7 U. S. Comp. St., 1916, §8047.

[b] **Amendment of complaint** may be permitted at any time before verdict if not prejudicial to the accused. United States *v.* Smith, 17 Fed. 510; U. S. Rev. St., §4302; 7 U. S. Comp. St., 1916, §8048.

[c] **Want of due verification** of the complaint cannot be urged for the first time in arrest of judgment. United States *v.* Smith, 17 Fed. 510.

32. See the titles "**Admiralty;**" "**Penalties, Forfeitures and Fines.**"

33. Harrison *v.* Vose, 9 How. (U. S.) 372, 13 L. ed. 179; Gould *v.* Staples, 9 Fed. 159; Parsons *v.* Hunter, 2 Sumn. 419, 18 Fed. Cas. No. 10,778; Levy *v.* Burley, 2 Sumn. 355, 15 Fed. Cas. No. 8,300.

[a] **It is not an indictable offense** for a master to refuse or neglect to deposit the ship's papers with the United States consul or similar official on arrival at a foreign port. 7 Op. Atty. Gen. 395.

As to the nature of the proceedings, see 1 STANDARD PROC. 420.

34. United States *v.* Allen, 4 Day 474, 24 Fed. Cas. No. 14,431; Parsons *v.* Hunter, 2 Sumn. 419, 18 Fed. Cas. No. 10,778. See the title "**Penalties, Forfeitures and Fines.**"

35. The Arctic, 11 Fed. 177; Pollock *v.* The Sea Bird, 3 Fed. 573.

[a] **For neglecting to post copies of the passenger act,** see The Llewellen, 4 Biss. 156, 15 Fed. Cas. No. 8,307.

[b] **Effect of Error in Docketing Case.**—A mere clerical error in docketing a proceeding against a passenger vessel for overcrowding is not sufficient to oust the jurisdiction of the court. Hatch *v.* The Boston, 3 Fed. 807.

36. See the title "**Admiralty.**"

Venue of proceedings to enforce a forfeiture, see 1 STANDARD PROC. 425.

[a] **Filing Libel Before Seizure.** (1) The jurisdiction of admiralty to enforce a lien against a foreign vessel to recover a penalty for the failure of its master to announce his arrival or file a manifest as provided by statute does not depend upon a seizure of the vessel before the filing of the libel. The Paolina, 18 Blatchf. 315, 11 Fed. 171. (2) And the same is true in a case of carrying an unlawful number of passengers. Hatch *v.* The Boston, 3 Fed. 807. But see United States *v.* The Frank Silvia, 45 Fed. 641, *reversing* 13 Sawy. 595, 37 Fed. 155; The Oconto, 5 Biss. 460, 18 Fed. Cas. No. 10,421.

[b] **Court Where Vessel Seized Has Jurisdiction.** — A proceeding for the forfeiture of a vessel for a violation of the navigation laws should be brought in the federal district court of the district where the vessel is seized, irrespective of where the forfeiture occurred. Keene *v.* United States, 5 Cranch (U. S.) 304, 3 L. ed. 108; The Idaho, 29 Fed. 187; Pollock *v.* The Sea Bird, 3 Fed. 573.

3. Parties. — The general rules as to parties are observed in such cases.[37] While the party liable may be proceeded against by the United States for an infraction of a federal navigation law,[38] the proceeding may be instituted by an informer,[39] in which case the United States is not a necessary party.[40]

4. Pleading. — The pleadings in such cases, which are civil in their nature,[41] follow the rules elsewhere discussed.[42] The particular section of the statute which imposes the penalty need not be stated.[43] The facts pleaded in a civil suit based on the statute against carrying explosives or other dangerous articles must show negligence or willful tort.[44]

5. Trial by Jury. — The right of trial by jury in proceedings for the enforcement of a penalty or forfeiture has been treated elsewhere in this work.[45]

6. Judgment or Decree, Appeal and Costs. — In all proceedings for the recovery of a penalty or enforcement of a forfeiture for offenses against the navigation laws the judgment or decree,[46] the ap-

37. See the titles "**Admiralty;**" "**Parties.**"

[a] **A mere figurehead or dummy** cannot maintain a libel against a vessel to recover a penalty for a violation of the provisions of the Harter Act relating to bills of lading. The libelant, having no interest in the transaction, the court will not retain jurisdiction of the case for the purpose of expressing an opinion on the statute involved. The Minnehaha, 114 Fed. 672.

[b] **The proper party defendant,** in an action to recover a penalty for piloting without a license, which a statute imposes solely upon the individual, is such individual and not the vessel. The Carrie L. Tyler, 106 Fed. 426, 45 C. C. A. 405, *affirming* 103 Fed. 327.

38. United States *v.* Independent Pkt. Co., 228 Fed. 673, 143 C. C. A. 195; United States *v.* Holtzhauer, 40 Fed. 76; United States *v.* Kellum, 19 Blatchf. 372, 7 Fed. 843; United States *v.* Bougher, 6 McLean 277, 24 Fed. Cas. No. 14,627.

39. The Minnehaha, 114 Fed. 672 (for violating bill-of-lading provisions of the Harter Act); Hatch *v.* The Boston, 3 Fed. 807, for carrying unlawful number of passengers.

40. The Sidonian, 38 Fed. 440; The Laura M. Starin, 11 Fed. 177; The Sea Bird, 3 Fed. 573.

41. See 1 STANDARD PROC. 420.

42. See the titles "**Admiralty;**" "**Penalties, Forfeitures and Fines;**" and particularly 1 STANDARD PROC. 458; United States *v.* Holtzhauer, 40 Fed. 76.

[a] **Admission or Denial of Criminal Act.**—Under admiralty rule 31 the claimant may answer without admitting or denying the allegation in the libel as to the number of passengers carried on the ground that a particular answer on that subject might expose him to a prosecution or punishment for a crime and subject his property to a penalty or forfeiture. Pollock *v.* The Laura, 5 Fed. 133.

[b] **Insufficient Answer.**—Oral permission to carry additional passengers on an excursion is not a good answer under a statute which requires a written permission. Pollock *v.* The Laura, 5 Fed. 133.

43. United States *v.* Independent Pkt. Co., 228 Fed. 673, 143 C. C. A. 195, for running without licensed mate. *Compare* 1 STANDARD PROC. 459, note.

44. Wyman, Partridge & Co. *v.* Boston Blacking Co., 175 Fed. 834.

45. See 1 STANDARD PROC. 538.

46. See the titles "**Admiralty;**" "**Decrees;**" "**Judgments;**" "**Penalties, Forfeitures and Fines.**"

[a] **Decree Based on Pleadings.** Where the penalty imposed for violating a provision of the passenger act is measured according to the number of excess passengers carried, recovery can only be had for the number specified in the libel, not for a greater

peal,[47] and costs,[48] follow the general rules of procedure elsewhere treated.

number proved, unless the libel be amended to conform to the proof. The Columbia, 39 Fed. 617, *reversed* on other grounds, 50 Fed. 441, 1 C. C. A. 526.

[b] **Effect of Decree.**—Where a personal action is brought against the owners of a passenger vessel for overcrowding and the number of passengers carried is established, in a subsequent proceeding to enforce the lien against the vessel, its new owners, who were not privies to the former action, are not precluded by the judgment rendered in such action from showing that the actual number of passengers carried was less than was therein determined. The Boston, 8 Fed. 628.

47. See the titles "**Admiralty;**" "**Appeals.**"

Appealable by either party, see 1 STANDARD PROC. 554.

[a] **Matters Reviewable.**—Where a ground for forfeiture of a passenger vessel charged with overcrowding is not urged below, nor a part of the record, it cannot be raised for the first time on appeal. The Anna, Taney 549, 24 Fed. Cas. No. 14,458, *affirming* 24 Fed. Cas. No. 14,457.

48. See the titles "**Admiralty;**" "**Costs.**"

[a] **When Costs Charged to Prevailing Party.**—Costs may be awarded against the vessel, even though the libel is dismissed, where it appears that the suit was justified, in a proceeding to recover a penalty for carrying an unlawful number of passengers. The Geneva, 26 Fed. 647.

SIGNATURE. — See **Bills and Answers; Declaration and Complaint; Findings and Conclusions; Indictment and Information; Judgments; Pleading; Process.**

SIMILITER. — See **Issues in Pleading and Practice.**

SLANDER. — See **Libel and Slander.**

SLANDER OF TITLE. — See **Libel and Slander.**

SLAVES. — See **Master and Servant.**

SLEEPING CARS. — See **Passengers.**

SMUGGLING. — See **Customs Duties; Immigration; Internal Revenue; Penalties, Forfeitures and Fines.**

SOCIETIES. — See **Associations; Beneficial Associations; Corporations; Joint Stock Companies; Religious Societies.**

SODOMY

By the Editorial Staff.

I. INDICTMENT AND INFORMATION, 962

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CROSS-REFERENCES:

Indictment and Information.

For form of indictment, see 9 STANDARD PROC. 1157.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INDICTMENT AND INFORMATION. — An indictment or information charging sodomy or the infamous crime against nature, naming it, with a designated person or animal, is sufficient[1] without setting forth in detail the manner in which it was committed.[2] It is not necessary to lay the carnaliter cognovit in the indictment,[3] nor to specify whether the defendant was agent or pathic.[4] A charge substantially in the language of the statute is as a rule sufficient,[5] even

1. **Cal.**—People *v.* Williams, 59 Cal. 397. **Ill.**—Honselman *v.* People, 168 Ill. 172, 48 N. E. 304. **Ia.**—State *v.* McGruder, 125 Iowa 741, 101 N. W. 646. **Mass.**—Com. *v.* Dill, 160 Mass. 536, 36 N. E. 472. **Tex.**—Cross *v.* State, 17 Tex. App. 476.

[a] **That it was committed with a human being** is shown by an averment that the offense was committed in and upon the person of one named by Christian name and surname. People *v.* Moore, 103 Cal. 508, 37 Pac. 510.

[b] **The sex** of the person upon whom the crime is alleged to have been committed should be disclosed. People *v.* Carroll, 1 Cal. App. 2, 81 Pac. 680.

[c] **Characterizing the offense as "crime against nature"** is not sufficient where the statute uses the words "the infamous crime against nature." People *v.* Carroll, 1 Cal. App. 2, 81 Pac. 680.

2. **Ill.**—Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323; Honselman *v.* People, 168 Ill. 172, 48 N. E. 304. **Ia.**—State *v.* McGruder, 125 Iowa 741, 101 N. W. 646. **La.**—State *v.* Williams, 34 La. Ann. 87. **Mont.** State *v.* Chandonette, 10 Mont. 280, 25 Pac. 438.

3. Davis *v.* State, 3 Har. & J. (Md.) 154.

4. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

5. State *v.* McGruder, 125 Iowa 741, 101 N. W. 646; State *v.* Romans, 21

though the offense is not specifically defined by the statute.[6] An indictment charging an attempt to commit the infamous crime against nature is sufficient without an averment of a particular act constituting the attempt.[7]

Duplicity. — Several defendants may be jointly charged in one count with the commission of sodomy where they jointly participated in the assault.[8]

II. BILL OF PARTICULARS. — Under some statutes the defendant is entitled to a bill of particulars more specifically stating the act with which he is charged,[9] but in order to entitle the defendant to a bill of particulars it must be made to appear that he cannot properly prepare his defense without it.[10]

III. INSTRUCTIONS. — The general rules[11] governing the giving and refusing of instructions apply to prosecutions for the crime of sodomy. A charge to the jury which defines the crime of sodomy in the language of the indictment,[12] or the statute,[13] is sufficiently specific.

IV. VERDICT AND JUDGMENT. — Where several persons are jointly indicted for sodomy and the jury is authorized to fix the punishment, the verdict must assess the punishment separately against each defendant.[14] And under a statute providing generally that an attempt to commit a crime is punishable, a defendant charged with sodomy may be convicted of an attempt to commit such crime.[15]

Wash. 284, 57 Pac. 819. See generally 12 STANDARD PROC. 447.

6. State *v.* Williams, 34 La. Ann. 87.

7. Bradford *v.* State, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24.

8. Foster *v.* State, 1 Ohio C. C. 467, 1 Ohio Cir. Dec. 261. See generally 12 STANDARD PROC. 499.

9. Com. *v.* Dill, 160 Mass. 536, 36 N. E. 472.

10. Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323. See generally the title "**Bills of Particulars.**"

11. See the title "**Instructions.**"

12. White *v.* Com., 115 Ky. 473, 73 S. W. 1120.

13. State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

14. Medis *v.* State, 27 Tex. App. 194, 11 S. W. 112, 11 Am. St. Rep. 192. See the title "**Verdict.**"

15. State *v.* Frank, 103 Mo. 120, 15 S. W. 330. See 12 STANDARD PROC. 573.

SOLDIERS. — See **Courts Martial; Moratorium; Navy and Army; Pensions and Bounties; War.**

SOLICITATION. — See **Accessories and Accomplices; Indictment and Information; Prostitution; Vagrancy.**

SOLICITORS. — See **Attorneys; Lawyer and Client.**

SPECIAL ASSESSMENT

By the Editorial Staff.

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I. COMPELLING LEVY AND COLLECTION. — The levy or collection of a special assessment by the officers charged with the performance of ministerial duties in this connection may be enforced by mandamus.[1]

II. REMEDIES FOR FAILURE TO LEVY ASSESSMENT. — An action on the case for negligence may be maintained against a municipality for its failure to levy and collect a special assessment,[2] unless the plaintiff is entitled to look to the special assessment alone for his recompense.[3]

III. RECOVERY BY CONTRACTOR OF ASSESSMENT WHICH HAS BEEN COLLECTED. — If a municipality has levied and collected a special assessment the person entitled to payment may maintain an action of assumpsit for the amount due him,[4] or may enforce its payment by mandamus proceedings.[5]

1. **Ill.**—McCartney *v.* Chicago, 273 Ill. 276, 112 N. E. 675; Conway *v.* Chicago, 237 Ill. 128, 86 N. E. 619. **Ind.**—Chapin *v.* Osborn, 29 Ind. 99. **Ia.**—State *v.* Keokuk, 9 Iowa 438, to compel collection. **Minn.**—Oliver Iron Min. Co. *v.* Ely, 129 Minn. 40, 151 N. W. 545, Ann. Cas. 1916B, 189. **N. Y.** People *ex rel.* Ready *v.* Syracuse, 144 N. Y. 63, 38 N. E. 1006; Harrison *v.* New Brighton, 110 App. Div. 267, 97 N. Y. Supp. 246. **Wash.**—State *v.* Seattle, 42 Wash. 370, 85 Pac. 11, where a reassessment was compelled.

Procedure in mandamus, generally see the title "**Mandamus.**"

[a] **The fact that a void assessment has been levied** is no defense to a proceeding to compel the levying of a valid assessment. Himmelmann *v.* Cofran, 36 Cal. 411; People *v.* Pontiac, 185 Ill. 437, 56 N. E. 1114.

[b] The petition must clearly show the grounds upon which the prior assessment was invalid. Frick *v.* Morford, 87 Cal. 576, 25 Pac. 764.

[c] **Confirmation** of an assessment by a board of review, may be compelled by mandamus. People *v.* Green, 6 Thomp. & C. (N. Y.) 129.

[d] **Where relator is not in right and justice entitled to payment** the writ will be refused. Sherwood *v.* Rynearson, 141 Mich. 92, 104 N. W. 392.

[e] **Cancelling of tax bills** upon a district improperly defined and the issuing of new ones upon a district properly defined may be enforced by mandamus. State *ex rel.* Skrainka Const. Co. *v.* St. Louis, 211 Mo. 591, 111 S. W. 89.

[f] **Inadequacy of Other Remedies.** Mandamus will issue only when other remedies are inadequate to afford relief. Frick *v.* Morford, 87 Cal. 576, 25 Pac. 764 (an administrative appeal to correct irregularities is an adequate remedy and a defense to a proceeding for a new assessment); Simpson *v.* Kansas City, 52 Kan. 88, 34 Pac. 406.

[g] **The making of a demand** upon the proper officers is a condition precedent to the issuance of the writ. People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

[h] **The discretion of the public officer or board** cannot be controlled by mandamus. People *ex rel.* Osborne *v.* Gilon, 9 N. Y. Supp. 563, 24 Abb. N. C. 125.

[i] **Errors and irregularities** in an assessment (1) cannot be corrected by mandamus (**Ind.**—Gorman *v.* State, 157 Ind. 205, 60 N. E. 1083. **N. J.**—Wilson *v.* Longstreet, 38 N. J. L. 312. **N. Y.**—People *ex rel.* Osborne *v.* Gilon, 9 N. Y. Supp. 563, 24 Abb. N. C. 125), unless (2) they are merely clerical errors. People *ex rel.* Nostrand *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064.

2. Mecartney *v.* Chicago, 273 Ill. 276, 112 N. E. 675 (mandamus to compel the levy is not the sole remedy); Clayburgh *v.* Chicago, 25 Ill. 535, 79 Am. Dec. 346.

3. See McCartney *v.* Chicago, 273 Ill. 276, 112 N. E. 675.

4. Conway *v.* Chicago, 237 Ill. 128, 86 N. E. 619.

5. State *v.* Hobe, 106 Wis. 411, 82 N. W. 336.

IV. JUDICIAL REVIEW. — A. In General. — Matters resting with the discretion of a legislative body, such as the necessity and desirability of a proposed public improvement[6] will not be reviewed by the courts.

B. Confirmation or Annullment of Assessment. — Special jurisdiction is under some statutes, conferred upon particular courts to review assessments by administrative bodies, for local improvements.[7] The proceeding being statutory, must be strictly in accordance with the provisions of the statute.[8] Notice of the proceedings must be given as required by statute;[9] and the persons designated in the statute must be made parties to the proceeding.[10] The petition must also substantially conform to the requirements of the statute,[11] and the objections to confirmation must clearly point out the defect in the proceedings which is relied upon to defeat them.[12] Amendments to objections[13] and additional objections[14] may be allowed to be filed

6. **Ala.** — Cramton *v.* Montgomery, 171 Ala. 478, 55 So. 122. **Ia.**—*In re* Jefferson St. Sewer, 179 Iowa 975, 162 N. W. 239. **Mo.**—Meyers *v.* Wood, 173 Mo. App. 564, 158 S. W. 909.

[a] "**The durability** of the contemplated pavement, its cost, and the difficulty or expense of its maintenance, are all questions purely of legislative policy and discretion which a court of chancery cannot supervise or control." Cramton *v.* Montgomery, 171 Ala. 478, 484, 55 So. 122.

Review of highway proceedings, see the title "**Highways, Streets and Bridges.**"

7. Rock Island *v.* Marshall, 263 Ill. 133, 104 N. E. 1008 (probate judge sitting as a county judge); South Park Comrs. *v.* Pearce, 248 Ill. 578, 94 N. E. 33, 32 L. R. A. (N. S.) 1056; Thorn *v.* West Chicago Park Comrs., 130 Ill. 594, 22 N. E. 520; *In re* Duffy, 133 N. Y. 512, 31 N. E. 517; *In re* Flower, 129 N. Y. 643, 29 N. E. 463.

8. Chicago *v.* Stein, 252 Ill. 409, 96 N. E. 886, Ann. Cas. 1912D, 294; Goetter *v.* Colville, 82 Wash. 305, 144 Pac. 30, discussing the record on which the case is heard.

[a] **An assessment roll may be re-referred to the commissioner** who made it with leave to make a new assessment roll, without specific directions as to the manner in which it should be made, and without loss of jurisdiction by the court. Donovan *v.* Donovan, 236 Ill. 636, 86 N. E. 575.

9. People *v.* Sargent, 252 Ill. 104, 96 N. E. 847; Yaggy *v.* Chicago, 194 Ill. 88, 62 N. E. 316.

[a] **Where additional property is added to the assessment roll** a new notice must be given. Kankakee *v.* Illinois Cent. R. Co., 258 Ill. 368, 101 N. E. 592.

[b] **Waiver.**—Defects in the notice will be waived by appearance at the hearing and contesting the assessment on its merits. Hoopeston *v.* Smith, 272 Ill. 604, 112 N. E. 266; Chicago *v.* Marsh, 251 Ill. 298, 96 N. E. 250.

10. Chicago *v.* Sullivan Mach. Co., 269 Ill. 58, 109 N. E. 696.

11. Hull *v.* Chicago, 156 Ill. 381, 40 N. E. 937.

[a] **A correct copy of the ordinance** authorizing the improvement must be attached to the petition. Decatur *v.* Barteau, 260 Ill. 612, 103 N. E. 601; Highland Park *v.* McMullin, 249 Ill. 568, 94 N. E. 966.

[b] **A copy of the estimate of the cost of the improvement** must be attached to the petition. Hillsboro *v.* Grassel, 249 Ill. 190, 94 N. E. 48.

12. Fisher *v.* Chicago, 213 Ill. 268, 72 N. E. 680; Delamater *v.* Chicago, 158 Ill. 575, 42 N. E. 444.

[a] **Objections not argued** are considered to have been waived. Des Plaines *v.* Winkelman, 270 Ill. 149, 110 N. E. 417.

13. Des Plaines *v.* Winkelman, 270 Ill. 149, 110 N. E. 417.

14. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

[a] **In New York** objections not presented to the commissioner will not be considered on a motion for confirmation of his report. *In re* Cotton Street, 151 N. Y. Supp. 639.

by the court in its discretion. Objections which do not go to the jurisdiction of the court may be waived at the hearing.[15] The general rules applicable to the trials of civil action govern the hearing,[16] and only such questions as are properly within the scope of the review provided for by the particular statute involved, can be tried.[17] The necessity for the improvement cannot be questioned.[18] If one material objection is sustained, other objections need not be passed upon.[19] Questions of fact should be left to the jury.[20] The court may, under most statutes, modify, revise and correct the assessments upon the property,[21] or add property to or remove property from the assessment roll.[22] The judgment entered is subject to the general rules applicable to judgments in other classes of action.[23]

15. Chicago *v.* Wells, 274 Ill. 360, 113 N. E. 695.

16. Goodwillie *v.* Lake View (Ill.), 21 N. E. 817.

[a] **One county judge** may pass upon legal objections and set the objections to benefits down for trial at a later date before a different judge. Fisher *v.* Chicago, 213 Ill. 268, 72 N. E. 680.

[b] **The hearing may be either at a law or probate term** of the court, in Illinois. Rossville *v.* Smith, 256 Ill. 302, 100 N. E. 292.

[c] **Property Owner Is Not Entitled to More Than One Hearing.**—Napieralski *v.* West Chicago Park Comrs., 260 Ill. 628, 103 N. E. 547.

[d] **The right to open and close the argument** lies with the municipality. Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755.

[e] **A motion to dismiss the petition,** made in open court, need not be in writing. Highland Park *v.* McMullin, 249 Ill. 568, 94 N. E. 966.

[f] **A commissioner who levied an assessment** cannot be called upon to impeach it. City of Belleville *v.* Mitchell, 273 Ill. 136, 112 N. E. 368.

17. See the statutes.

[a] **Whether lands have been assessed more** than their proportionate share of the cost of the improvement cannot be tried. Kankakee *v.* Illinois Cent. R. Co., 263 Ill. 589, 105 N. E. 731. But see Horton Inv. Co. *v.* Seattle, 94 Wash. 556, 162 Pac. 989, L. R. A. 1918E, 194.

[b] **Whether the proportion of the cost to be borne by the public** was correctly determined cannot be inquired into. Leitch *v.* La Grange, 138 Ill. 291, 27 N. E. 917.

18. Rock Island *v.* Marshall, 263 Ill. 133, 104 N. E. 1008; Houston *v.* Chicago, 191 Ill. 559, 61 N. E. 396.

19. Highland Park *v.* Gail, 276 Ill. 24, 114 N. E. 563.

20. Des Plaines *v.* Winkelman, 270 Ill. 149, 110 N. E. 417.

[a] **What is a local improvement** is (1) a question of law for the courts (Peoria *v.* Peoria R. Co., 274 Ill. 48, 113 N. E. 170), but (2) whether the facts being an improvement within the legal definition, is a question of fact. East St. Louis *v.* Vogel, 276 Ill. 490, 114 N. E. 941.

[b] **Whether property would be benefited and the amount of such benefit,** are questions for a jury. Highwood *v.* Chicago & N. W. R. Co., 276 Ill. 98, 114 N. E. 585.

[c] **Whether a special assessment for benefits is excessive** is a question of fact. Briscoe *v.* District of Columbia, 221 U. S. 547, 31 Sup. Ct. 679, 55 L. ed. 848.

21. **Colo.**—Phipps *v.* Denver, 57 Colo. 205, 140 Pac. 797; Denver *v.* Lathan, 57 Colo. 371, 141 Pac. 462. **Ill.**—Ottawa *v.* Colwell, 260 Ill. 548, 103 N. E. 573; Chicago *v.* Crozer, 246 Ill. 511, 92 N. E. 947. **N. H.**—Granite State Land Co. *v.* Hampton, 77 N. H. 179, 89 Atl. 842. **Wash.**—In re Leary Ave., 77 Wash. 399, 138 Pac. 8; Seattle *v.* Sylvester-Cowen Invest. Co., 55 Wash. 659, 104 Pac. 1121.

Contra, Application of Mayor of New Orleans, 4 Rob. (La.) 357.

22. Kankakee *v.* Illinois Cent. R. Co., 258 Ill. 368, 101 N. E. 592.

23. See the title "**Judgments.**"

[a] **It Is Not Subject to Collateral Attack.**—Keeler *v.* People, 160 Ill. 179, 43 N. E. 342; Sanderson *v.* Seattle, 95 Wash. 582, 164 Pac. 217.

[b] **The judgment may be vacated**

On appeal, objections not urged in the court below will be considered to have been waived,[24] unless they go to the jurisdiction of the court.[25] The judgment entered will be affirmed unless it is clearly erroneous.[26] Where the amount which property will be benefited by the improvement cannot be determined from the record, the case will be remanded for the taking of further evidence.[27]

C. APPEALS. — An appeal is specifically authorized by some statutes, from an order levying a special assessment,[28] but unless expressly authorized no right to an appeal exists.[29] The time and manner of taking the appeal,[30] the scope of the review which is per-

during the term at which it is rendered. Rossville *v.* Smith, 256 Ill. 302, 100 N. E. 292.

24. Chicago *v.* Wells, 274 Ill. 360, 113 N. E. 695.

25. Fisher *v.* Chicago, 213 Ill. 268, 72 N. E. 680.

[a] **Jurisdiction of the proceedings** must appear on the face of the record. Chicago *v.* Stein, 252 Ill. 409, 96 N. E. 886, Ann. Cas. 1912D, 294.

26. In re Western Avenue, 93 Wash. 472, 161 Pac. 381.

[a] **The fact that an incorrect reason** is given by the lower court for the judgment, is immaterial. Oak Park *v.* Lane, 275 Ill. 420, 114 N. E. 146; Horton Inv. Co. *v.* Seattle, 94 Wash. 556, 162 Pac. 989, L. R. A. 1918E, 194.

[b] **The scope of the review** is limited by the provisions of the particular statute under which the appeal is prosecuted. Highwood *v.* Chicago & M. Elec. R. Co., 268 Ill. 482, 109 N. E. 270.

[c] **Only the property owners who appealed** are entitled to take advantage of the reversal of a judgment of confirmation. In re West Wheeler St., 85 Wash. 146, 147 Pac. 873; In re Shilshole Avenue, 85 Wash. 522, 148 Pac. 781.

[d] **Certiorari** lies in some jurisdiction to review the order of a court confirming an assessment. Sherwood *v.* Duluth, 40 Minn. 22, 41 N. W. 234.

27. In re Jefferson St. Sewer, 179 Iowa 975, 162 N. W. 239.

28. **Ala.**—Brock *v.* Decatur, 185 Ala. 146, 64 So. 73; Huntsville *v.* Goodenrath, 13 Ala. App. 579, 68 So. 676. **Conn.**—Ferguson *v.* Borough of Stamford, 60 Conn. 432, 22 Atl. 782. **Idaho.** Veatch *v.* Gibson, 29 Idaho 609, 160 Pac. 1112. **Ind.**—Simon *v.* Wabash, 58 Ind. App. 127, 107 N. E. 738, the appeal is purely statutory. **Ore.**—Reiff *v.* Portland, 71 Ore. 421, 141 Pac. 167, 142 Pac. 827, L. R. A. 1915D, 772. **Wis.** Warner *v.* Ashland, 154 Wis. 54, 142 N. W. 513; Dunn *v.* Superior, 148 Wis. 636, 135 N. W. 145.

[a] **The averments in the petition** are sufficient if they comply with the specific statutory requirements. Simon *v.* Wabash, 58 Ind. App. 127, 107 N. E. 738.

Appeals in highway proceedings, see the ttile "**Highways, Streets and Bridges.**"

[b] "**The transcript of all papers** and proceedings in the cause before the common council constituted the complaint, and appellant's statement of grievances the answer thereto, in the circuit court." New York, C. & St. L. R. Co. *v.* Hammond, 170 Ind. 493, 83 N. E. 244. And see, Logansport *v.* Webster, 45 Ind. App. 499, 91 N. E. 36.

[c] **Effect.**—An appeal does not vacate the assessment but merely suspends the right to collect it. New York, C. & St. L. R. Co. *v.* Hammond, 170 Ind. 493, 83 N. E. 244.

29. Indianapolis *v.* Hawkins, 180 Ind. 382, 103 N. E. 10; Van Meter *v.* Tipton, 178 Iowa 1201, 159 N. W. 171.

30. **Cal.**—Cotton *v.* Watson, 134 Cal. 422, 66 Pac. 490. **Md.**—Timanus *v.* Baltimore, 128 Md. 105, 96 Atl. 1030. **Wis.**—Warner *v.* Ashland, 154 Wis. 54, 142 N. W. 513.

[a] **The giving of an appeal bond** is essential. McCord *v.* Cherokee, 180 Iowa 448, 161 N. W. 440; Van Meter *v.* **Tipton,** 178 Iowa 1201, 159 N. W. 171.

[b] **Different lot owners cannot join in one appeal.** Decatur Land Co. *v.* New Decatur (Ala.), 73 So. 509.

mitted,[31] and the character of the judgment which may be entered,[32] are all matters which depend upon the provisions of the particular statute under which the appeal is taken.

D. CERTIORARI.[33] — Certiorari proceedings may, in many states, be maintained to review the action of an administrative body in levying a special assessment.[34]

E. EQUITABLE RELIEF. — A court of equity will, unless there is an adequate legal remedy,[35] or unless there is an express statute pro-

31. Chicago R. I. & P. R. Co. *v.* **Centerville (Iowa),** 153 N. W. 106 (objections not made before the body which levied the assessment will not be considered); Bass *v.* Bangor, 111 Me. 390, 89 Atl. 309.

[a] **The entire apportionment** of an assessment is not subject to review on an appeal by one lot owner. Gilbert *v.* New Haven, 39 Conn. 467.

32. Chicago Gt. W. R. Co. *v.* Council Bluffs (Iowa), 157 N. W. 947; Dunn *v.* Superior, 148 Wis. 636, 135 N. W. 145; Newton *v.* Superior, 146 Wis. 308, 130 N. W. 242, 131 N. W. 986.

33. **Proceeding on certiorari** generally, see 4 STANDARD PROC. 881.

34. **Ala.**—Pierce *v.* Huntsville, 185 Ala. 490, 64 So. 301. **Minn.**—State ex rel. Hunt *v.* Montevideo, 135 Minn. 436, 161 N. W. 154. **N. Y.**—New York Central & H. R. R. Co. *v.* Buffalo, 67 Misc. 642, 122 N. Y. Supp. 1058. **Ore.** Reiff *v.* Portland, 71 Ore. 421, 141 Pac. 167, 142 Pac. 827, L. R. A. 1915D, 772. **Pa.**—In re Twenty Eight St., 158 Pa. 464, 27 Atl. 1109.

Compare, Whitlock *v.* Hudson, 50 Mich. 86, 14 N. W. 708; State ex rel. Brown *v.* Red Wing, 134 Minn. 204, 158 N. W. 977.

Certiorari in highway proceedings, see the title "**Highways, Streets and Bridges.**"

[a] **If another adequate remedy exists,** certiorari will not issue. State ex rel. Brown *v.* Red Wing, 134 Minn. 204, 158 N. W. 977; Florenzie *v.* East Orange, 88 N. J. L. 438, 97 Atl. 260, right to an appeal constitutes an adequate remedy. But see, State ex rel. Hunt *v.* Montevideo, 135 Minn. 436, 161 N. W. 154 (holding the remedy by appeal to be inadequate); State *v.* Ashland, 71 Wis. 502, 37 N. W. 809.

[b] **Time for Application for Writ.** An application for a writ of certiorari must be made within the time limited by the law. St. Vincent's Church *v.* **Borough of Madison, 86 N. J. L. 567,** 92 Atl. 348; Cook *v.* Allendale, 79 N. J. L. 285, 75 Atl. 769; People *v.* Dimond, 122 App. Div. 459, 106 N. Y. Supp. 832.

[c] **The Petition Must Show the Reasons Why the Assessment Is Illegal.**—People *v.* Buffalo, 57 Misc. 10, 107 N. Y. Supp. 689.

[d] **Conclusions of law** should not be stated in the complaint. Hochfeld *v.* Portland, 72 Ore. 190, 142 Pac. 824.

[e] **Scope of Review.**—(1) The court is limited to an examination of the record and proceedings before the body levying the assessment. **Ala.** Pierce *v.* Huntsville, 185 Ala. 490, 64 So. 301. **Minn.**—State *v.* St. Paul Bd. of Public Works, 27 Minn. 442, 8 N. W. 161. **N. Y.**—Matter of Phelps, 110 App. Div. 69, 96 N. Y. Supp. 862. **Ore.** Reiff *v.* Portland, 71 Ore. 421, 141 Pac. 167, 142 Pac. 827, L. R. A. 1915D, 772. (2) Disputed questions of fact cannot be determined. People *ex rel.* Empie *v.* Smith, 216 N. Y. 95, 110 N. E. 174.

[f] **Errors not called to the attention of the body levying the assessment** will not be reviewed. People ex rel. O'Reilly *v.* Kingston Com. Council, 114 App. Div. 326, 99 N. Y. Supp. 657.

[g] **Relief To Be Granted.**—(1) The court may set aside the assessment as a whole (Lehigh Valley R. Co. *v.* Jersey City, 81 N. J. L. 290, 80 Atl. 228) or (2) only in part (Wakeman *v.* Jersey City, 35 N. J. L. 455), or (3) may modify and correct it. People ex rel. Tietjen *v.* Reis, 109 App. Div. 919, 96 N. Y. Supp. 601.

35. **Cal.**—Byrne *v.* Drain, 127 Cal. 663, 60 Pac. 433. **N. J.**—Goodwin *v.* Millville, 75 N. J. Eq. 270, 71 Atl. 674. **N. Y.**—New York Central & H. R. R. Co. *v.* Buffalo, 67 Misc. 642, 122 N. Y. Supp. 1058. **Pa.**—Geesey *v.* York, 254 Pa. 397, 99 Atl. 27.

[a] **A remedy under the statute is considered to be adequate. Ala.**—Cramton *v.* Montgomery, 171 Ala. 478, 55

hibiting the action,[36] enjoin the consummation of illegal proceedings for the levying of a special assessment or the collection of an illegal special assessment,[37] or will take jurisdiction to prevent or remove

So. 122. **Idaho.**—Caldwell *v.* Village of Mountain Home, 29 Idaho 13, 156 Pac. 909. **Mich.**—Brown *v.* Grand Rapids, 83 Mich. 101, 47 N. W. 117. **Utah.** Stott *v.* Salt Lake City, 47 Utah 113, 151 Pac. 988. **Wash.**—Reynolds *v.* Cosmopolis, 84 Wash. 660, 147 Pac. 407.

[b] **An appeal** provided by statute, affords an adequate remedy as to all matters which may be there reviewed. **Ala.**—Brock *v.* Decatur, 185 Ala. 146, 64 So. 73. **Ind.**—Gardiner *v.* Bluffton, 173 Ind. 454, 89 N. E. 853, 90 N. E. 898. **Ia.**—Ellyson *v.* Des Moines, 179 Iowa 882, 162 N. W. 212; Clifton Land Co. *v.* Des Moines, 144 Iowa 625, 123 N. W. 340. **Md.**—Safe Deposit & Tr. Co. *v.* Baltimore, 121 Md. 522, 88 Atl. 267. **Minn.**—A. A. White Townsite Co. *v.* Moorhead, 120 Minn. 1, 138 N. W. 939. **Wash.**—Reynolds *v.* Cosmopolis, 84 Wash. 660, 147 Pac. 407; Brazell *v.* Seattle, 55 Wash. 180, 104 Pac. 155. **Wis.**—Newton *v.* Superior, 146 Wis. 308, 130 N. W. 242, 131 N. W. 986. *Compare* Liebermann *v.* Milwaukee, 89 Wis. 336, 61 N. W. 1112.

36. Marion *v.* **Pilot Mountain**, 170 N. C. 118, 87 S. E. 53.

[a] **A statute requiring payment of an assessment under protest** if it is claimed to be erroneous or irregular, and institution of an action to recover the amount so paid, does not apply to a case where it is claimed that the property assessed was exempt from the assessment. Wey & Salt Lake City, 35 Utah 504, 101 Pac. 381.

37. **Ark.**—Ferguson *v.* McLain, 113 Ark. 193, 168 S. W. 127. **Idaho.**—Wilson *v.* Boise City, 7 Idaho 69, 60 Pac. 84. **Ia.**—Northern Light Lodge No. 156 *v.* Monona, 161 N. W. 78. **Mich.** Harris *v.* Highland Park, 183 Mich. 573, 150 N. W. 108. **Mont.**—Hensley *v.* Butte, 33 Mont. 206, 83 Pac. 481. **N. D.** Robertson Lumber Co. *v.* Grand Forks, 27 N. D. 556, 147 N. W. 249; McKenzie *v.* Mandan, 27 N. D. 546, 147 N. W. 808. **Ore.**—Kirkpatrick *v.* Dallas, 58 Ore. 511, 115 Pac. 424; Oregon & C. R. Co. *v.* Portland, 25 Ore. 229, 35 Pac. 452, 22 L. R. A. 713. **Pa.** McAndrew *v.* Dunmore, 245 Pa. 101, 91 Atl. 237. **Wis.**—Stoughton State Bank *v.* Stoughton, 159 Wis. 330, 150 N. W. 418.

[a] **Multiplicity of Suits.**—The equitable jurisdictions is sometimes supported upon the ground of prevention of a multiplicity of suits. Whetsell *v.* Elkins, 68 W. Va. 709, 70 S. E. 754.

[b] **The fact that the character of improvement ordered** may not be the one best adopted to the benefit of the property, is no ground for the issuance of an injunction. Haugan *v.* Chicago, 259 Ill. 249, 102 N. E. 185.

[c] **Improper performance of work which has been accepted** is not (1) ground for an injunction (**Ind.**—Du Puy *v.* Wabash, 133 Ind. 336, 32 N. E. 1016. **Kan.**—Ferguson *v.* Coffeyville, 77 Kan. 391, 94 Pac. 1010. **Ky.**—Russell *v.* Whitt, 161 Ky. 187, 170 S. W. 609. **Utah.**—Stott *v.* Salt Lake City, 47 Utah 113, 151 Pac. 988. **Wash.**—O'Neill *v.* Auburn, 76 Wash. 207, 135 Pac. 1000, 50 L. R. A. (N. S.) 1140), though (2) fraud in obtaining the acceptance of the work may be. Rudolph S. Blome Co. *v.* Herd (Tex. Civ. App.), 185 S. W. 53; Eiermann *v.* Milwaukee, 142 Wis. 606, 126 N. W. 53, work may be so defective as to be evidence of the fraud.

[d] **Objections which could have been urged in the proceedings to confirm the assessment,** will not be considered. Mushbaugh *v.* East Peoria, 260 Ill. 27, 102 N. E. 1027; Haugan *v.* Chicago, 259 Ill. 249, 102 N. E. 185.

Enjoining highway proceedings, see the title "**Highways, Streets and Bridges.**"

[e] **Failure to literally comply with statutory requirements** is (1) no ground for an injunction. Manning *v.* Cable, 83 Kan. 787, 112 Pac. 604; Stott *v.* Salt Lake City, 47 Utah 113, 151 Pac. 988. (2) No irregularity which would not constitute a defense to an action to foreclose the assessment is sufficient to justify relief. Collins *v.* Ellensburg, 68 Wash 212, 122 Pac. 1010.

[f] **The decisions of the body levying the assessment can be set aside** "only for excessive or exorbitant overvaluation, fraud, or arbitrary or capricious action." Martin *v.* **Olympia,**

the cloud upon the title to property created by it, by decreeing an annullment of the assessment.[38] The general rules as to parties,[39]

69 Wash. 28, 124 Pac. 214.

[g] **The fact that plaintiff has lost his remedy at law by his own neglect** does not call for action in his favor by a court of equity. Goodwin *v.* Millville, 75 N. J. Eq. 270, 71 Atl. 674.

[h] **A suit to enjoin payment for an improvement is a collateral attack** upon (1) the proceedings authorizing the improvement (Menzie *v.* Greensburg, 42 Ind. App. 657, 85 N. E. 484), and (2) only jurisdictional defects can be urged. Menzie *v.* Greensburg, 42 Ind. App. 657, 85 N. E. 484.

[i] **Conditions Precedent.**—(1) **If an assessment** is as to plaintiff void as a whole no tender of payment is required (**Colo.**—Denver *v.* State Inv. Co., 49 Colo. 244, 112 Pac. 789, 33 L. R. A. N. S. 395. **Kan.**—Union Pac. R. Co. *v.* Kansas City, 92 Kan. 487, 141 Pac. 302. **Okla.**—Jones *v.* Whitaker, 33 Okla. 13, 124 Pac. 312. **Ore.**—Ladd *v.* Spencer, 23 Ore. 193, 31 Pac. 474), but (2) if only in part illegal payment of that portion which is valid must be tendered (**Cal.**—Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301. **Colo.**—Hildreth *v.* Longmont, 47 Colo. 79, 105 Pac. 107. **Ia.**—Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330. **Kan.**—Ottawa *v.* Barney, 10 Kan. 270. **Okla.**—Whitehead *v.* Mackey, 163 Pac. 124), though (3) payment of deferred installments is not necessary. Atchison, T. & S. F. Ry. Co. *v.* Cherryvale, 87 Kan. 57, 123 Pac. 874. (4) If the amount legally due is not clearly ascertainable, no tender is required. **Ind.**—Wilt *v.* Bueter, 111 N. E. 926. **Mich.**—Lawrence *v.* Grand Rapids, 166 Mich. 134, 131 N. W. 581. **Wash.**—Howell *v.* Tacoma, 3 Wash. 711, 29 Pac. 447, 28 Am. St. Rep. 83. (5) Under some statutes the amount of the assessment is expressly required to be deposited before the suit can be maintained. Schmidt *v.* Milwaukee, 155 Wis. 44, 143 N. W. 1066; Wisconsin Real Est. Co. *v.* Milwaukee, 151 Wis. 198, 138 N. W. 642. But see, Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474, holding such a charter provision unconstitutional.

[j] **Estoppel.**—A property owner who permits an improvement to be completed without objection cannot complain of non-jurisdictional irregularities in the proceedings. Menzie *v.* Greensburg, 42 Ind. App. 657, 85 N. E. 484. But see, Lawrence *v.* Grand Rapids, 166 Mich. 134, 131 N. W. 581; Marion *v.* Pilot Mountain, 170 N. C. 118, 87 S. E. 53.

[k] **A reassessment** without right, will be enjoined. Barkley *v.* Lincoln, 82 Neb. 181, 117 N. W. 398, 130 Am. St. Rep. 659, 18 L. R. A. (N. S.) 392.

38. Cal.—Owens *v.* Dudley, 162 Cal. 422, 122 Pac. 1087; Bolton *v.* Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33. **Del.**—Catts *v.* Smyrna, 10 Del. Ch. 263, 91 Atl. 297. **Mo.**—Albers *v.* St. Louis, 268 Mo. 349, 188 S. W. 83; Parker-Washington Co. *v.* Kemper Inv. Co., 143 Mo. App. 244, 128 S. W. 271. **N. M.**—Albuquerque *v.* Zeiger, 5 N. M. 674, 27 Pac. 315. **N. Y.**—Alvord *v.* Syracuse, 163 N. Y. 158, 57 N. E. 310. **Utah.**—Wey *v.* Salt Lake City, 35 Utah 504, 101 Pac. 381. **W. Va.** Whetsell *v.* Elkins, 68 W. Va. 709, 70 S. E. 754.

[a] **Although the same matters could be raised as a defense** to an action to enforce the assessment, **the** right to maintain a suit to remove the cloud exists. Bolton *v.* Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

[b] **The suit constitutes a collateral attack upon the proceedings** and is subject to the limitations applying to such an attack. McGhee *v.* Walsh, 249 Mo. 266, 155 S. W. 445.

39. See generally the title "**Parties,**" and Geesey *v.* York, 254 Pa. 397, 99 Atl. 27.

[a] **Different property owners** may join (1) in an action to enjoin collection of an illegal assessment (**Cal.** Toomey *v.* Knobloch, 8 Cal. App. 585, 97 Pac. 529. **Colo.**—Keese *v.* Denver, 10 Colo. 112, 15 Pac. 825. **Kan.**—Gardner *v.* Board of Comrs., 94 Kan. 509, 146 Pac. 1000. **Ore.**—Dyer *v.* Bandon, 68 Ore. 406, 136 Pac. 652. **Wash.**—Coleman *v.* Rathbun, 40 Wash. 303, 82 Pac. 540. **W. Va.**—Whetsell *v.* Elkins, 68 W. Va. 709, 70 S. E. 754), although (2) in some states a contrary rule exists. Watkins *v.* Milwaukee, 52 Wis. 98, 8 N. W. 823.

[b] **The contractor need not be joined** (1) where it is claimed that the

pleadings,[40] judgments,[41] and appeals,[42] govern such actions.

assessment is illegal only as to the plaintiff. Chicago, M. & St. P. Ry. Co. *v.* Phillips, 111 Ia. 377, 82 N. W. 787. *Compare,* Geesey *v.* York, 254 Pa. 397, 99 Atl. 27. (2) But where the contractor is directly connected with the irregularity which is the basis of the action, he must be made a party defendant. Boles *v.* Kelley, 90 Ark. 29, 117 S. W. 1073. (3) If the contractor has been paid by the municipality, he need not be joined, though he is a proper party. Eiermann *v.* Milwaukee, 142 Wis. 606, 126 N. W. 53.

[c] **Holders of bonds** issued (1) to pay the cost of the improvement are not necessary parties (Covington *v.* Schlosser, 141 Ky. 838, 133 S. W. 987), though (2) if their rights are being jeopardized they will be allowed to intervene. Covington *v.* Schlosser, 141 Ky. 838, 133 S. W. 987.

[d] **The board levying the assessment** or the officer who would collect it and not the municipality, is the proper party defendant. Cohn *v.* Parcels, 72 Cal. 367, 14 Pac. 26; Harris *v.* Saratoga Springs, 171 App. Div. 977, 152 N. Y. Supp. 73.

40. Hoehler *v.* Short, 40 Okla. 681, 140 Pac. 146.

Pleadings in equity suits generally, see the titles "**Bills and Answers;**" "**Equity Jurisdiction and Procedure;**" and titles dealing with particular equity proceedings such as "**Injunctions.**"

[a] **The irregularities in the proceedings** as a result of which they are claimed to be invalid, must be clearly and specifically set out. **Ark.**—Boles *v.* Kelley, 90 Ark. 29, 117 S. W. 1073. **Ky.**—Russell *v.* Whitt, 161 Ky. 187, 170 S. W. 609. **Mont.**—Beck *v.* Holland, 29 Mont. 234, 74 Pac. 410. **Okla.**—Terry *v.* Hinton, 52 Okla. 170, 152 Pac. 851. **Wash.**—Coats Shingle Co. *v.* Hoquiam, 55 Wash. 690, 105 Pac. 141. **W. Va.** Whetsell *v.* Elkins, 68 W. Va. 709, 70 S. E. 754. **Wis.**—Hoefer *v.* Milwaukee, 155 Wis. 83, 143 N. W. 1038.

[b] **A general allegation** that the assessment is illegal, is insufficient. Phillips *v.* Sioux Falls, 5 S. D. 524, 59 N. W. 881; Martin *v.* Olympia, 69 Wash. 28, 124 Pac. 214.

[c] **Fraud** must be pleaded specifically. Boles *v.* Kelley, 90 Ark. 29, 117 S. W. 1073; Russell *v.* Whitt, 161 Ky. 187, 170 S. W. 609.

[d] **If the proceedings are attacked as a whole,** the allegation as to the property affected need be only sufficiently definite to show the plaintiff's interest. Coats Shingle Co. *v.* Hoquiam, 55 Wash. 690, 105 Pac. 141.

[e] **The notice of confirmation** should be set out where it is claimed to have been defective. Haugan *v.* Chicago, 259 Ill. 249, 102 N. E. 185.

[f] **If the action is brought by several plaintiffs,** the complaint must show either a common interest or that they join to prevent multiplicity of actions. Michael *v.* St. Louis, 112 Mo. 610, 20 S. W. 666.

41. See the title "**Judgments.**"

[a] **Only such relief as is properly within the scope of the issues** raised by the pleadings will be granted. Gardner *v.* Leavenworth Bd. of Comrs., 100 Kan. 351, 164 Pac. 182; Muff *v.* Cameron, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116.

[b] **Property Owners Not Parties to the Suit.**—If the assessment is held illegal, its enforcement against the property of persons who are not parties to the suit will not be enjoined. Trimmer *v.* Rochester, 130 N. Y. 401, 29 N. E. 746; Sayles *v.* Hartford, 161 Wis. 136, 152 N. W. 853.

[c] **In an action by several owners** relief will only be granted on a ground which is open to all of them in common. Smith *v.* Jefferson, 75 Ore. 179, 146 Pac. 809.

[d] **Damages** cannot be recovered, but an action at law must be maintained. Clark *v.* Portland, 62 Ore. 124, 123 Pac. 708.

[e] **Only the collection of the invalid portion of the tax** will be enjoined, if a separation of the valid and invalid portions is possible. Gwilliam *v.* Ogden City, 49 Utah 555, 164 Pac. 1022.

42. See generally the title "**Appeals.**"

[a] **An appeal in such a case** involves revenue directly so as to be within the appellate jurisdiction of the Illinois Supreme Court. Mushbaugh *v.* East Peoria, 260 Ill. 27, 102 N. E. 1027.

V. RECOVERY OF ASSESSMENTS WHICH HAVE BEEN PAID. — An action may be maintained to recover the amount of an assessment which has been paid, where the improvement was subsequently abandoned.[43] If the assessment for the public improvement was illegal, and has been set aside, an involuntary payment may be recovered,[44] but not a voluntary one.[45]

VI. ENFORCEMENT AND COLLECTION. — A. In General. The procedure by which special assessments are collected varies greatly under the statutory provisions of different states.[46] A specific remedy given by statute is usually held to be exclusive of all other remedies,[47] though under some statutes a choice of remedies exists.[48] A special assessment creates no personal liability, in most states,[49]

43. McConville *v.* St. Paul, 75 Minn. 383, 77 N. W. 933, 74 Am. St. Rep. 508, 43 L. R. A. 584.

44. Newberry *v.* Detroit, 184 Mich. 188, 150 N. W. 838. See generally the title "**Taxation.**"

[a] **A payment made under protest** may be recovered, (1) in some states (Marion *v.* Pilot Mountain, 170 N. C. 118, 87 S. E. 53), but (2) in other states it is not regarded as an involuntary payment under all conditions. Phelan *v.* San Francisco, 120 Cal. 1, 52 Pac. 38.

[b] **An action for money had and received against the municipality** which collected an improvement certificate and paid the proceeds over to the person entitled to receive them, cannot be maintained. Marine Co. *v.* Milwaukee, 151 Wis. 239, 138 N. W. 640.

[c] **A statutory remedy** for vacating or correcting an assessment (1) does not govern an action to recover an assessment involuntarily paid. De Montsaulnin *v.* New York, 46 Hun 188, 11 N. Y. St. 308. (2) Statute authorizing recovery of a tax unlawfully collected does not apply to a special assessment. Marine Co. *v.* Milwaukee, 151 Wis. 239, 138 N. W. 640.

45. Louisville *v.* Belknap Hdw. & Mfg. Co., 145 Ky. 266, 140 S. W. 185.

[a] **The right to recover money voluntarily paid on an illegal assessment** must be found in an express statutory provision. Moffitt *v.* Salem, 81 Ore. 686, 160 Pac. 1152.

46. See the statutes.

[a] **Amendments to statutes** regulating collection of assessments, are not to be construed as applying to assessments levied prior to the amendment. **Cal.**—Dyer *v.* Pixley, 44 Cal. 153. **Mo.**—Gilsonite Const. Co. *v.* Greffet, 174 Mo. App. 176, 156 S. W. 765. **Pa.**—Allentown *v.* Roth, 231 Pa. 140, 80 Atl. 56. See the title "**Remedy.**"

[b] **The power to determine the method of collecting special assessments** may be conferred by the legislature upon a municipality. St. Mary's *v.* Locke, 73 W. Va. 30, 80 S. E. 841.

47. **Ala.**—Decatur *v.* Southern R. Co., 187 Ala. 364, 65 So. 536; Huntsville *v.* Madison County, 166 Ala. 389, 52 So. 326, 139 Am. St. Rep. 45. **Cal.** Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52. **Pa.**—Uniontown Borough *v.* Hogsett, 24 Pa. Dist. 690. **Wash.**—Clizer *v.* Krauss, 57 Wash. 26, 106 Pac. 145.

[a] **If the statute provided no remedy** for the collection of a special assessment, an action at law could be maintained. Decatur *v.* Southern Ry. Co., 187 Ala. 364, 65 So. 536.

48. **Ind.**—Shirk *v.* Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490; Martin *v.* Wills, 157 Ind. 153, 60 N. E. 1021. **Ia.**—Talcott *v.* Noel, 107 Iowa 470, 78 N. W. 39. **Pa.**—Philadelphia *v.* De Armond, 63 Pa. Super. 436. **W. Va.** St. Mary's *v.* Locke, 73 W. Va. 30, 80 S. E. 841.

49. **Cal.**—Taylor *v.* Palmer, 31 Cal. 240. **Ky.**—Mt. Sterling *v.* Montgomery, 152 Ky. 637, 153 S. W. 952, 44 L. R. A. (N. S.) 57. **Mich.**—Beecher *v.* Detroit, 92 Mich. 268, 52 N. W. 731. **Mo.** Heman Const. Co. *v.* Loevy, 179 Mo. 455, 78 S. W. 613. **S. D.**—Brookings *v.* Natwick, 22 S. D. 322, 117 N. W. 376, 133 Am. St. Rep. 927, 18 L. R. A. (N. S.) 1259. **Va.**—Asberry *v.* Roanoke, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636. **Wash.**—Clizer *v.* Krauss, 57 Wash. 26, 106 Pac. 145.

and a personal action cannot be maintained for its collection,[50] unless expressly authorized by statute.[51] An action on contract cannot in most states be maintained against the property owner either by the contractor doing the work or by the municipality which authorized it, if the assessment proceedings were invalid.[52] In most states proceedings for the collection of assessments for public improvements have for their immediate end the enforcement against the land of the lien of the assessment and its sale to satisfy that lien.[53] In some states a tax bill, certificate, or warrant issues to the contractor upon which he may maintain an action;[54] in other states a precept for the amount of the assessment issues upon demand of the contractor, after it has remained unpaid for a specified length of time, under which a levy and sale of the land upon which the assessment is a lien may be enforced;[55] in others, a writ of summary execution,[56] or

[a] **Proceedings to enforce a special assessment** (1) are proceedings in rem (**Ala.**—Decatur *v.* Southern Ry. Co., 187 Ala. 364, 65 So. 536. **Ky.**—Orth *v.* Park, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251. **Minn.** Morey *v.* Duluth, 75 Minn. 221, 77 N. W. 829. **Mo.**—Connors *v.* St. Joseph, 237 Mo. 612, 141 S. W. 638; Kirkwood *v.* Handlan, 182 Mo. App. 626, 168 S. W. 346. **Wash.**—Carstens *v.* Seattle, 84 Wash. 88, 146 Pac. 381, Ann. Cas. 1917A, 1070), except (2) in so far as a personal liability may have been created by an express statute. Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726.

50. Pleasant Hill *v.* Dasher, 120 Mo. 675, 25 S. W. 566; Philadelphia *v.* Bradfield, 159 Pa. 517, 28 Atl. 360.

51. **Ia.**—Muscatine *v.* Chicago R. I. & P. R. Co., 79 Iowa 645, 44 N. W. 909. **Me.**—Bangor *v.* Peirce, 106 Me. 527, 76 Atl. 945, 138 Am. St. Rep. 363, 29 L. R. A. (N. S.) 770. **N. Y.**—Matter of Elsner, 86 App. Div. 207, 83 N. Y. Supp. 670. **Pa.**—Philadelphia *v.* De Armond, 63 Pa. Super. 436. **W. Va.** St. Mary's *v.* Locke, 73 W. Va. 30, 80 S. E. 841.

52. **Ia.**—Swan *v.* Indianola, 142 Iowa 731, 121 N. W. 547. **Mich.**—Manistee *v.* Harley, 79 Mich. 238, 44 N. W. 603. **Mo.**—Galbreath *v.* Newton, 30 Mo. App. 380.

[a] "**It is a principle without exception** that where a person is held liable for his special share of a public burden it must be determined by some form of assessment whereby the burden is distributed, on some uniform basis, among the persons or property that ought to contribute." Manistee *v.* Harley, 79 Mich. 238, 44 N. W. 603.

53. See the statutes.

[a] "**The lien given by statute, and is a remedy** which the legislature may modify at any time before rights have become vested, or when such change does not impair a contract right, or substantially deprive a party of adequate means of enforcing his right." Gubbins *v.* Harrington, 48 Ind. App. 488, 96 N. E. 31.

54. See Cotton *v.* Watson, 134 Cal. 422, 66 Pac. 490.

[a] **The tax bill should be filed as an exhibit to the complaint** but failure to do so does not invalidate the judgment. Robinson *v.* Levy, 217 Mo. 498, 117 S. W. 577.

[b] **The naked, legal, custodian of** the instrument who is not the real party in interest, cannot maintain the action. Loomis *v.* Chicago & N. W. Ry. Co., 31 S. D. 408, 141 N. W. 386.

55. Burt *v.* Hasselman, 139 Ind. 196, 38 N. E. 598.

[a] **The affidavit** to obtain the issuance of a precept, must substantially conform to the requirements of the statute. Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889.

[b] **An appeal** may be taken from the precept, in some states. Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Boyd *v.* Murphy, 127 Ind. 174, 25 N. E. 702.

56. **Ala.**—Drennen *v.* White, 191 Ala. 274, 68 So. 41, applying the city code of Birmingham. **Cal.**—Hayne *v.* City & County of San Francisco, 174 Cal. 185, 162 Pac. 625, applying the charter of the city of San Francisco.

a writ of scire facias will issue;[57] in some states, the officer authorized to collect the assessment may apply for judgment for the amount of the assessment and for an order of sale of the premises,[58] and in still other states unpaid special assessments are treated as delinquent taxes and are collected as such.[59] An action to foreclose on a special assessment lien[60] is controlled by the general rules applicable to

Ga.—Georgia Pac. Ry. Co. *v.* Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342. See Wing *v.* Macon, 142 Ga. 382, 82 S. E. 1062.

[a] **Defenses** may be raised by an affidavit of illegality. Georgia Pac. Ry. Co. *v.* Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342.

57. Carrick *v.* Canevin, 243 Pa. 283, 90 Atl. 147; City *v.* Mason, 16 Pa. Dist. 753; Philadelphia *v.* Peters, 57 Pa. Super. 275.

[a] **Defenses** may be raised by an affidavit of defense. York City *v.* Miller, 60 Pa. Super. 407.

[b] **Set-Offs.**—A claim for money owing to the use-plaintiff may be pleaded on a set-off. York City *v.* Miller, 60 Pa. Super. 407.

Proceeding on scire facias generally, see the title "**Scire Facias.**"

58. Napieralski *v.* W. Chicago Park Comrs., 260 Ill. 628, 103 N. E. 547 (the procedure is collateral to the judgment of confirmation); State *ex rel.* Brown *v.* Red Wing, 134 Minn. 204, 158 N. W. 977.

[a] **Until a warrant for** collection of the assessment has issued, an application for judgment cannot be maintained. People *v.* George Moench Estate, 277 Ill. 121, 115 N. E. 187.

[b] **Form.**—The application for judgment must follow substantially the requirements of the statute. People *v.* Harper, 244 Ill. 121, 91 N. E. 90; People *v.* Colegrove, 218 Ill. 545, 75 N. E. 991.

[c] **Notice of the application** (1) must conform to the requirements of the statute. People *v.* Chicago, Title & Tr. Co., 273 Ill. 203, 112 N. E. 659; Smythe *v.* People, 219 Ill. 76, 76 N. E. 82; Gage *v.* People, 205 Ill. 547, 69 N. E. 80. (2) Defects in the notice will be waived by a general appearance. Ottis *v.* Sullivan, 219 Ill. 365, 76 N. E. 487.

[d] **Any person interested** may appear and object to the granting of the application. Morey *v.* Duluth, 75 Minn. 221, 77 N. W. 829, a prior mortgagee.

[e] **Any objection or defense** (1) which assails the validity of the assessment can be interposed, in some states. State *ex rel.* Brown *v.* Red Wing, 134 Minn. 204, 158 N. W. 977. (2) In other states no defence to the application can be made which could have been interposed on the proceeding for the making of the assessment or on the application for confirmation. Napieralski *v.* W. Chicago Park Comrs., 260 Ill. 628, 103 N. E. 547; Noonan *v.* People, 221 Ill. 567, 77 N. E. 930. (3) Objections which are not specifically made and which could have been obviated by an amendment will be deemed to have been waived. People *v.* George Moench Estate, 277 Ill. 121, 115 N. E. 187.

[f] **A jury trial** cannot be had in Illinois. People *v.* Chicago, B. & Q. R. Co., 231 Ill. 112, 83 N. E. 120.

[g] **Judgment.**—The judgment should in form and contents follow the provisions of the statute. Stillwater *v.* Henningsen, 109 Minn. 132, 123 N. W. 289, one general judgment may be entered against several tracts of land. It is not subject to collateral attack. Willard *v.* Hodapp, 98 Minn. 269, 107 N. W. 954.

[h] **Appeals.**—The general rules applicable to appeals control. Bass *v.* People, 203 Ill. 206, 67 N. E. 806, only such objections as were made on the hearing will be considered.

59. State *ex rel.* Brown *v.* Red Wing, 134 Minn. 204, 158 N. W. 977. See generally the title "**Taxation.**"

60. See *infra*, this note.

[a] **The Suit Is One of Equitable Character.**—Brownell Imp. Co. *v.* Nixon, 48 Ind. App. 195, 92 N. E. 693, 95 N. E. 585.

[b] **Joinder of Actions.**—(1) A separate cause of action exists as to each lot of land assessed under a single contract and assessment. Realty

process,[61] jurisdiction,[62] venue,[63] parties,[64] pleadings;[65] and the same

Construction & M. Co. *v.* Superior Court, 165 Cal. 543, 132 Pac. 1048. (2) These causes of action may, but need not be joined in one complaint. Realty Construction & M. Co. *v.* Superior Court, 165 Cal. 543, 132 Pac. 1048; Barber Asphalt Pav. Co. *v.* Crist, 21 Cal. App. 1, 130 Pac. 435, action against the owners in common of several lots. (3) A joinder is permitted in some states even though the lots are owned by different persons. Cleveland C. C. & St. L. Ry. Co. *v.* Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319; Des Moines *v.* Stephenson, 19 Iowa 507. (4) Causes of action for the enforcement of liens on the same lot but under different assessments cannot be joined. Dyer *v.* Barstow, 50 Cal. 652.

[c] **Conditions Precedent.**—(1) Under some statutes, notice of the assessment must be given prior to suit. People *v.* Reay, 52 Cal. 423; Schaefer *v.* Hines, 56 Ind. App. 17, 102 N. E. 838; Gubbins *v.* Harrington, 48 Ind. App. 488, 96 N. E. 31. (2) So also a demand for payment must be made under some statutes. San Francisco Pav. Co. *v.* Egan, 146 Cal. 635, 80 Pac. 1076; Engelbert *v.* McElwel, 122 Cal. 284, 54 Pac. 900. (3) Holders of improvement bonds which are a lien upon specific property may institute a suit to enforce them without a resolution of the municipal council authorizing the suit. Scott *v.* Hayes, 162 Ind. 548, 70 N. E. 879.

61. See Greenstreet *v.* Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; Kirkwood *v.* Handlan, 182 Mo. App. 626, 168 S. W. 346, service of process is essential although the action is in rem. See also the titles "**Process;**" "**Service of Process and Papers.**"

[a] **Service of process upon a nonresident by publication** may be had. Kirkwood *v.* Handlan, 182 Mo. App. 626, 168 S. W. 346.

62. Robinson *v.* Levy, 217 Mo. 498, 117 S. W. 577.

Jurisdiction of courts generally, see 17 STANDARD PROC. 629.

63. Kirkwood *v.* Handlan, 182 Mo. App. 626, 168 S. W. 346, the action is local. See generally the title, "**Venue.**"

64. See the title "**Parties.**"

[a] **If a statute directs a tax bill to be issued to a specific officer** suit should be instituted in his name. California *v.* Kiesling (Mo. App.), 180 S. W. 559; Bowyer *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

[b] **The contractor** may under some statutes sue in his own name. Dyer *v.* North, 44 Cal. 157; Barber Asphalt Co. *v.* Crist, 21 Cal. App. 1, 130 Pac. 435.

[c] **The municipality** is not a necessary party in an action by the contractor. Lake Erie & W. R. Co. *v.* Bowker, 9 Ind. App. 428, 36 N. E. 864.

[d] **The owner of the property** (1) is a necessary party defendant. **Cal.** Phelan *v.* Dunne, 72 Cal. 229, 13 Pac. 662, the devisee of the property. **Ky.** Middlesborough *v.* Coal & Iron Bank, 110 S. W. 355. **Mo.**—Granite Bituminous Pav. Co. *v.* Parkview Realty & Imp. Co., 168 Mo. App. 468, 151 S. W. 479; Parker-Washington Co. *v.* Kemper Inv. Co., 143 Mo. App. 244, 128 S. W. 271, the record owner. (2) Any person interested in the premises is a proper party defendant. Granite Bituminous Pav. Co. *v.* Parkview Realty & Imp. Co., 168 Mo. App. 468, 151 S. W. 479 (prior encumbrancers); Werninger *v.* Huntington, 78 W. Va. 107, 88 S. E. 655, the holder of a lien on the property under a will. (3) A mortgagee is a proper, but not a necessary party (Hancock *v.* Bowman, 49 Cal. 413; Krutz *v.* Gardner, 18 Wash. 332, 51 Pac. 397), and (4) if he is not joined his rights are not affected. Krutz *v.* Gardner, 25 Wash. 396, 65 Pac. 771.

[e] **A wife** having a dower interest is (1) a proper party defendant. Coburn *v.* Bossert, 13 Ind. App. 359, 40 N. E. 281. (2) If the assessment is on community property, the wife is a necessary party, in some states. McNair *v.* Ingebrightsen, 36 Wash. 186, 78 Pac. 789.

[f] **Parties defendant may be brought in by amendment** even though the original defendants are not the owners. Koch *v.* Shepherd (Mo. App.), 193 S. W. 601.

65. See *infra*, this note.

[a] **Compliance with all of the material steps necessary to the validity**

of the assessment must (1) be specifically alleged under some statutes. Fairmont *v.* Bishop, 68 W. Va. 308, 69 S. E. 802. (2) Thus there must be an averment that the notices required to give jurisdiction to the body ordering the work were given (**Cal.**—Barber Asphalt Pav. Co. *v.* Costa, 171 Cal. 138, 152 Pac. 296. **Ind.**—Deane *v.* Indiana Macadam & Construction Co., 161 Ind. 371, 68 N. E. 686. **S. D.**—Haggart *v.* Alton, 29 S. D. 509, 137 N. W. 372), and (3) that notice of the assessment (Schaefer *v.* Hines, 56 Ind. App. 17, 102 N. E. 838. But see, Pittsburgh, C. C. & St. L. R. Co. *v.* Schmuck, 181 Ind. 323, 103 N. E. 325), and (4) demand for payment were given and made. Williams *v.* Bergin, 127 Cal. 578, 60 Pac. 164; Engelbert *v.* McElwell, 122 Cal. 284, 54 Pac. 900; Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822; Schaefer *v.* Hines, 56 Ind. App. 17, 102 N. E. 838. (5) The work authorized must be described with certainty (Crouse *v.* Barrows, 156 Cal. 154, 103 Pac. 894 [reference to an insufficient resolution of intention is insufficient] Buckman *v.* Hatch, 139 Cal. 53, 72 Pac. 445; Richmond Const. Co. *v.* Growney, 29 Cal. App. 427, 155 Pac. 1008; Lehman *v.* City of Goshen, 178 Ind. 54, 98 N. E. 1, 710), as well as (6) the land upon which the assessment is claimed to constitute a lien. Bell *v.* Johnson, 207 Mo. 281, 105 S. W. 1039. (7) Under the express provisions of other statutes, much less detail of statement is required and if the facts required by the statute are stated the complaint will be sufficient. Dawson *v.* Hipskind, 173 Ind. 216, 89 N. E. 863; Gallatin *v.* Netherton, 189 Mo. App. 24, 176 S. W. 495; Fellows *v.* Dorsey, 171 Mo. App. 289, 157 S. W. 995; Bambrick Bros. Const. Co. *v.* McCormick, 157 Mo. App. 198, 137 S. W. 43; First Nat. Bank *v.* Shewalter, 153 Mo. App. 635, 134 S. W. 42; Barber Asphalt Pav. Co. *v.* Kihlberg Bath Co., 136 Mo. App. 555, 118 S. W. 519.

[b] **A copy of a tax bill** which is the basis of the suit, should be filed as an exhibit. Robinson *v.* Levy, 217 Mo. 498, 217 S. W. 577, failure to do so does not render the judgment void.

[c] **A copy of the assessment** must be filed with the complaint as an exhibit, under some statutes. Lehman *v.* Goshen, 178 Ind. 54, 98 N. E. 1, 710; Sloan *v.* Faurot, 11 Ind. App. 689, 39 N. E. 539.

[d] **The enactment of the ordinance or resolution** (1) under which the improvement was authorized must be pleaded (Barber Asphalt Pav. Co. *v.* Costa, 171 Cal. 138, 152 Pac. 296), though (2) a general allegation of the fact is sufficient. Dyer *v.* North, 44 Cal. 157; Cabell *v.* Henderson, 28 Ky. L. Rep. 89, 88 S. W. 1095.

[e] Publication of the ordinance (1) need not be specifically alleged (Schaefer *v.* Hines, 56 Ind. App. 17, 102 N. E. 838; Johnson *v.* McKenna, 171 Ky. 389, 188 S. W. 480. But see, Richmond *v.* Madison Female Inst., 153 Ky. 301, 153 S. W. 371; Bitzer *v.* Dinwiddie, 20 Ky. L. Rep. 298, 45 S. W. 1049), and (2) the ordinance need not be set out at length. Leeds *v.* Defrees, 157 Ind. 392, 61 N. E. 930; Gaertner *v.* Louisville Artificial Stone Co., 114 Ky. 160, 70 S. W. 293, a reference to the title and date of the ordinance is sufficient. (3) That the orders and resolutions were spread of record on the books of the municipality, need not be alleged. Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822.

[f] **The execution of the contract** (1) for making the improvement (**Cal.** Palmer *v.* Burnham, 120 Cal. 364, 52 Pac. 664. **Ind.**—Millikan *v.* Crail, 177 Ind. 426, 98 N. E. 291. **Tex.**—Breath *v.* Galveston (Tex. Civ. App.), 46 S. W. 903), and (2) the performance of the work in compliance with the contract (California Imp. Co. *v.* Reynolds, 123 Cal. 88, 55 Pac. 802; Millikan *v.* Crail, 177 Ind. 426, 98 N. E. 291), must be alleged, though the contract need not be set out in full. Greenwood *v.* Hassett, 128 Cal. xviii, 61 Pac. 173; Van Sickle *v.* Belknap, 129 Ind. 558, 28 N. E. 305.

[g] **Answers.**—Affirmative defenses must be specially pleaded. Brown *v.* Board of Education, 103 Cal. 531, 37 Pac. 503 (want of authority in the body making the contract); Low *v.* Dallas, 165 Ind. 392, 75 N. E. 822, the option to pay an assessment by installments.

[h] **The facts**, and not mere conclusions, must be set up in pleading an affirmative defense. Lux & Talbott Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014, fraud in obtaining acceptance of the work.

is true as to the defenses,[66] trial,[67] evidence,[68] judgments,[69] costs,[70]

[i] **An answer complaining of the apportionment of the cost** is bad unless it shows that under a proper apportionment the amount due would be less. Huesman *v.* Dersch (Ky.), 109 S. W. 319.

[j] **Counterclaims and Set-Offs.** (1) A counterclaim or set-off for damages inflicted upon the property of the defendant (**Cal.**—Hornung *v.* McCarthy, 126 Cal. 17, 58 Pac. 303; Himmelmann *v.* Spanagel, 39 Cal. 389. **Ind.** Dawson *v.* Hipskind, 173 Ind. 216, 89 N. E. 863; Lux & Talbott Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014. **Ia.**—Burlington *v.* Palmer, 67 Iowa 681, 25 N. W. 877. **Ky.**—Hardinsburg *v.* Mercer, 172 Ky. 661, 189 S. W. 1117; Bayes *v.* Paintsville, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027. But see Board of Council *v.* Brislan, 126 Ky. 477, 104 S. W. 311, 1199), for (2) the value of old improvements (Hedge *v.* Des Moines, 141 Iowa 4, 119 N. W. 276. *Compare,* Casey *v.* Trout, 114 Ark. 359, 170 S. W. 75, decided under a special statute and distinguishing Board of Imp. Dist. No. 5 *v.* Offenhauser, 84 Ark. 257, 105 S. W. 265), or (3) based on other grounds (Ainsworth *v.* Arizona Asphalt Pav. Co., 18 Ariz. 242, 158 Pac. 428), cannot (4) be interposed in an action by a municipality or the contractor to collect on assessment.

[k] **A cross-complaint** to have the acceptance of the work set aside for fraud on the part of the contractor in obtaining it may be maintained. Gorman *v.* Johnson, 46 Ind. App. 672, 91 N. E. 971.

66. See the preceding note and *infra* this note.

[a] **Defenses which could have been urged by appeal** from the assessment or objection to its confirmation, will not be heard. **Cal.**—Petaluma Pav. Co. *v.* Singley, 136 Cal. 616, 69 Pac. 426. **Ind.**—Thompson *v.* Mitchell, 54 Ind. App. 258, 100 N. E. 20. **Kan.** Board of County Comrs. *v.* Haskell, 97 Kan. 304, 154 Pac. 1029. **S. D.**—Haggart *v.* Alton, 38 S. D. 527, 162 N. W. 158. **Tex.**—But see Rudolph S. Blome Co. *v.* Herd (Tex. Civ. App.), 185 S. W. 53.

67. Pittsburgh, C. C. & St. L. R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454.

[a] **Under a general denial,** any evidence tending to show non-compliance with necessary preliminary proceedings may be received. Cushing *v.* Powell, 130 Mo. App. 576, 109 S. W. 1054.

[b] **Variance.**—The pleadings and proof must conform in material particulars. New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

68. See 11 ENCY. OF EV. 842.

[a] **A warrant, assessment, and diagram** with the affidavit of demand and non-payment, is made prima facie evidence of a right to recover, under some statutes. Ainsworth *v.* Arizona Asphalt Pav. Co., 18 Ariz. 242, 158 Pac. 428; Barber Asphalt Pav. Co. *v.* Costa, 171 Cal. 138, 152 Pac. 296. And see Bambrick Bros. Const. Co. *v.* McCormick, 157 Mo. App. 198, 137 S. W. 43.

69. See the title "**Judgments.**"

[a] **The judgment must state** (1) the amount of the assessment (Gage *v.* People, 205 Ill. 547, 69 N. E. 80), and (2) describe the property to be sold. People *v.* Chicago Title & Trust Co., 266 Ill. 224, 107 N. E. 198; Meyer *v.* Covington, 103 Ky. 546, 45 S. W. 769.

[b] **Where the validity of the tax bill is upheld** the decree need not expressly dispose of affirmative defenses set up in the answer. Perkinson *v.* Weber, 251 Mo. 186, 157 S. W. 961.

[c] **The duration of the lien of the judgment** is governed by the general rules applicable to judgments. Dorland *v.* Smith, 93 Cal. 120, 28 Pac. 812.

[d] **A personal judgment** cannot (1) be entered against the defendant (**Ala.**—Decatur *v.* Southern Ry. Co., 187 Ala. 364, 65 So. 536; Huntsville *v.* Madison County, 166 Ala. 389, 52 So. 326, 139 Am. St. Rep. 45. **Cal.**—Manning *v.* Den, 90 Cal. 610, 27 Pac. 435. **Ky.** Long *v.* Barber Asphalt Pav. Co., 151 Ky. 1, 151 S. W. 6. **Mo.**—Kirkwood *v.* Handlan, 182 Mo. App. 626, 168 S. W. 346. **Ore.**—Ivanhoe *v.* Enterprise, 29 Ore. 245, 45 Pac. 771, 35 L. R. A. 58), unless (2) the governing statute expressly authorizes it. Farwell *v.* Brick Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63.

70. See the title "**Costs.**"

[a] **Attorney's fees** in a reasonable

and appeals,[71] except in so far as such rules are modified by express statutory provisions.[72]

B. ENFORCEMENT OF JUDGMENT.—**1. Sales of Land.** — The general rules governing the sales of land for payment of delinquent taxes apply to sales under special assessments.[73] Strict compliance with the existing statutory provisions is essential to the validity of the sale.[74]

2. Execution Against Personal Property. — Personal property of the defendant is not subject to levy and sale under a judgment enforcing a special assessment,[75] unless this is expressly authorized by statute.[76]

amount, may be allowed under some statutes. Realty Carst. & Mtg. Co. *v.* San Joaquin County, 165 Cal. 543, 132 Pac. 1048; Engebretsen *v.* Gay, 158 Cal. 30, 109 Pac. 880, Ann. Cas. 1912A, 690, 28 L. R. A. N. S. 1062; Pittsburgh, C. C. & St. L. R. Co. *v.* Schmuck, 181 Ind. 323, 103 N. E. 325; Thompson *v.* Mitchell, 54 Ind. App. 258, 100 N. E. 20.

71. See People *v.* Chicago Title & Trust Co., 266 Ill. 224, 107 N. E. 198, the title "**Appeals**" and other titles dealing with particular phases of appellate procedure.

[a] **Objections first urged upon an appeal** will not be considered. Williams *v.* McDonald, 58 Cal. 527; Shreveport *v.* Chatwin, 139 La. 531, 71 So. 791.

72. See the statutes.

73. See generally the title "**Taxation.**"

Judicial sales generally, see 16 STANDARD PROC. 711.

74. Detroit *v.* Weber, 158 Mich. 590, 123 N. W. 36; West *v.* Scott-McClure L. Co., 84 Ore. 296, 164 Pac. 554.

[a] **Notice of the sale** must be given as required by statute. **Cal.**—Ellis *v.* Witmer, 134 Cal. 249, 66 Pac. 301. **Minn.**—Cassidy *v.* Souster, 115 Minn. 191, 132 N. W. 292. **Ore.**—Jeffery *v.* Smith, 63 Ore. 514, 128 Pac. 822.

[b] **Postponements of sales** must be made in accordance with the procedure of the particular statute under which the sale is conducted. Hayne *v.* City & County of San Francisco, 174 Cal. 185, 162 Pac. 625.

75. Cave Hill Cemetery Co. *v.* Gosnell, 156 Ky. 599, 161 S. W. 980; McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653.

[a] **The property of a public corporation,** (1) or of a public utility, essential to the performance of public functions or duties will not be ordered sold (Decatur *v.* Southern Ry. Co., 187 Ala. 364, 65 So. 536; Pittsburgh, C. C. & St. L. R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454), but (2) execution may be satisfied out of its personal property. Pittsburgh, C. C. & St. L. R. Co. *v.* Taber, 168 Ind. 419, 77 N. E. 741; Pittsburgh, C. C. & St. L. R. Co. *v.* Fish, 158 Ind. 525, 63 N. E. 454; Lima *v.* Cemetery Assn., 42 Ohio St. 128, 51 Am. Rep. 809. *Contra,* Decatur *v.* Southern Ry. Co., 187 Ala. 364, 65 So. 536; Lincoln *v.* Lincoln St. R. Co., 67 Neb. 469, 93 N. W. 766.

76. Eubank *v.* Ft. Worth (Tex. Civ. App.), 173 S. W. 1003.

SPECIAL ASSUMPSIT. — See **Assumpsit.**

SPECIAL FINDINGS. — See **Findings and Conclusions; Issues in Pleading and Practice; Special Interrogatories to Juries; Verdict.**

SPECIAL INTERROGATORIES TO JURIES

By the Editorial Staff.

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CROSS-REFERENCES:

Injuries to Persons and Property;
Instructions;
Issues in Pleading and Practice;
Juries and Jurors;
Verdict.

For forms, see 9 STANDARD PROC. 1159, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. NATURE AND OBJECT. — A special interrogatory to the jury is a single inquiry directed to a material fact necessarily involved in the finding of a general verdict.[1]

Its object is to test the correctness of the general verdict by ascertaining the facts upon which it is based,[2] and to enable the court,

1. See cases *infra,* this note and section.

[a] **Only in connection with a general verdict,** are special interrogatories authorized. **Ind.**—Eudaly *v.* Eudaly, 37 Ind. 440; Morse *v.* Morse, 25 Ind. 156; Little Coal Co. *v.* O'Brien (Ind. App.), 113 N. E. 465; Cleveland, C. C. & St. L. R. Co. *v.* True, 53 Ind. App. 156, 100 N. E. 22. **Kan.**—Kansas Pac. Ry. Co. *v.* Pointer, 14 Kan. 37. **Mo.**—Benton *v.* St. Louis & S. F. Ry. Co., 25 Mo. App. 155. **N. Y.**—Manning *v.* Monaghan, 23 N. Y. 539.

2. **Cal.**—Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Fujise *v.* Los Angeles R. Co., 12 Cal. App. 207, 107 Pac. 317. **Idaho.**—Burke *v.* McDonald, 2 Idaho 339, 646, 13 Pac. 351. **Ind.**—Louisville N. A. & C. Ry. Co. *v.* Kane, 120 Ind. 140, 22 N. E. 80; McCullough *v.* Martin, 12 Ind. App. 165, 39 N. E. 905; Evansville & T. H. R. Co. *v.* Marohn, 6 Ind. App. 646, 34 N. E. 27. **Ia.**—Morbey *v.* Chicago & N. W. R. Co., 116 Iowa 84, 89 N. W. 105. **Kan.**—Morrow *v.* Saline, 21 Kan. 484. **Mass.**—Parrott *v.* Thacher, 9 Pick. 426, 431. **Mich.**—Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475; Beecher *v.* Galvin, 71 Mich. 391, 39 N. W. 469. **Mo.**—Benton *v.* St. Louis & S. F. Ry. Co., 25 Mo. App. 155. **Mont.** Michalsky *v.* Centennial Brew. Co., 48 Mont. 1, 131 Pac. 307. **N. H.**—Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85.

where the facts as found by the jury in response to the special interrogatories are inconsistent with the general verdict, to enter judgment on the special findings notwithstanding the general verdict.[3]

A special verdict differs from special interrogatories in that by the latter answers pertinent to, although not necessarily covering all the material facts in issue, are given in connection with a general verdict while the former is complete in itself containing findings on all the material facts in issue and is the sole basis of the judgment.[4]

II. RIGHT AND DUTY OF COURT TO SUBMIT. — A. COMMON LAW. — The practice of submitting special interrogatories to the jury has been recognized independently of statute[5] as a matter resting in

N. M.—Robinson *v.* Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535. **N. Y.** Fraschieris *v.* Henriques, 6 Abb. Pr. (N. S.) 251. **Okla.**—Lawton *v.* McAdams, 15 Okla. 412, 83 Pac. 429. **W. Va.**—Griffith *v.* American Coal Co., 78 W. Va. 34, 88 S. E. 595.

[a] **The purpose of special interrogatories** is to designate the controlling questions in the case, exact for them separate consideration and thereby guard against misapprehension of what are the vital questions at issue. Morley *v.* Chicago & N. W. R. Co., 116 Iowa 84, 89 N. W. 105.

[b] **The expense and delay of a second trial** may often be avoided by the submission of questions of fact for special findings. Lambert *v.* McFarland, 7 Nev. 159.

[c] **Where the court directs a verdict** special findings of fact are immaterial. Missouri, K. & T. R. Co. *v.* Watkins M. Co., 76 Kan. 813, 92 Pac. 1102.

3. **Colo.**—Rio Grande S. R. Co. *v.* Deasy, 6 Colo. App. 196, 32 Pac. 725. **Idaho.**—Bradbury *v.* Idaho & Oregon Land Co., 2 Idaho 239, 10 Pac. 620. **Ill.**—Tate *v.* Missouri Pac. Ry. Co., 143 Ill. App. 289; Chicago City Ry. Co. *v.* Bucholz, 90 Ill. App. 440. **Ind.**—Morse *v.* Morse, 25 Ind. 156; Cleveland, C. C. & St. L. R. Co. *v.* True, 53 Ind. App. 156, 100 N. E. 22. **Ia.**—Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58. **Kan.**—Tacha *v.* Chicago, R. I. & P. R. Co., 97 Kan. 571, 155 Pac. 922. **Mich.**—Trenor *v.* Hawley, 99 Mich. 504, 58 N. W. 466. **Neb.**—Norfolk Beet Sugar Co. *v.* Preuner, 55 Neb. 656, 75 N. W. 1097. **N. M.**—Smith *v.* Atchison, T. & S. F. R. Co., 19 N. M. 247, 147 Pac. 150. **N. D.**—Acton *v.* Fargo & M St. R. Co., 20 N. D. 434, 129 N. W 225. **Ohio.**—Troy *v.* Brady, 67 Ohio St. 65, 65 N. E. 616. **Vt.**—Caledonia School *v.* Kent, 86 Vt. 151, 84 Atl. 26. **W. Va.**—Grass *v.* Big Creek Development Co., 75 W. Va. 719, 84 S. E. 750.

See *infra*, IX.

4. **Cal.**—Fujise *v.* Los Angeles R. Co., 12 Cal. App. 207, 107 Pac. 317. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ill.**—Chicago & N. W. Ry. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15. **Ind.** Todd *v.* Fenton, 66 Ind. 25; Toledo W. & W. Ry. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221. **Ia.**—Morbey *v.* Chicago, etc. R. Co., 116 Iowa 84, 89 N. W. 105. **Kan.**—First Nat. Bank *v.* Peck, 8 Kan. 660. **Wis.**—Carroll *v.* Chicago, B. & N. R. Co., 99 Wis. 399, 75 N. W. 176.

As to special verdicts generally, see the title **"Verdict."**

[a] **Special verdict as used in the code of California** is the same, except in name, as special findings on particular issues and is not the common law special verdict which covered all the issues. Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56. *Compare* amendment to the code made in 1909.

[b] **The power to find special verdicts** is not destroyed by a statute authorizing the submission of special interrogatories in aid of a general verdict. Hendrickson *v.* Walker, 32 Mich. 68.

[c] **The parties are not entitled to special findings** where the jury finds a special verdict upon all the issues. Morse *v.* Morse, 25 Ind. 156.

5. **U. S.**—Walker *v.* New Mexico & S. P. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. ed. 837; Victor Fuel Co. *v.* Peccarich, 209 Fed. 568, 126 C. C. A. 390; Grand Trunk Western R. Co. *v.*

the court's discretion, to be exercised in the promotion of justice and the prevention of unnecessary litigation.[6]

B. STATUTES. — In most jurisdictions the subject is regulated by statutes, which, in general, provide for special findings in all civil actions where issues of fact are involved and a general verdict is rendered.[7] Such statutory provisions are not applicable to criminal cases,[8] though it has been held that at common law the jury may make special findings.[9]

III. PROCEDURE TO OBTAIN. — A. COURT'S OWN MOTION. The trial court may upon its own motion submit interrogatories to the jury,[10] even in addition to,[11] or in lieu of,[12] those submitted by the parties. Interrogatories thus propounded by the court need not be presented to the parties,[13] unless the statute so requires.[14]

B. REQUEST BY PARTIES. — **1. In General.** — A party desiring special findings upon any of the material facts of the case must make a request therefor.[15]

Lindsay, 201 Fed. 836, 120 C. C. A. 166. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Me.**—Walker *v.* Bailey, 65 Me. 354. **Mass.**—Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447. **N. H.** Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85.

6. Spurr *v.* Shelburne, 131 Mass. 429; Dorr *v.* Fenno, 12 Pick. (Mass.) 521.

7. See the statutes and **Dak.**—Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1. **Ia.**—Willson *v.* Phelps, 86 Iowa 735, 53 N. W. 115. **Neb.**—Marx *v.* Kilpatrick, 25 Neb. 107, 41 N. W. 111.

[a] **In condemnation proceedings,** special interrogatories not authorized. Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635; Toledo S. & M. R. Co. *v.* Campau, 83 Mich. 31, 46 N. W. 1026.

8. State *v.* Ridley, 48 Iowa 370.

9. Underwood *v.* People, 32 Mich. 1, 20 Am. Rep. 633.

Special verdict in criminal cases, see the title "**Verdict.**"

10. **Conn.**—Cullum *v.* Colwell, 85 Conn. 459, 83 Atl. 695. **Ill.**—Variety Mfg. Co. *v.* Mills Novelty Co., 145 Ill. App. 387. **Ind.**—Senheim *v.* Evansville, 140 Ind. 675, 40 N. E. 69; Lewman *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784. **Ia.**—Emery Auto Co. *v.* Neiderhauser, 175 Iowa 219, 157 N. W. 143. **Kan.**—Waggoner *v.* Oursler, 54 Kan. 141, 37 Pac. 973; Mannen *v.* Stebbins, 1 Kan. App. 261, 40 Pac. 1085. **N. H.**—Beckley *v.* Alexander, 77 N. H. 255, 90 Atl. 878. **Wis.**—Carroll *v.* Chicago B. & N. R. Co., 99 Wis. 399, 75 N. W. 176.

[a] The court has the same right on its own motion to submit to a jury special interrogatories as to give instructions. Norton *v.* Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167.

[b] **Some statutes expressly confer** such power upon the trial court. Halstead *v.* Woods, 48 Ind. App. 127, 95 N. E. 429; Emeny Auto Co. *v.* Neiderhauser, 175 Iowa 219, 157 N. W. 143.

[c] **If no objection is made** thereto by the parties they will be deemed to have assented to the submission of such interrogatories. Allen Cummings & Co. *v.* Aldrich, 29 N. H. 63.

11. Norton *v.* Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167; Hammond W. & E. C. Electric R. Co. *v.* Spyzehalski, 17 Ind. App. 7, 46 N. E. 47.

12. Chicago & A. R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622.

13. Pittsburgh, C. C. & St. L. Ry. Co. *v.* Smith, 110 Ill. App. 154; Bryan *v.* Lamson, 88 Ill. App. 261; Miles *v.* Schrunk, 139 Iowa 563, 117 N. W. 971.

As to necessity of submitting requested interrogatories to the opposing party, see *infra*, III, B, 4.

14. Pittsburgh, C. C. & St. L. Ry. Co. *v.* Smith, 207 Ill. 486, 69 N. E. 873.

15. **Ill.**—Bagley *v.* Grand Lodge, 131 Ill. 498, 22 N. E. 487. **Ind.**—Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756.

2. Time To Make Request. — A request to have interrogatories submitted should be timely,[16] preferably before the beginning of the argument to the jury.[17] But the matter rests largely in the court's discretion,[18] and it may properly deny[19] or grant[20] a belated request.

3. Form and Requisites of Request. — Counsel, in seeking special interrogatories need only frame a proper request therefor,[21] accompanied by the interrogatories[22] in separate form[23] which he wishes to have submitted.

Ia.—Kassing *v.* Walter, 65 N. W. 832. **Mich.**—Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205. **Minn.**—Dakota *v.* Parker, 7 Minn. 267. **Mont.**—Prosser *v.* Montana Cent. Ry. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814. **Neb.** Town *v.* Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. 402. **N. M.**—Upton *v.* Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275. **N. Y.**—Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853.

16. Jones *v.* Southwestern Interurban R. Co., 92 Kan. 809, 141 Pac. 999.

[a] **The record must show that the request for the submission of special interrogatories was timely made in order that a refusal of the court to submit the same be available on appeal.** American Fire Ins. Co. *v.* Sisk, 9 Ind. App. 305, 36 N. E. 659.

[b] **Where the record does not affirmatively disclose** when the rejected interrogatories were presented a refusal of the court to submit the same to the jury cannot be reviewed. Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782.

17. **Ill.**—McMahon *v.* Sankey, 133 Ill. 636, 24 N. E. 1027; Prout *v.* Martin, 160 Ill. App. 11. **Ind.**—Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695. **Ia.**—Harmon *v.* Loomis, 166 Iowa 119, 147 N. W. 203; Wilson *v.* Wapello, 129 Iowa 77, 105 N. W. 363. **Kan.** Lehnen *v.* Hines & Co., 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830; Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593. **Md.**—Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782.

18. Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901; Peninsular Land, T. & Mfg. Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

19. **Ill.**—McMahon *v.* Sankey, 133 Ill. 636, 24 N. E. 1027. **Ind.**—Wabash St. L. & P. Co. *v.* Tretts, 96 Ind. 450; Sherman *v.* Hogland, 73 Ind. 472; Ollam *v.* Shaw, 27 Ind. 388. **Ia.**—Hopper *v.* Moore & Co., 42 Ia. 563. **Nev.** Lambert *v.* McFarland, 7 Nev. 159. **W. Va.**—McKelvey *v.* Chesapeake & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261.

[a] **After commencement of argument,** denied. Union R. R. Trans. & Stock-Yard Co. *v.* Moore, 80 Ind. 458; Sandford Tool & F. Co. *v.* Mullen, 1 Ind. App. 204, 27 N. E. 448.

[b] **After beginning of charge,** denied. Miller *v.* Voss, 40 Ind. 307; Neeley *v.* Stratton, 185 Mich. 409, 151 N. W. 1045.

[c] **After return of the jury,** although their verdict has not yet been announced. Allen *v.* Dodson, 39 Kan. 220, 226, 17 Pac. 667; Hairgrove *v.* Millington, 8 Kan. 480; Lambert *v.* McFarland, 7 Nev. 159.

20. McKelvey *v.* Chesapeake & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261.

[a] **After Close of the Argument Granted.**—Baltimore & O. R. Co. *v.* McCamey, 5 Ohio C. D. 631, 12 Ohio C. C. 543.

[b] **Before the Jury Retires.**—Toledo & O. Cent. Ry. Co. *v.* Beard, 20 Ohio C. C. 681.

21. Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56.

[a] **In Event of General Verdict.** (1) The form contemplated by some statutes is that the jury be asked to answer the interrogatories in the event they find a general verdict (Long *v.* Doxey, 50 Ind. 385; Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437; West *v.* Knoppenberger, 26 Ohio C. C. 168), but (2) that no such qualification as "in case you find a general verdict" need be included in the request. See Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56.

22. Town *v.* Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. 402; Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853.

23. Pressley *v.* Bloomington & Nor-

4. Submitting Requested Interrogatories to Adversary. — Unless required by statute,[24] the requested interrogatories need not be submitted to the opposing party.[25]

5. Disposition of Request. — In some states the court is obliged to grant a proper and timely request to have interrogatories submitted,[26] and its refusal so to do constitutes reversible error.[27] Elsewhere it rests in the court's discretion to grant or refuse[28] the re-

mal Ry. & Light Co., 271 Ill. 622, 111 N. E. 511.

[a] **Request denied** on ground that the interrogatories were not in separate form proper to be submitted to jury. Pressley *v.* Bloomington & N. Ry. & L. Co., 271 Ill. 622, 111 N. E. 511.

24. Pittsburgh, C. C. & St. L. Ry. Co. *v.* Smith, 207 Ill. 486, 69 N. E. 873; Sarchfield *v.* Hayes (Ia.), 112 N. W. 1100; Crosby *v.* Hungerford, 59 Iowa 712, 12 N. W. 582.

Submission by court of its own interrogatories, to the parties, see *supra*, III, A.

25. Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

26. **Cal.**—Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56. **Ill.**—Devine *v.* Northwestern Elev. R. Co., 184 Ill. App. 64, *affirmed*, 265 Ill. 641, 107 N. E. 118. **Ind.**—Cleveland, C. C. & St. L. R. Co. *v.* True, 53 Ind. App. 156, 100 N. E. 22. **Ia.**—O'Leary *v.* German Am. Ins. Co., 100 Iowa 390, 69 N. W. 686. **Kan.**—Jones *v.* Annis, 47 Kan. 478, 28 Pac. 156. **Mich.** Tyler *v.* Wright, 188 Mich. 561, 155 N. W. 353, 158 N. W. 1025; Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373. **Ohio.**—Walsh *v.* Thomas' Sons, 91 Ohio St. 210, 110 N. E. 454; Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437. **W. Va.** Griffith *v.* American Coal Co., 78 W. Va. 34, 88 S. E. 595.

Belated request, see *supra*, III, B, 2.

[a] **The federal courts** are not bound by a mandatory provision of a state statute in regard to submission of special interrogatories to the jury, but such submission is discretionary with the trial court. Indianapolis & St. L. Ry. Co. *v.* Horst, 93 U. S. 291, 23 L. ed. 898; Toledo St. L. & W. R. Co. *v.* Reardon, 159 Fed. 366, 86 C. C. A. 366.

27. **Ind.**—Cleveland, C. C. & St. L. R. Co. *v.* True, 53 Ind. App. 156, 100 N. E. 22. **Kan.**—Barker *v.* Missouri Pac. R. Co., 89 Kan. 573, 132 Pac. 156; Atchison, T. & S. F. Ry. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722. **Mich.**—Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373. **Ohio.**—Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437.

[a] **It is "error** for the trial court to refuse to submit to the jury important questions of fact that are based on competent testimony and which are within the issues." McLain *v.* Birchfield, 7 Kan. App. 752, 53 Pac. 377.

28. **U. S.**—Gila Valley G. & N. R. Co. *v.* Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. ed. 276; Victor Fuel Co. *v.* Peccarich, 209 Fed. 568, 126 C. C. A. 390; Grand Trunk Western R. Co. *v.* Lindsay, 201 Fed. 836, 120 C. C. A. 166. **Ark.**—Surridge *v.* Ellis, 117 Ark. 223, 174 S. W. 537; St. Louis & S. F. Ry. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595. **Colo.**—First Nat. Bank *v.* Shank, 53 Colo. 446, 128 Pac. 56. **Conn.**—Kornblau *v.* McDermant, 90 Conn. 624, 98 Atl. 587; Cullum *v.* Colwell, 85 Conn. 459, 83 Atl. 695; Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Idaho.** Giffen *v.* Lewiston, 6 Idaho 231, 55 Pac. 545. **Me.**—Walker *v.* Bailey, 65 Me. 354. **Mass.**—Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286; Boston Dairy Co. *v.* Mulliken, 175 Mass. 447, 56 N. E. 711. **Minn.**—Kling *v.* Thompson-McDonald Lumb. Co., 127 Minn. 468, 149 N. W. 947; Stensgaard *v.* St. Paul Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575. **Mont.**—McDonald *v.* Klenze, 52 Mont. 142, 157 Pac. 175; Michalsky *v.* Centennial Brew. Co., 48 Mont. 1, 134 Pac. 307; Poor *v.* Madison River Power Co., 41 Mont. 236, 108 Pac. 645. **Neb.**—Trenholm *v.* Kloepper, 88 Neb. 236, 129 N. W. 436; Union Pac. Ry. Co. *v.* Cobb, 41 Neb. 120, 59 N. W. 355. **N. H.**—Beckley *v.* Alexander, 77 N. H. 255, 90 Atl. 878; Elwell *v.* Roper, 72 N. H. 585, 58 Atl. 507; Johnson *v.* Haverhill, 35 N. H. 74. **N. Y.**—Hamilton *v.* Third Ave. R.

quest, or to limit the number of,[29] or modify,[30] the requested interrogatories. The exercise of its discretion in these matters is not subject to review unless it is made clearly to appear that it has been abused,[31] and according to some cases error cannot be predicated at all upon the refusal of the court to submit requested interrogatories.[32]

IV. FORM AND SUFFICIEICY OF INTERROGATORIES. — A. IN GENERAL. — Aside from the fact that some statutes require the interrogatories to be in writing,[33] their sufficiency in form is for the court to determine.[34] Each interrogatory should call for a direct[35]

Co., 48 How. Pr. 50. **Okla.**—Cox *v.* Kirkwood, 158 Pac. 930; St. Louis & S. F. R. Co. *v.* Clampitt, 55 Okla. 686, 154 Pac. 40. **Ore.**—Meier & Frank Co. *v.* Mitlehner, 75 Ore. 331, 146 Pac. 796; Palmer *v.* Portland Ry. L. & P. Co., 62 Ore. 539, 125 Pac. 840. **Pa.** Duffy *v.* York Haven W. & P. Co., 242 Pa. 146, 88 Atl. 935. **S. D.**—Yeager *v.* South Dakota Cent. R. Co., 31 S. D. 304, 140 N. W. 690; National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962. **Utah.**—Lindsay Land Co. *v.* Smart Land Co., 43 Utah 554, 137 Pac. 837; Mangum *v.* Bullion B. & C. Min. Co., 15 Utah 534, 50 Pac. 834. **Vt.** Spaulding *v.* Robbins, 42 Vt. 90. **Wash.** Acres *v.* Frederick, 79 Wash. 402, 140 Pac. 370; Purcell *v.* Warburton, 70 Wash. 129, 126 Pac. 89; Loy *v.* Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372. **Wis.**—McDougall *v.* Ashland S. F. Co., 97 Wis. 382, 73 N. W. 327.

[a] **A request that all or none** of the interrogatories presented be submitted, will justify a refusal to submit any of them where some are improper. Sun Oil Co. *v.* Ohio Farmers' Ins. Co., 15 Ohio C. C. 355.

29. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ia.**—Cinkovitch *v.* Thistle Coal Co., 143 Iowa 595, 121 N. W. 1036; Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371. **Kan.**—Rogers *v.* Kansas Co-op. Refining Co., 91 Kan. 351, 137 Pac. 991.

30. **Ill.**—Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 1, 70 N. E. 619; Chicago & A. R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224; Gardner *v.* Girtin, 69 Ill. App. 422. **Ind.**—Hammond W. & E. C. R. Co. *v.* Spyzehalski, 17 Ind. App. 7, 46 N. E. 47; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200. **Ia.**—Wilson *v.* Onstott, 121 Iowa 263, 96 N. W. 779. **Kan.**—Missouri Pac. Ry. Co. *v.* Holley, 30 Kan. 465, 1 Pac. 130.

[a] **It is the duty** of the court to amend those which are improper in form or equivocal in their meaning. Atchison, T. & S. F. Ry. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722.

[b] **Evidentiary matter** may be stricken out. Thus it is proper to modify an interrogatory asking the jury to find whether defendant's servants were negligent and "if so, in what respect" by striking out the last words. Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 1, 70 N. E. 619.

31. Rairden *v.* Hedrick, 46 Mont. 510, 129 Pac. 498; Lindsay Land & L. Co. *v.* Smart L. & L. Co., 43 Utah 554, 137 Pac. 837.

32. **U. S.**—Fisher Mach. Works Co. *v.* Dougherty, 231 Fed. 910, 146 C. C. A. 106; Crescent Mill. Co. *v.* H. N. Strait Mfg. Co., 227 Fed. 804, 142 C. C. A. 328. **Conn.**—Kornblau *v.* McDermant, 90 Conn. 624, 98 Atl. 587. **Ind.** Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756. **Okla.**—St. Louis & S. F. R. Co. *v.* Clampitt, 55 Okla. 686, 154 Pac. 40. **Wash.**—Acres *v.* Frederick, 79 Wash. 402, 140 Pac. 370; Loy *v.* Northern Pac. R. Co., 77 Wash. 25, 137 Pac. 446; Purcell *v.* Warburton, 70 Wash. 129, 126 Pac. 89.

33. Pittsburgh, C. C. & St. L. Ry. Co. *v.* Smith, 207 Ill. 486, 69 N. E. 873.

34. **Ariz.**—Taggart Merc. Co. *v.* Clack, 8 Ariz. 295, 71 Pac. 925. **Ind.** Allen *v.* Davison, 16 Ind. 416. **Kan.** Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45; Foster *v.* Turner, 31 Kan. 58, 1 Pac. 145. **Minn.**—Jacobson *v.* Chicago, M. & St. P. R. Co., 132 Minn. 181, 156 N. W. 251, Ann. Cas. 1918A, 355, L. R. A. 1916D, 144.

35. **Cal.**—Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Fujise *v.* Los Angeles R. Co., 12 Cal.

answer in reference only to a single,[36] material,[37] as well as ulti-

App. 207, 107 Pac. 317. **Ind.**—Muncie & P. Traction Co. *v.* Hall, 173 Ind. 95, 89 N. E. 484; Southern Ry. Co. *v.* De Pauw (Ind. App.), 90 N. E. 27; Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064. **Kan.** Hashman *v.* Wyandotte Gas. Co., 83 Kan. 328, 111 Pac. 468. **Okla.**—Drumm Flato Com. Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311; Guthrie *v.* Shaffer, 7 Okla. 459, 54 Pac. 698.

[a] **A categorical answer** such as "yes" or "no" required by some statutes. **Ariz.**—Taggart Merc. Co. *v.* Clack, 8 Ariz. 295, 71 Pac. 925. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ind.**—Grand Trunk Western R. Co. *v.* Poole, 175 Ind. 567, 93 N. E. 26. **Ia.** Marshall *v.* Blackshire, 44 Iowa 475. **Okla.**—Guthrie *v.* Snafter, 7 Okla. 459, 54 Pac. 698. But such statutes are directory merely. Taggart Merc. Co. *v.* Clack, 8 Ariz. 295, 71 Pac. 925.

36. Ariz. — Taggart Merc. Co. *v.* Clack, 8 Ariz. 295, 71 Pac. 925. **Conn.** Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ill.** Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328. **Ind.**—Tippecanoe Loan & T. Co. *v.* Jester, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721; Muncie & P. Traction Co. *v.* Hall, 173 Ind. 95, 89 N. E. 484; Southern Ry. Co. *v.* De Pauw (Ind. App.), 90 N. E. 27. **Ia.**—Morrow *v.* National Masonic Acc. Assn., 125 Iowa 633, 101 N. W. 468; Brier *v.* Davis, 122 Ia. 59, 96 N. W. 983; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652. **Kan.**—Foltz *v.* Buck, 89 Kan. 381, 131 Pac. 587; Hashman *v.* Wyandotte Gas. Co., 83 Kan. 328, 111 Pac. 468. **Okla.**—Stillwater *v.* Swisher, 16 Okla. 585, 85 Pac. 1110.

[a] **Where more than one question** is embraced, it may be rejected. Muncie & P. Traction Co. *v.* Hall, 173 Ind. 95, 89 N. E. 484; Union Cent. Life Ins. Co. *v.* Hollowell, 20 Ind. App. 150, 50 N. E. 399; Anderson *v.* Heasley, 95 Kan. 572, 148 Pac. 738.

[b] **Compound Question.** — An interrogatory calling for a finding as to whether plaintiff saw or could have seen by the exercise of reasonable care the notice of the unsafe condition of the bridge posted or the same after it was repaired calls for a single answer to a compound question and is on that ground objectionable. Jones *v.* Shelby, 124 Iowa 551, 100 N. W. 520.

37. Colo.—Denver *v.* Teeter, 31 Colo. 486, 74 Pac. 459. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ill.**—Smith *v.* Sanitary District, 260 Ill. 453, 103 N. E. 254; Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 1, 70 N. E. 619; Chicago & N. W. Ry. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15; Chicago City Ry. Co. *v.* Olis, 94 Ill. App. 323. **Ind.** Reed *v.* Light, 170 Ind. 550, 85 N. E. 9; Cockrum Co. *v.* Klein, 165 Ind. 627, 77 N. E. 529; Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641; Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815; Lukin *v.* Halderson, 24 Ind. App. 645, 57 N. E. 254; Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240; McCullough *v.* Martin, 12 Ind. App. 165, 39 N. E. 905. **Ia.**—Harmon *v.* Loomis, 166 Iowa 119, 147 N. W. 203; Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; White *v.* Adams, 77 Iowa 295, 42 N. W. 199; Van Horn *v.* Overman, 75 Iowa 421, 39 N. W. 679. **Kan.**—Berhenke *v.* Penfield, 94 Kan. 532, 146 Pac. 1187; Atchison, T. & S. F. Ry. Co. *v.* Shaw, 56 Kan. 519, 43 Pac. 1129; Glynn *v.* Home Bldg. Assn., 22 Kan. 746; Wyandotte *v.* White, 13 Kan. 191; Lawrence *v.* Davis, 8 Kan. App. 225, 55 Pac. 492; Missouri Pac. Ry. Co. *v.* Brown, 5 Kan. App. 880, 47 Pac. 553. **Mich.**—Tyler *v.* Wright, 188 Mich. 561, 155 N. W. 353, 158 N. W. 1025; Schuetz *v.* Van Orman, 184 Mich. 478, 151 N. W. 613; Davis *v.* Teachout's Estate, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531; Darrah *v.* Gow, 77 Mich. 16, 43 N. W. 851; Solomon *v.* Oscoda, 77 Mich. 365, 43 N. W. 990. **Minn.** Pierce *v.* Brennan, 88 Minn. 50, 92 N. W. 507. **N. D.**—Oakland *v.* Nelson, 28 N. D. 456, 149 N. W. 337. **Okla.** Stillwater *v.* Swisher, 16 Okla. 585, 85 Pac. 1110. **W. Va.**—Millan *v.* Bartlett, 78 W. Va. 367, 89 S. E. 711; Brogan *v.* Union Traction Co., 76 W. Va. 698, 86 S. E. 753; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

[a] **Controlling.**—(1) The questions must be so framed as to call for an answer which may be controlling of

mate[38] rather than a merely evidentiary and controlling fact and the main issue. Tyler *v.* Wright, 188 Mich. 561, 155 N. W. 353, 158 N. W. 1025. (2) The question must be such that an answer favorable to the party propounding it would be inconsistent with a general verdict against him. Plyler *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56.

[b] **An interrogatory concerns a material fact when** the answer thereto would in some way limit or explain the verdict. **Cal.**—Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56; Fujise *v.* Los Angeles R. Co., 12 Cal. App. 207, 107 Pac. 317. **Conn.** Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ill.** Smith *v.* Sanitary District, 260 Ill. 453, 103 N. E. 254; Springfield Coal Min. Co. *v.* Gedutis, 227 Ill. 9, 81 N. E. 9; Frick *v.* Aurora, E. & C. Ry. Co., 154 Ill. App. 277. **Ind.**—Lake Erie & W. R. Co. *v.* Voliva, 53 Ind. App. 170, 101 N. E. 338; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200. **Ia.**—Morrow *v.* National Masonic Acc. Assn., 125 Iowa 633, 101 N. W. 468. **Kan.**—Atchison, T. & S. F. Ry. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722. **Mich.**—Moss *v.* Detroit & M. R. Co., 182 Mich. 40, 148 N. W. 204. **Ohio.**—Schweinfurth *v.* Cleveland, C. C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N. E. 89. **W. Va.**—Ward *v.* Liverpool Salt & Coal Co., 79 W. Va. 371, 92 S. E. 92; Griffith *v.* American Coal Co., 78 W. Va. 34, 88 S. E. 595; Lyons *v.* Fairmont Real Estate Co., 71 W. Va. 754, 77 S. E. 525.

[c] **Where damages are sought for false imprisonment,** it is error to reject a requested interrogatory asking the jury to find whether the officer arrested plaintiff in his official capacity. Murray *v.* Werner, 192 Ill. App. 564.

[d] **After proof of ratification** of the act of an agent it is not error to refuse to submit a special interrogatory concerning the authority of the agent. Fleishman *v.* Ver Does, 111 Iowa 322, 82 N. W. 757.

38. **Ill.**—Matheny *v.* Lees, 193 Ill. App. 503; Murray *v.* Werner, 192 Ill. App. 564; Heath *v.* Chicago, 186 Ill. App. 65; Kuchler *v.* Stafford, 185 Ill. App. 199. **Ind.**—Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000. **Ia.** Maine *v.* Rittenmeyer, 169 Iowa 675, 151 N. W. 499; Hall *v.* Shenandoah, 167 Iowa 735, 149 N. W. 831; Allgood *v.* Fahrney, 164 Iowa 540, 146 N. W. 42; Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236. **Kan.**—Madison *v.* Kansas City, M. & O. R. Co., 88 Kan. 784, 129 Pac. 1157. **Ohio.** Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437. **Okla.**—Severy *v.* Chicago, R. I. & P. Ry. Co., 6 Okla. 153, 50 Pac. 162. **Ore.**—White *v.* White, 34 Ore. 141, 50 Pac. 801, 55 Pac. 645.

[a] **If it calls for a conclusion of law,** (1) it is objectionable. **Conn.** Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ind.** Tippecanoe Loan & T. Co. *v.* Jester, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721; Pennsylvania Co. *v.* Reesor, 60 Ind. App. 636, 108 N. E. 983; National Biscuit Co. *v.* Wilson, 52 Ind. App. 630, 99 N. E. 819; Southern Ry. Co. *v.* Utz, 52 Ind. App. 270, 98 N. E. 375; Southern Ry. Co. *v.* De Pauw (Ind. App.), 90 N. E. 27. **Ohio.**—Brier Hill Steel Co. *v.* Ianakis, 93 Ohio St. 300, 112 N. E. 1013. (2) It is not error to refuse to submit to the jury an interrogatory seeking an answer as to whether the condition of the street was such as to warn persons of probable or possible danger as it asked for a conclusion and not a fact and the jury might properly have been asked to give the condition of the street itself. Indianapolis *v.* Mullally, 38 Ind. App. 125, 77 N. E. 1132.

[b] **Questions calling for answers as to noncontrolling evidentiary matters** should not be submitted. **Ill.** Springfield Coal Min. Co. *v.* Gedutis, 227 Ill. 9, 81 N. E. 9; Shope *v.* Laughlin, 191 Ill. App. 38; Rosinski *v.* Burton, 163 Ill. App. 162; Nelson *v.* Fehd, 104 Ill. App. 114. **Ind.**—Ft. Wayne C. Co. *v.* Page, 170 Ind. 585, 84 N. E. 145, 23 L. R. A. (N. S.) 946; Cockrum Co. *v.* Klein, 165 Ind. 627, 74 N. E. 529; North Western Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24. **Ia.** Thompson *v.* Illinois Cent. R. Co., 177 Iowa 328, 158 N. W. 676; Zalesky *v.* Fidelity & Cas. Co., 176 Iowa 267, 157 N. W. 858; Johnston *v.* Delano, 175 Iowa 498, 154 N. W. 1013; Korab *v.* Chicago, R. I. & P. R. Co., 165 Iowa 1, 146 N. W. 765, Ann. Cas. 1916E,

should not be leading[39] nor ambiguous,[40] nor in the alternative,[41] nor assume the existence of controverted facts,[42] nor embrace matters not in issue,[43] or as to which there no evidence.[44] or

637. **Kan.**—McClintock *v.* Pyle, 91 Kan. 393, 137 Pac. 788; Riley *v.* Wolfley, 60 Kan. 855, 55 Pac. 461. **Mich.** Ward *v.* Campau, 161 Mich. 85, 125 N. W. 734; Turner *v.* Phoenix Ins. Co., 55 Mich. 236, 21 N. W. 326. **N. D.** Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637. **Ohio.**—Cleveland & E. Elec. R. Co. *v.* Hawkins, 64 Ohio St. 391, 60 N. E. 558; Schweinfurth *v.* Cleveland, C. C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N. E. 89. **Wis.**—Hackett *v.* Wisconsin Cent. R. Co., 141 Wis. 464, 124 N. W. 1018.

[c] **Ownership.**—Where plaintiff was bitten by a dog which he claims was harbored by the defendants it was proper to submit special interrogatories as to whether defendants owned or harbored the dog in question. Trumble *v.* Happy, 114 Iowa 624, 87 N. W. 678.

39. Romans *v.* Thew, 142 Iowa 89, 120 N. W. 629; McClintick *v.* Pyle, 91 Kan. 393, 137 Pac. 788; Chicago, R. I. & P. Ry. Co. *v.* Lost Springs Lodge, 74 Kan. 847, 85 Pac. 803; Riley *v.* Wolfley, 60 Kan. 855, 55 Pac. 461.

[a] **That interrogatories are not objectionable** because leading, see Denver & R. G. Ry. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093; Chicago & A. R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Chicago City Ry. Co. *v.* Bucholz, 90 Ill. App. 440.

40. **Cal.**—Plyer *v.* Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56. **Ill.**—Gronlund *v.* Forsman, 124 Ill. App. 362. **Ind.**—Louisville, N. A. & C. Ry. Co. *v.* Kane, 120 Ind. 140, 22 N. E. 80. **Ia.**—Morrow *v.* National Masonic Acc. Assn., 125 Iowa 633, 101 N. W. 468. **Kan.**—Jones *v.* Southwestern Interurban R. Co., 92 Kan. 809, 141 Pac. 999. **Okla.**—Drumm-Flato Com. Co. *v.* Edmisson, 17 Okla. 344, 87 Pac. 311.

[a] The object of the statute is to elicit facts and not mere fragments or items of evidence; hence, interrogatories that are calculated to mislead, confuse, or harass the jury should not be submitted. Lawton *v.* McAdams, 15 Okla. 412, 83 Pac. 429.

41. Gay *v.* Milwaukee E. Ry. & L. Co., 138 Wis. 348, 120 N. W. 283.

42. **Ill.**—Gundlach *v.* Schott, 95 Ill. App. 110. **Ia.**—Hall *v.* Shenandoah, 167 Iowa 735, 149 N. W. 831. **Kan.**—Murray *v.* Empire Dist. Elec. Co., 99 Kan. 507, 162 Pac. 1145.

[a] **Assuming Negligence.** — An interrogatory which requires the jury to find whether the act of plaintiff in negligently placing himself on the footboard of the engine next to the car contributed to cause the injury is properly refused as it assumes that plaintiff was negligent. Chicago & A. R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622.

43. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ill.**—Brink's Express Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446; Yezner *v.* Roberts, Johnson Shoe Co., 140 Ill. App. 61; Beardstown *v.* Clark, 104 Ill. App. 568; Gundlach *v.* Schott, 95 Ill. App. 110. **Ind.**—Board of Comrs. *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470. **Ia.**—Fagg *v.* Minneapolis & St. L. R. Co., 175 Iowa 459, 157 N. W. 148; Bank of Bushnell *v.* Buck Bros., 161 Iowa 362, 142 N. W. 1004; Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925; Kletzing *v.* Amstraig, 119 Iowa 505, 93 N. W. 500. **Kan.**—Riley *v.* Wolfley, 60 Kan. 855, 55 Pac. 461; Kelley *v.* Ford, 10 Kan. App. 16, 61 Pac. 679; Bickford *v.* Champlin, 3 Kan. App. 681, 44 Pac. 901. **Mich.** Cousins *v.* Lake Shore & M. S. Ry. Co., 96 Mich. 386, 56 N. W. 14; Pigott *v.* Engle, 60 Mich. 221, 27 N. W. 3. **N. D.**—Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637. **Ohio.** Schweinfurth *v.* Cleveland, C. C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N. E. 89. **Ore.**—White *v.* White, 34 Ore. 141, 50 Pac. 801, 55 Pac. 645. **R. I.** King *v.* Providence Gas Co., 36 R. I. 382, 90 Atl. 743. **S. D.**—Iverson *v.* Look, 32 S. D. 321, 143 N. W. 332. **Wis.**—Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644.

44. **Ill.**—Consolidated Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715. **Ia.**

matters which are properly for the court,[45] or which are covered by other interrogatories submitted.[46]

B. In Actions Founded Upon Negligence. — Interrogatories requiring the jury to specify the particular act or omission from which the injury resulted are improper[47] unless several acts of negligence are charged in the complaint,[48] and it is not error to refuse to submit an interrogatory which requires the jury to specify in what manner the injury was sustained.[49] Special interrogatories in reference to contributory negligence which are indecisive and not comprehensive of all the facts necessary to establish such defense,[50] or which do not limit the jury to a time before the accident,[51] are objectionable. An interrogatory asking the jury to find whether plaintiff could have avoided the accident by the exercise of ordinary care is improper as being speculative and not calling for an ultimate fact,[52] and a special interrogatory requiring the jury to state the proximate cause of the injury complained of should not be submitted as it involves a question of law.[53] In actions founded upon negligence it is improper to require the jury to itemize the damages where the items of damages need not be pleaded.[54]

Willson *v.* Phelps, 86 Iowa 735, 53 N. W. 115. **Kan.**—Parkinson Sugar Co. *v.* Riley, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123; Leroy & W. Ry. Co. *v.* Anderson, 41 Kan. 528, 21 Pac. 588. **Md.**—Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782.

45. Bowen *v.* Chicago, B. & K. C. Ry. Co., 95 Mo. 268, 8 S. W. 230.

Legal conclusions, see *supra,* this subsection.

[a] **Special interrogatories upon mixed questions** of law and fact (1) likewise should not be submitted. Indiana Union Traction Co. *v.* Abrams, 180 Ind. 54, 101 N. E. 1. (2) An interrogatory as to whether or not the officers of a municipality had notice that certain street lights were out of repair is improper as being a mixed question of law and fact. New Castle *v.* Grubbs, 171 Ind. 482, 86 N. E. 757.

[b] **An interrogatory calling for an interpretation or construction** of a written instrument should not be submitted to the jury. Reed *v.* Light, 170 Ind. 550, 85 N. E. 9.

46. **Ind.**—Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641; Board of Comrs. *v.* Bonebrake, 146 Ind. 311, 45 N. E. 470. **Ia.**—Cinkovitch *v.* Thistle Coal Co., 143 Iowa 595, 121 N. W. 1036; Hanousek *v.* Marshalltown, 130 Iowa 550, 107 N. W. 603. **Kan.** Kansas City, Ft. S. & M. Ry. Co. *v.* Chamberlain, 61 Kan. 859, 60 Pac. 15. **W. Va.**—Harman *v.* Appalachian Power Co., 77 W. Va. 48, 86 S. E. 917.

47. Chicago Exch. Bldg. Co. *v.* Nelson, 98 Ill. App. 189; Peer *v.* Ryan, 54 Mich. 224, 19 N. W. 961.

48. Broadhead *v.* Atchison, T. & S. F. R. Co., 97 Kan. 222, 155 Pac. 20.

49. Nelson *v.* Fehd, 104 Ill. App. 114.

50. Griffith *v.* American Coal Co., 75 W. Va. 686, 84 S. E. 621.

51. Jones *v.* Shelby, 124 Iowa 551, 100 N. W. 520.

52. Reagan *v.* Borgeson, 173 Ill. App. 100; Runyan *v.* Kanawha Water & L. Co., 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430.

53. Peterson *v.* California Cotton Mills Co., 20 Cal. App. 751, 130 Pac. 169; Luisi *v.* Chicago Great Western R. Co., 155 Iowa 458, 136 N. W. 322.

54. Queen Coal & M. Co. *v.* Epple (Ind. App.), 113 N. E. 19; Cleveland, C. C. & St. L. R. Co. *v.* True, 53 Ind. App. 156, 100 N. E. 22; Madison *v.* Kansas City, M. & O. R. Co., 88 Kan. 784, 129 Pac. 1157.

[a] **Where the answer to such improper interrogatory shows** that an unauthorized element of damages is included in the verdict it will be disregarded and the answer to the interrogatory will be deemed waived, unless a reconsideration of the question is requested. Queen Coal & Min. Co. *v.* Epple (Ind. App.), 113 N. E. 19.

V. WITHDRAWAL OF INTERROGATORIES. — In some jurisdictions it is not within the power of the trial court to withdraw special interrogatories requested by the parties unless they assent thereto,[55] but where the submission of special interrogatories rests in the discretion of the court it is also in its discretion to withdraw the same,[56] unless the jury has announced that it cannot agree upon an answer and the determination of the question asked is essential to the finding of a general verdict.[57] A refusal to compel the jury to answer interrogatories in effect withdraws them from the jury.[58]

VI. OBJECTIONS AND EXCEPTIONS. — Defective or improper interrogatories should be objected to[59] at the time they are submitted,[60] or at least before they are answered.[61]

VII. INSTRUCTIONS ON INTERROGATORIES. — It is error to direct the jury not to consider the special interrogatories until after

55. Summers *v.* Greathouse, 87 Ind. 205; Gale *v.* Priddy, 66 Ohio St. 400, 64 N. E. 437.

56. **Kan.**—Smith *v.* Wilson, 5 Kan. App. 379, 48 Pac. 436. **Mass.**—Florence Mach. Co. *v.* Daggett, 135 Mass. 582. **Mont.**—Poor *v.* Madison River Power Co., 41 Mont. 236, 108 Pac. 645. **N. M.**—Robinson *v.* Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535. **Ore.** Rohr *v.* Isaacs, 8 Ore. 451. **S. D.**—National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

[a] **Showing of Prejudice.** — The withdrawal of special interrogatories in the absence of a showing of prejudice does not constitute reversible error. Missouri Pac. Ry. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

57. Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539; Ermentraut *v.* Providence Washington Ins. Co., 67 Minn. 451, 70 N. W. 572.

[a] **After Disagreement.**—In Ermentraut *v.* Providence-Washington Ins. Co., 67 Minn. 451, 70 N. W. 572, it is said: "The plaintiff's position upon this point is that, as it was discretionary with the court to submit the special questions, it had the implied power to withdraw them whenever it was deemed advisable. This view of the present case cannot be taken, for the logic of it is that when the court exercises its discretion, and calls upon the jury to answer a specific question going to the very gist of the cause of action and to plaintiff's right to recover, and then discovers that an answer cannot be agreed upon, it may smooth the way, and induce a general verdict in his favor, by removing the obstacle which has theretofore absolutely prevented it."

[b] **Where the interrogatories would not be controlling** of the general verdict whether they are answered in the affirmative or negative they may be withdrawn by the court from the consideration of the jury where they report their inability to agree on the answers thereto. People *v.* Ekola, 170 Mich. 158, 135 N. W. 914.

[c] **But where the interrogatory is submitted on court's own motion** it is discretionary with the court to accept the general verdict without requiring the jury to answer it. Florence Mach. Co. *v.* Daggett, 135 Mass. 582; National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

58. Wyandotte *v.* Gibson, 25 Kan. 236; Poor *v.* Madison River Power Co., 41 Mont. 236, 108 Pac. 645.

59. Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901.

60. Dupont *v.* Starring, 42 Mich. 492, 4 N. W. 190.

61. **Conn.**—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ind.**—Lake Shore & M. S. Ry. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246. **Mich.**—Dupont *v.* Starring, 42 Mich. 492, 4 N. W. 190. **N. H.** Richardson *v.* Weare, 62 N. H. 80.

[a] **After return of the jury** for further instructions, it is too late to object. Lett *v.* Eastern Moline Plow Co., 46 Ind. App. 56, 91 N. E. 978.

they have agreed upon the general verdict,[62] except where the statute directs an answer to special interrogatories only after agreement on a general verdict.[63] It is not proper for the court to explain to the jury what the legal effect of the answer to special interrogatories may or may not be.[64] And it is error to seek in the instructions to harmonize the answer to special interrogatories with the general verdict,[65] but it has been held proper for the court to call the jury's attention to the necessity of consistency in the special findings and verdict.[66] Where a general verdict in favor of one party would render the interrogatories immaterial the jury may be instructed that they need not answer them in the event of such a verdict.[67] Where they are susceptible of such answer, it is not improper to direct the jury to answer the interrogatories definitely by "yes" or "no."[68] But it is error to instruct the jury that if they find there is no sufficient evidence to answer the special interrogatories they may respond by so stating.[69]

VIII. ANSWERS TO INTERROGATORIES. — A. GENERALLY. The statutes may require the answers to interrogatories to be signed either by the jury as a whole or by their foreman.[70] They must be pronounced in open court in the same manner as the general verdict,[71] and under some statutes they must be recorded with the verdict as a part thereof.[72]

B. SUFFICIENCY IN SUBSTANCE. — Special findings of the jury should conform to the issues[73] and the proof,[74] and be responsive to

62. Wabash R. Co. *v.* Gretzinger, 182 Ind. 155, 104 N. E. 69.

[a] **But a refusal to charge** the jury that they are at liberty to answer the special interrogatories either before or after they have agreed upon a general verdict is not reversible error. Little Coal Co. *v.* O'Brien (Ind.), 113 N. E. 465.

63. Summers *v.* Tarney, 123 Ind. 560, 24 N. E. 678.

64. Walsh *v.* Thomas' Sons, 91 Ohio St. 210, 110 N. E. 454; Coats *v.* Stanton, 90 Wis. 130, 62 N. W. 619.

65. Cole *v.* Boyd, 47 Mich. 98, 10 N. W. 124.

[a] **An instruction directing** the jury to answer a special interrogatory in the negative if they found a general verdict in favor of a party is clearly erroneous and prejudicial. Walsh *v.* Thomas' Sons, 91 Ohio St. 210, 110 N. E. 454.

66. Des Moines Land & Tree Co. *v.* Polk Co., 82 Iowa 663, 45 N. W. 773.

67. Lawson *v.* Chicago, R. I. & P. R. Co., 57 Iowa 672, 11 N. W. 633.

68. Altoona State Bank *v.* Hart, 82 Kan. 398, 108 Pac. 818.

69. **Ind.**—Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235; Union Traction Co. *v.* Howard (Ind. App.), 87 N. E. 1103. **Kan.**—Union Pac. Ry. Co. *v.* Fray, 35 Kan. 700, 12 Pac. 98. **Mich.** Crane *v.* Reeder, 25 Mich. 303.

70. Greenberg *v.* Hoff, 80 Cal. 81, 22 Pac. 69; Kingfisher *v.* Altizer, 13 Okla. 121, 74 Pac. 107.

[a] **Each separate answer** need not be signed; it is sufficient for the foreman of the jury to affix his signature at the end of the answers to the interrogatories. Louisville & N. R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931.

71. Egmann *v.* East St. Louis Ry. Co., 65 Ill. App. 345; Life Assur. Co. *v.* Haughton, 31 Ind. App. 626, 67 N. E. 950.

72. Life Assur. Co. *v.* Haughton, 31 Ind. App. 626, 67 N. E. 950.

73. **Ind.**—Ft. Wayne *v.* Durnell (Ind. App.), 39 N. E. 1049. **Ia.**—Thompson *v.* Leuth, 94 Iowa 455, 62 N. W. 842. **Kan.**—Atchison, T. & S. F. Ry. Co. *v.* Owens, 6 Kan. App. 515, 50 Pac. 962.

74. **Ia.**—Waterbury *v.* Chicago, M.

the interrogatories submitted.[75] They should be definite and direct answers[76] upon ultimate facts.[77] An answer expressing the jury's inability to answer the interrogatory should not be accepted by the court unless the jury cannot agree thereon.[78] Answers to special interrogatories which contain mere conclusions of law are properly disregarded.[79] The jury need not answer interrogatories which are not determinative of the rights of the parties,[80] or which are not controverted.[81]

& St. P. Ry. Co., 104 Iowa 32, 73 N. W. 341. **Kan.**—Chicago, K. & N. Ry. Co. *v.* Muncie, 56 Kan. 210, 42 Pac. 710. **N. M.**—Thompson *v.* Albuquerque Traction Co., 15 N. M. 407, 110 Pac. 552.

75. Ingalls *v.* Allen, 144 Ill. 535, 33 N. E. 203.

[a] **Where the findings are not responsive** to the interrogatories submitted, objection should be made to the court receiving the verdict and a request presented to direct the jury to find specifically in the respect wherein their finding was insufficient. Ingalls *v.* Allen, 144 Ill. 535, 33 N. E. 203.

76. Ind.—Union Traction Co. *v.* Howard (Ind. App.), 87 N. E. 1103; Life Assur. Co. *v.* Haughton, 31 Ind. App. 626, 67 N. E. 950. **Kan.**—Hallwood Cash Register Co. *v.* Dailey, 70 Kan. 620, 79 Pac. 158; Kalina *v.* Union Pac. R. Co., 69 Kan. 172, 76 Pac. 438; Morrow *v.* Saline, 21 Kan. 484. **Mich.** Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198. **W. Va.**—Runyan *v.* Kanawha Water & L. Co., 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430.

[a] **Indefinite Answer.**—An answer to an interrogatory calling for a finding of the market value of the goods involved, stating that they were worth "about" a certain sum is not sufficiently definite. Schnull *v.* Cuddy, 36 Ind. App. 262, 74 N. E. 1030.

77. U. S.—Monticello Bank *v.* Bostwick, 77 Fed. 123, 23 C. C. A. 73. **Ark.**—Lanagin *v.* Nowland, 44 Ark. 84. **Ill.**—Vincent *v.* Morrison, 1 Ill. 227. **Ind.**—Boyer *v.* Robertson, 144 Ind. 604, 43 N. E. 879; Smith *v.* Goodwin, 86 Ind. 300; Trustees of Bluffton *v.* Shoemaker's Est., 20 Ind. App. 319, 50 N. E. 594. **Ia.**—Morbey *v.* Chicago, etc. R. Co., 116 Iowa 84, 89 N. W. 105. **Kan.**—First Nat. Bank *v.* Peck, 8 Kan. 660. **Ohio.**—Hambleton *v.* Joseph W. Dempsey & Co., 20 Ohio 168.

See *supra*, IV, A.

[a] **A finding of probative facts** going to make up the ultimate fact is sufficient if the court is enabled thereby to say that the ultimate fact necessarily results therefrom. **Ill.** Lake Shore & M. S. Ry. Co. *v.* Johnsen, 135 Ill. 641, 26 N. E. 510. **Ind.** Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000. **Ia.**—Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236. **Okla.**—Severy *v.* Chicago, R. I. & P. Ry. Co., 6 Okla. 153, 50 Pac. 162.

78. Life Assur. Co. *v.* Haughton, 31 Ind. App. 626, 67 N. E. 950.

79. Hodges *v.* Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; Terre Haute & I. R. Co. *v.* Becker, 146 Ind. 202, 45 N. E. 96; Erwin *v.* Clark, 13 Mich. 10. See *supra*, IV, A.

Compare the title "**Conclusions of Law.**"

[a] **That a promissory note was acquired in the usual course** of business is not a finding of fact as contemplated by the statute. Winters *v.* Coons, 162 Ind. 26, 69 N. E. 458.

[b] **But payment of a note** is a question of fact and a finding to that effect does not state a conclusion of law. Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537.

80. Ark.—Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258. **Ill.**—Elgin J. & E. R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729. **Ind.**—Indianapolis *v.* Keeley, 167 Ind. 516, 79 N. E. 499. **Ia.**—Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190. **Mich.**—Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117. **Neb.** Doan *v.* Smith Bros. Loan & Trust Co., 51 Neb. 280, 70 N. W. 909.

81. Fenske *v.* Nelson, 74 Minn. 1, 76 N. W. 785.

C. Effect of Failure To Answer. — Where the jury returns the interrogatories unanswered,[82] or not fully answered,[83] the court generally should require the jury to return and to complete the answers. And in some cases it has been held error to receive a general verdict without compelling an answer to special interrogatories,[84] even where the matter of the submission of the interrogatories rests in the discretion of the court,[85] or the jury upon return of a sealed verdict has separated.[86] But it is the duty of the parties to move the court to require the jury to return to complete the findings,[87] and error cannot be predicated upon the court's omission in this respect unless such motion is made before the discharge of the jury.[88]

82. Ill.—St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715. **Ind.**—Grand Rapids & I. R. Co. *v.* Oliver, 181 Ind. 145, 103 N. E. 1066; Metropolitan L. Ins. Co. *v.* Johnson, 49 Ind. App. 233, 94 N. E. 785. **Ore.** Russell *v.* Oregon R. & Nav. Co., 54 Ore. 128, 102 Pac. 619.

[a] **Verdict Necessarily Involving Agreement on Interrogatory.** — Where the jury in view of the evidence introduced in a cause must necessarily agree upon the answer to a special interrogatory before they can find a verdict and they report a failure to agree on such answer the verdict cannot be accepted by the court. Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280.

83. Ill.—Cleveland, C. C. & St. L. Ry. Co. *v.* Doerr, 41 Ill. App. 530. **Ind.** Dockerty *v.* Hutson, 125 Ind. 102, 25 N. E. 144. **Kan.**—American Cent. Ins. Co. *v.* Hathaway, 43 Kan. 399, 23 Pac. 428. **N. H.**—Winslow *v.* Smith, 74 N. H. 65, 65 Atl. 108.

84. Rathbun *v.* Parker, 113 Mich. 594, 72 N. W. 31.

85. O'Connell *v.* United Railroads, 19 Cal. App. 36, 124 Pac. 1022.

86. Chicago & A. R. Co. *v.* Reilly, 75 Ill. App. 125.

87. Conn.—Freedman *v.* New York, N. H. & H. R. Co., 81 Conn. 601, 71 Atl. 901. **Ill.**—Torpedo Top Co. *v.* Royal Ins. Co., 162 Ill. App. 338. **Ind.** Deatty *v.* Shirley, 83 Ind. 218; Indianapolis & N. W. Traction Co. *v.* Newby, 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36. **Ia.**—Mack *v.* Leedle, 78 Iowa 164, 42 N. W. 636; Timins *v.* Chicago, etc. Ry. So., 72 Iowa 94, 33 N. W. 379. **Ohio.**—Caldwell *v.* Brown, 9 Ohio C. C. 691, 6 Ohio Cir. Dec. 694. **Okla.**—Standard *v.* Sampson, 23 Okla. 13, 99 Pac. 796. **W. Va.**—Carrico *v.* West Va. Cent. & P. Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

[a] **Where an answer is uncertain or inconsistent** with answers to other interrogatories (1) a motion to reject such answer is properly overruled as the remedy is to ask the court to refer the interrogatory back to the jury for a more specific answer. North Western Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24. (2) Where a finding either regarded by itself or in the light of other findings is not specific and certain and the jury is discharged without any objection to it or any effort to have it made specific and certain it will thereafter be construed against the party in whose favor it is found. State *ex rel.* Upper *v.* Hanna, 87 Wash. 29, 151 Pac. 83, 1087.

88. Ill.—Torpedo Top Co. *v.* Royal Ins. Co., 162 Ill. App. 338; Chicago & A. R. R. Co. *v.* Reilly, 75 Ill. App. 125. **Ind.**—Jones *v.* Angell, 95 Ind. 376. **Ia.** Mulvaney *v.* Burroughs, 152 Iowa 439, 132 N. W. 873. **Ohio.**—Miller *v.* Southworth, 10 Ohio C. C. 572. **W. Va.** Griffith *v.* American Coal Co., 78 W. Va. 34, 88 S. E. 595.

[a] **The entry of the general verdict without objection** to the incompleteness of the answers to special interrogatories constitutes a waiver of the request for special findings. Brown *v.* Central Pac. R. Co. (Cal.), 12 Pac. 512.

[b] **Where Facts Sufficiently Established.**—But a motion to require the jury to answer the special interrogatories more definitely and with greater certainty is properly overruled where the material facts are sufficiently established by the answers. Ohio & M. Ry. Co. *v.* Wrape, 4 Ind. App. 100, 30 N. E. 428.

[c] **It is not error to refuse a second request** to require the jury to an-

Failure to fully answer interrogatories pertaining to material questions of fact as to which there is evidence is fatal to the verdict,[89] unless independently thereof the jury has found the facts essential to the determination of the cause.[90] But failure to answer an interrogatory which does not involve a controlling fact, upon the decision of which the rights of the parties depend, does not affect the general verdict.[91]

Failure to answer an interrogatory is equivalent to a finding against the party who was required to prove the fact embraced in the interrogatory.[92]

IX. JUDGMENT NOTWITHSTANDING VERDICT.[93] — A. In General. — Where the answers to the special interrogatories are wholly inconsistent with the general verdict the former must prevail,[94] and a judgment may be rendered upon them notwithstanding the general verdict. It must appear that the answers to the special interrogatories cannot be reconciled with the general verdict,[95] and

swer more fully, where after having been required to give a more definite answer the jury returned with the statement that they had answered the question to the best of their ability. Cockerill Zinc Co. *v.* Streets, 79 Kan. 806, 101 Pac. 475.

89. Corley *v.* Atchison, T. & S. F. R. Co., 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764.

90. Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

91. **Ark.**—Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258. **Ill.**—Elgin J. E. R. Co. *v.* Raymond, 148 Ill. 241, 35 N. E. 729. **Ind.**—Bedford S. O. & B. R. Co. *v.* Rainbolt, 99 Ind. 551; Indiana Stone Co. *v.* Stewart, 7 Ind. App. 563, 34 N. E. 1019. **Ia.**—Patterson *v.* Omaha etc. R. & B. Co., 90 Iowa 247, 57 N. W. 880. **Mass.**—Cronin *v.* Holyoke, 162 Mass. 257, 38 N. E. 445. **Mich.**—Pettibone *v.* Maclem, 45 Mich. 381, 8 N. W. 84. **Minn.**—Schneider *v.* Chicago B. & N. R. Co., 42 Minn. 68, 43 N. W. 783. **Nev.** Week *v.* Reno Traction Co., 38 Nev. 285, 149 Pac. 65. **N. M.**—Robinson *v.* Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535.

92. **Ark.**—Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280. **Ind.**—Boyer *v.* Robertson, 144 Ind. 604, 43 N. E. 879; Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251. **Kan.**—Kalina *v.* Union Pac. R. Co., 69 Kan. 172, 76 Pac. 438. **Mich.** Crane *v.* Reeder, 25 Mich. 303. **Ohio.** Hayes *v.* Smith, 15 Ohio C. Ct. 300. **Okla.**—Atchison, T. & S. F. Ry. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641.

93. **Judgment Non Obstante Veredicto,** see generally 14 Standard Proc. 958.

94. **Colo.**—Rio Grande S. R. Co. *v.* Deasy, 3 Colo. App. 196, 32 Pac. 725. **Idaho.**—Bradbury *v.* Idaho & Oregon Land Co., 2 Idaho 239, 10 Pac. 620. **Ill.**—Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557. **Ind.**—Robbins *v.* Souers, 177 Ind. 213, 96 N. E. 586, 97 N. E. 530, 102 N. E. 800. **Ia.**—Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58. **Kan.**—Sipult *v.* Wilson Land & G. Co., 94 Kan. 224, 146 Pac. 329; Emory *v.* Eggan, 75 Kan. 82, 88 Pac. 740. **Mass.**—Stiles *v.* Granville, 6 Cush. 458. **Mich.**—Trenor *v.* Hawley, 99 Mich. 504, 58 N. W. 466. **Minn.** Awde *v.* Cole, 99 Minn. 357, 109 N. W. 812. **Neb.**—Wallenburg *v.* Missouri Pac. R. Co., 86 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135; Norfolk Beet Sugar Co. *v.* Preuner, 55 Neb. 656, 75 N. W. 1097. **Nev.**—Berry *v.* Equitable Gold Min. Co., 29 Nev. 451, 91 Pac. 537. **N. D.**—Acton *v.* Fargo & M. St. R. Co., 20 N. D. 434, 129 N. W. 225. **Ohio.**—Troy *v.* Brady, 67 Ohio St. 65, 65 N. E. 616. **Vt.**—Caledonia School *v.* Kent, 86 Vt. 151, 84 Atl. 26. **Wash.**—Bullis *v.* Ball, 98 Wash. 342, 167 Pac. 942. **W. Va.**—Grass *v.* Big Creek Development Co., 75 W. Va. 719, 84 S. E. 750.

95. **Ind.**—Beard *v.* Goulding, 55 Ind. App. 398, 103 N. E. 875. **Ia.**—Wilson *v.* Onstott, 121 Iowa 263, 96 N. W. 779. **Kan.**—Tacha *v.* Chicago, R. I. & P. R. Co., 97 Kan. 571, 155 Pac. 922. **Mich.**—Martin *v.* Fisher, 143 Mich. 462,

that they pertain to some material fact in issue,[96] and that they are sufficient to support a judgment.[97]

B. MOTION FOR. — To obtain a judgment on special findings notwithstanding a general verdict, a motion therefor must be made.[98] In the absence of such motion judgment may be rendered on the general verdict,[99] although the answers to the special interrogatories are inconsistent with the verdict.[1]

C. HEARING. — In determining a motion for judgment notwithstanding the verdict the court can look only to the pleadings, general verdict and the answers to the special interrogatories.[2] No reference can be made to the evidence actually adduced on the trial.[3] Upon the hearing the findings within the issues import absolute verity.[4]

D. CONSTRUCTION OF FINDINGS. — The answers to special interrogatories must be so construed as to harmonize the same with the general verdict,[5] and every reasonable presumption must be indulged in

107 N. W. 86. **Minn.**—McAlpine *v.* Resch, 82 Minn. 523, 85 N. W. 545. **N. M.**—Smith *v.* Atchison, T. & S. F. R. Co., 19 N. M. 247, 142 Pac. 150; Roswell *v.* Davenport, 14 N. M. 91, 89 Pac. 256. **Ohio.**—Board of Comrs. *v.* Deitsch, 94 Ohio St. 1, 113 N. E. 745; Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819. **Okla.**—Goodwin *v.* Greenwood, 16 Okla. 489, 85 Pac. 1115.

96. Cleveland, C. C. & St. L. Ry. Co. *v.* Blind (Ind.), 117 N. E. 641; Wise *v.* Cleveland, C. C. & St. L. R. Co., 183 Ind. 484, 108 N. E. 369; Chicago & E. R. Co. *v.* Dinius, 180 Ind. 596, 103 N. E. 652; Topeka *v.* Noble, 9 Kan. App. 171, 58 Pac. 1015.

[a] **Answers to improper interrogatories** must be disregarded. Terre Haute, I. & E. Traction Co. *v.* Hunter, 62 Ind. App. 399, 111 N. E. 344; Lake Erie & W. R. Co. *v.* Reed, 57 Ind. App. 65, 103 N. E. 127.

97. **Ill.**—Fitzgerald *v.* Hedstrom, 98 Ill. App. 109. **Ind.**—McCoy *v.* Kokomo R. & L. Co., 158 Ind. 662, 64 N. E. 92. **Ia.**—Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58. **Kan.**—Missouri, K. & T. Ry. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261. **Mass.**—Roche *v.* Ladd, 1 Allen 436. **Neb.**—Williams *v.* Eikenberry, 22 Neb. 210, 34 N. W. 373.

98. Ft. Wayne & N. I. T. Co. *v.* Kumb (Ind. App.), 116 N. E. 309.

99. Peninsular Land T. & Mfg. Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

1. Cleveland C. C. & St. L. Ry. Co. *v.* Miller, 165 Ind. 381, 74 N. E. 509.

2. Haskell & B. C. Co. *v.* Brant (Ind. App.), 116 N. E. 337; Williams *v.* Lowe, 62 Ind. App. 357, 113 N. E. 471; Cole Motor Car Co. *v.* Ludorff, 61 Ind. App. 119, 111 N. E. 447; Mutual Trust & D. Co. *v.* Traveler's P. Assn., 57 Ind. App. 329, 104 N. E. 880; Beard *v.* Goulding, 55 Ind. App. 398, 103 N. E. 875.

3. Stevens *v.* Logansport, 76 Ind. 498.

But if there could have been any proof under the issues sufficient to sustain the general verdict, the motion will be denied. See *infra*, IX, D.

4. Porter *v.* Waltz, 108 Ind. 40, 8 N. E. 705.

[a] **Where the answer to a special interrogatory which is not necessary to support the general verdict** is not sustained by the evidence the general verdict which is supported by the evidence will not be disturbed. Phoenix *v.* Lamb, 29 Iowa 352.

5. St. Louis & S. F. R. Co. *v.* Bryan, 29 Okla. 825, 119 Pac. 581.

[a] **Where the meaning of an answer to a special interrogatory is doubtful** the doubts are to be resolved in favor of the general verdict. **Ind.** Jenney Elect. Mfg. Co. *v.* Flannery, 53 Ind. App. 397, 98 N. E. 424. **Kan.** First Nat. Bank *v.* Stroup, 100 Kan. 444, 164 Pac. 1054. **W. Va.**—Peninsular Land T. & Mfg. Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

[b] **Where the interrogatories to which answers were made are indefinite as to time** the ordinary presumption

favor of the general verdict,[6] and to support it, if possible.[7] Nothing can be considered by inferences or intendments in favor of the answers to the interrogatories.[8] It is not enough to warrant a judgment upon special findings that they are susceptible of an interpretation which would overthrow the general verdict.[9] They must be so inconsistent with the general verdict that they will not bear an interpretation which will harmonize with the general verdict.[10] The general verdict deciding all the material issues, the answers to special interrogatories will not overthrow it unless the inconsistency between the findings and verdict could not be removed by any evidence admissible under the issues.[11] And where the answers to the interrogatories do not

that where time is inquired about it refers to the matter under consideration will not be indulged as against the general verdict, every intendment and presumption being taken in its favor. Chicago & E. R. Co. *v.* Mitchell (Ind. App.), 107 N. E. 743.

[c] **And where an interrogatory improperly contains more than one question** and the answer of the jury may be properly applied to each question, one of which would be consistent with the general verdict and the other in conflict with it, the interrogatory and answer will be given that construction which will sustain the general verdict. Indiana B. Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279.

6. **Ind.**—Continental Ins. Co. *v.* Bair (Ind. App.), 114 N. E. 763; Williams *v.* Lowe, 62 Ind. App. 357, 113 N. E. 471; Osborn *v.* Adams Brick Co., 52 Ind. App. 175, 99 N. E. 530, 100 N. E. 472. **Ia.**—Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546. **Kan.** Tarin *v.* Atchison, T. & S. F. R. Co., 98 Kan. 605, 158 Pac. 874; Missouri, K. & T. Ry. Co. *v.* Bussey, 66 Kan. 735, 71 Pac. 261. **Mich.**—Rajnowski *v.* Detroit, etc. R. Co., 78 Mich. 681, 44 N. W. 335. **Minn.**—Ready *v.* Peavey Elev. Co., 89 Minn. 154, 94 N. W. 442.

7. **Ill.**—Chicago & E. I. R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549. **Ind.**—Ft. Wayne Traction Co. *v.* Hardendorf, 164 Ind. 403, 72 N. E. 593; Indianapolis St. Ry. Co. *v.* Tenner, 32 Ind. App. 311, 67 N. E. 1044. **Ia.** Tarashonsky *v.* Illinois Cent. R. Co., 139 Iowa 709, 117 N. W. 1074. **Kan.**—Chicago, R. I. & P. R. Co. *v.* Wimmer, 72 Kan. 566, 84 Pac. 378, 4 L. R. A. (N. S.) 140. **Mich.**—Martin *v.* Fisher, 143 Mich. 462, 107 N. W. 86. **Minn.**—Awde *v.* Cole, 99 Minn. 357, 109 N. W. 812. **Mont.**—Butte First Nat. Bank *v.* Pardee, 16 Mont. 390, 41 Pac. 77. **N. M.** Roswell *v.* Davenport, 14 N. M. 91, 89 Pac. 256. **Ohio.**—Reber *v.* Columbus Mach. Mfg. Co., 12 Ohio St. 175. **Okla.** Goodwin *v.* Greenwood, 16 Okla. 489, 85 Pac. 1115. **Wash.**—Cameron *v.* Stack-Gibbs Lumber Co., 68 Wash. 539, 123 Pac. 1001.

8. **Cal.**—Tremble *v.* Tuman, 175 Cal. 696, 167 Pac. 142. **Ill.**—Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863. **Ind.**—Cleveland, C. C. & St. L. Ry. Co. *v.* Blind, 117 N. E. 641; Hill *v.* Swihart, 148 Ind. 319, 47 N. E. 705. **Ia.**—Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546. **Kan.**—Samson *v.* Zimmerman, 73 Kan. 654, 85 Pac. 757.

9. Osburn *v.* Atchison, T. & S. F. R. Co., 75 Kan. 746, 90 Pac. 289.

[a] **Where the answers to special interrogatories do not exclude other conclusions** by which the jury might have arrived at the general verdict such answers are not inconsistent with the general verdict. Boden *v.* Kewanee Coal & Min. Co., 168 Ill. App. 188; Jones *v.* City of Kingman, 101 Kan. 625, 168 Pac. 1099.

10. Osburn *v.* Atchison, T. & S. F. R. Co., 75 Kan. 746, 90 Pac. 289.

[a] **The inconsistency must be such** as is beyond the possibility of being removed by any evidence legitimately admissible under the issue. Salander *v.* Lockwood, 66 Ind. 285.

11. **Ill.**—Court of Honor *v.* Dinger, 221 Ill. 176, 77 N. E. 557. **Ind.**—Marietta Glass Mfg. Co. *v.* Pruitt, 180 Ind. 434, 102 N. E. 369; Lake Shore & M. S. R. Co. *v.* Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425; Beard *v.* Goulding, 55 Ind. App. 398, 103 N. E. 875. **Ia.**—Tarashonsky *v.* Illinois Cent. R. Co., 139 Iowa 709, 117 N. W. 1074. **Kan.**—Osburn *v.* Atchison,

negative facts which support the general verdict a motion for judgment on the answers notwithstanding the general verdict is properly overruled.[12] The general verdict must stand unless by the answers to the interrogatories some fact necessary to a recovery is found against the party in whose favor the verdict is rendered,[13] or the answers show a failure to prove a material fact or facts upon which the rights of the parties depend.[14]

The answers must be construed as a whole,[15] and an answer to one interrogatory cannot be singled out to overthrow the general verdict.[16]

E. EFFECT OF INCONSISTENT FINDINGS. — In passing upon a motion for judgment upon special findings notwithstanding the general verdict the court is not required to reconcile inconsistent findings,[17] although the answers to special interrogatories should be construed so as to harmonize them.[18] Generally, interrogatories which are contradictory destroy each other and furnish no ground for judgment as against a general verdict,[19] provided that, considered in their en-

T. & S. F. R. Co., 75 Kan. 746, 90 Pac. 289. **Mich.**—Baker *v.* Flint & P. M. R. Co., 68 Mich. 90, 35 N. W. 836. **Minn.**—McAlpine *v.* Resch, 82 Minn. 523, 85 N. W. 545. **N. M.**—Smith *v.* Atchison, T. & S. F. R. Co., 19 N. M. 247, 142 Pac. 150. **Ohio.**—Wicker *v.* Messinger, 22 Ohio C. C. 712. **Okla.** White *v.* Madison, 16 Okla. 212, 83 Pac. 798.

[a] A general verdict in favor of plaintiff is a finding that every averment of the complaint essential to plaintiff's cause of action is true and the court will assume as proven every fact provable which tends to reconcile it with the answers to the special interrogatories. Chicago & E. R. Co. *v.* Biddinger (Ind. App.), 113 N. E. 1027; Crabtree *v.* Missouri Pac. R. Co., 86 Neb. 33, 124 N. W. 932, 136 Am. St. Rep. 663.

[b] **Evidence Which Might Have Been Introduced.**—The court will look not only to the evidence introduced in the cause but will examine the pleadings to see if from any evidence possible under the issues the answers cannot be reconciled with the general verdict. Evansville, Mt. C. & N. Ry. Co. *v.* Scott (Ind. App.), 114 N. E. 649.

[c] And in considering the effect of the jury's answers to interrogatories upon the general verdict every material fact upon which evidence might properly be introduced must be taken as proved and if when so considered no irreconcilable conflict is found, the general verdict prevails. Kokomo Brass Works *v.* Doran, 59 Ind. App. 583, 105 N. E. 167.

12. Haskell & B. Car Co. *v.* Brant (Ind. App.), 116 N. E. 337.

13. Fort Wayne & N. I. Tract. Co. *v.* Schoeff, 56 Ind. App. 540, 105 N. E. 924.

14. Cleveland, C. C. & St. L. Ry. Co. *v.* Wolf (Ind. App.), 114 N. E. 236.

15. Tate *v.* Missouri Pac. Ry. Co., 143 Ill. App. 289.

16. Lake Erie & W. R. Co. *v.* McConkey, 62 Ind. App. 447, 113 N. E. 24; Peninsular Land T. & Mfg. Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

17. Osburn *v.* Atchison, T. & S. F. R. Co., 75 Kan. 746, 90 Pac. 289.

18. State *ex rel.* Upper *v.* Hanna, 87 Wash. 29, 151 Pac. 83, 1087.

19. **Ind.**—Wise *v.* Cleveland, C. C. & St. L. R. Co., 183 Ind. 484, 108 N. E. 369; Childress *v.* Lake Erie & W. R. Co., 182 Ind. 251, 105 N. E. 467; Cole Motor Car Co. *v.* Ludorff, 61 Ind. App. 119, 111 N. E. 447; Chicago & E. R. Co. *v.* Shenkel, 57 Ind. App. 175, 104 N. E. 50. **Ia.**—Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58. **Kan.** Missouri Pac. Ry. Co. *v.* Holley, 30 Kan. 465, 1 Pac. 130. **Mont.**—Capital Lumber Co. *v.* Barth, 33 Mont. 94, 81 Pac. 994.

[a] Answers to special interrogatories which are contradictory neutralize each other and the general verdict prevails. Traylor *v.* McCormick (Ind. App.), 115 N. E. 346; Southern R. Co.

tirety they are not inconsistent with the general verdict to such extent that they cannot be harmonized therewith,[20] and that the verdict can be sustained under some of the answers to the interrogatories.[21] Where the answers to special interrogatories are not only inconsistent with each other but also with the general verdict a new trial must be had.[22]

v. Utz, 52 Ind. App. 270, 98 N. E. 375; Baltimore & O. R. Co. *v.* Keiser, 51 Ind. App. 58, 94 N. E. 330.

20. McClain *v.* Chicago, R. I. & P. R. Co., 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699; Osburn *v.* Atchison, T. & S. F. R. Co., 75 Kan. 746, 90 Pac. 289.

21. Marietta Glass Mfg. Co. *v.* Pruitt, 180 Ind. 434, 102 N. E. 369; Jeffersonville Mfg. Co. *v.* Holden, 180 Ind. 301, 102 N. E. 21; Indiana Quarries Co. *v.* Lavender (Ind. App.), 114 N. E. 417; Cole Motor Car Co. *v.* Ludorff, 61 Ind. App. 119, 111 N. E. 447; Central I. Ry. Co. *v.* Wishard (Ind. App.), 104 N. E. 593.

22. **Cal.**—McEwen *v.* New York L. Ins. Co., 23 Cal. App. 694, 139 Pac. 242. **Kan.**—Hauck *v.* Valley Falls M. Co., 99 Kan. 790, 163 Pac. 457; Cole *v.* Atchison, T. & S. F. R. Co., 92 Kan. 132, 139 Pac. 1177; Union Pac. Ry. Co. *v.* Sternbergh, 54 Kan. 410, 38 Pac. 486. **Okla.**—Dickerson *v.* Waldo, 13 Okla. 189, 74 Pac. 505. **Wis.**—Fehrman *v.* Pine River, 118 Wis. 150, 95 N. W. 105.

SPECIAL ISSUES. — See **Issues in Pleading and Practice; Special Interrogatories to Juries.**

SPECIAL PLEAS. — See **Confession and Avoidance; Denials; Pleas.**

SPECIAL PROCEEDINGS. — See **Suits and Actions.**

SPECIAL TERM. — See **Courts.**

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SPECIFIC PERFORMANCE

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CROSS-REFERENCES:

Equity Jurisdiction and Procedure;
Frauds, Statute of;
Legal Remedy;
Prayer;
Reformation;
Rescission and Cancellation;
Vendor and Purchaser.

Specific performance of a contract to adopt a child, see 20 STANDARD PROC. 858; of agreements to bind apprentices, see 2 STANDARD PROC. 580; of an award, see 2 STANDARD PROC. 658; of contracts between attorneys and clients, see 18 STANDARD PROC. 840; of composition agreements, see 5 STANDARD PROC. 187; to compel issuance or transfer of corporate stock, see 5 STANDARD PROC. 572; of covenant for further assurance of title to land, see 6 STANDARD PROC. 141; of contract of bidder at sale of decedent's property, see 6 STANDARD PROC. 578; of contract to establish an easement, see 7 STANDARD PROC. 954; of execution sale, see 16 STANDARD PROC. 199; of contract for sale of homestead, see 11 STANDARD PROC. 374, 380; of contract to insure, see 14 STANDARD PROC. 13; of contract of indemnity, see 12 STANDARD PROC. 29; of agreements between husbands and wives, see 11 STANDARD PROC. 712; of contracts of married women to convey, see 11 STANDARD PROC. 825; of marriage settlements, see 11 STANDARD PROC. 819; of contracts of partnerships, see 21 STANDARD PROC. 18; of a covenant to improve leased premises, see 18 STANDARD PROC. 470, note 10; of agreements to loan money, see 18 STANDARD PROC. 1100; of bid of purchaser at a judicial sale, see 16 STANDARD PROC. 830; of contract to assign or sell a patent or invention, see 21 STANDARD PROC. 181; specific performance decreed on agreed case, see 1 STANDARD PROC. 764.

For forms in addition to those found in this article, see 9 STANDARD PROC. 1159, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. SUITS IN EQUITY FOR SPECIFIC PERFORMANCE. — **A.** DEFINITIONS AND DISTINCTIONS. — Specific performance is an equitable remedy[1] which compels the performance of a contract in the precise terms agreed upon,[2] or such a substantial performance as will do

1. **Cal.**—Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386; **Martin** *v.* Wray, 1 Cal. Unrep. 25. **Haw.**—Scott *v.* Pilipo, 22 Hawaii 412. **Ill.**—Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414. **Kan.** Stromel *v.* Hawes, 97 Kan. 120, 154 Pac. 232. **Me.**—Brown & Sons *v.* Boston & M. R. R. Co., 106 Me. 248, 76 Atl. 692. **Va.**—Rison *v.* Newberry, 90 Va. 513, 521, 18 S. E. 916.

See also 8 STANDARD PROC. 430.

2. **Del.**—Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 176, 14 Atl. 27; Burton *v.* Vessels, 5 Del. Ch. 568, 572. **Tenn.**—Trigg *v.* Read, 5 Humph. 529, 42 Am. Dec. 447. **Va.**—Rison *v.* New-

justice between the partes.[3] It is distinct from a suit at law for damages,[4] from an action for reformation,[5] redemption,[6] or rescission,[7] and from an action to foreclose a mortgage.[8]

B. Discretion of Court. — The right of a litigant to specific performance is a matter resting in the sound discretion of the court or chancellor.[9]

berry, 90 Va. 513, 521, 18 S. E. 916; Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610. **Wash.**—Young *v.* Porter, 27 Wash. 551, 555, 68 Pac. 362.

[a] **Other Definitions.**—It is "a remedy for enforcing the equitable duties arising out of the alleged instrument." Smith *v.* Bradhurst, 18 Misc. 546, 549, 41 N. Y. Supp. 1002.

[b] It is "the actual accomplishment of a contract by the party bound to fulfill it; performance of a contract in the precise terms agreed upon; strict performance." Burton *v.* Vessels, 5 Del. Ch. 568, 572.

[c] "An action for specific performance is nothing more nor less than an action to compel a party to do what he has agreed to do." Young *v.* Porter, 27 Wash. 551, 555, 68 Pac. 362.

[d] **An action by a vendor** to compel the purchaser to pay the purchase money is an action for specific performance. Crom *v.* Henderson (Ia.), 165 N. W. 397.

3. Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414; Rison *v.* Newberry, 90 Va. 513, 521, 18 S. E. 916. See *infra*, I, Q. 2.

4. Bruce *v.* Tilson, 25 N. Y. 194, 197.

[a] "**The distinction** between an action for a specific performance in equity and a suit at law for damages, for nonperformance, is this, that in the latter, the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former, the contract itself, and not a breach of it, gives the action." Bruce *v.* Tilson, 25 N. Y. 194, 197.

Election between, see *infra*, I, E.

5. Harris *v.* Williams, 103 Ga. 324, 29 S. E. 929; Bryan *v.* Canady, 169 N. C. 579, 86 S. E. 584. See the title "**Reformation.**"

But a reformation may be asked, and a specific performance had of the contract as reformed. See *infra*, I, J, 3.

6. **Ark.**—Phillips *v.* Jones, 103 Ark. 550, 146 S. W. 513. **Ill.**—Henry *v.* Britt, 197 Ill. App. 167. **Wis.**—Williams *v.* Williams, 50 Wis. 311, 316, 6 N. W. 814.

[a] **Distinguished.**—"Specific performance enforces a contract by giving a party something to which he had not title before. Redemption gives a party nothing new, but enforces his right to repurchase his own, incumbered for a debt." Williams *v.* Williams, 50 Wis. 311, 316, 6 N. W. 814.

7. Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 23, 7 Am. Dec. 513; Welch Pub. Co. *v.* Johnson Realty Co., 78 W. Va. 350, 89 S. E. 707, L. R. A. 1917A, 200.

See the title, "**Rescission and Cancellation.**"

Though a rescission would not be ordered, specific performance may be denied, see *infra*, I, C, 1.

8. De Hihns *v.* Free, 70 S. C. 344, 356, 49 S. E. 841.

9. **U. S.**—Washington Irr. Co. *v.* Krutz, 119 Fed. 279, 56 C. C. A. 1; Greison *v.* Winey, 226 Fed. 302. **Ala.** American Laundry Co. *v.* E. & W. Dry Cleaning Co., 74 So. 58. **Ariz.**—Kimball *v.* Statler, 176 Pac. 843. **Cal.** Bruck *v.* Tucker, 42 Cal. 346. **Del.** Godwin *v.* Collins, 3 Del. Ch. 189, 198. **Fla.**—Murphy *v.* Hohne, 74 So. 973; Hathcock *v.* Societe Anonyme La Floridienne, 54 Fla. 631, 45 So. 481. **Haw.** Peterson *v.* Lazarus, 7 Haw. 129; Andrews *v.* Mendonca, 5 Hawaii 446. **Ill.** Thackaberry *v.* Kibbe, 284 Ill. 199, 119 N. E. 897; Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414; Baltimore & O. S. W. R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Maltby *v.* Thews, 171 Ill. 264, 49 N. E. 486. **Ind.**—Ames *v.* Ames, 46 Ind. App. 597, 91 N. E. 509. **Ia.** Origer *v.* Kuyper, 168 N. W. 119; Sweeney *v.* O'Hora, 43 Iowa 34. **Kan.** Anderson *v.* Anderson, 75 Kan. 117, 129, 88 Pac. 743, 9 L. R. A. N. S. 229; Reid *v.* Mix, 63 Kan. 745, 66 Pac. 1021, 55 L. R. A. 706. **Ky.**—Jenkins *v.* Dawes, 207 S. W. 689; Edelen *v.* Samuels, 126 Ky. 295, 303, 103 S. W. 360; Cocanaugher *v.* Green, 93 Ky. 519,

The discretion exercised must not be an arbitrary, but a sound judicial discretion,[10] controlled by established principles of equity.[11]

20 S. W. 542. **Me.**—Brown & Sons *v.* Boston & McR. R. Co., 106 Me. 248, 76 Atl. 692. **Md.**—Rickard *v.* Neff, 130 Md. 89, 99 Atl. 940; Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232. **Mass.**—Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, note. **Mich.**—Tattan *v.* Bryant, 198 Mich. 515, 165 N. W. 778; Ogooshevitz *v.* Arnold, 197 Mich. 203, 163 N. W. 946, 165 N. W. 633; Cox *v.* Raider, 138 Mich. 249, 101 N. W. 531. **Mo.**—Carson *v.* Woods, 177 S. W. 623; Sease *v.* Cleveland Co-op. Stove & Hollow Ware F. Co., 141 Mo. 488, 42 S. W. 1084. **Mont.**—Interior Securities Co. *v.* Campbell, 178 Pac. 582. **Neb.** Edmiston *v.* Hupp, 98 Neb. 84, 152 N. W. 296; Hoctor-Johnston Co. *v.* Billings, 65 Neb. 214, 91 N. W. 183. **N. J.** King *v.* Morford, 1 N. J. Eq. 274. **N. Y.** Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261; Seymour *v.* Delancey, 6 Johns. Ch. 222 (per chancellor Kent); Glasser *v.* Loughran, 103 Misc. 20, 170 N. Y. Supp. 190. **N. C.**—Bradshaw *v.* Millikin, 92 S. E. 161; Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824. **N. D.**—Hunter *v.* McDevitt, 12 N. D. 505, 97 N. W. 869. **Pa.**—Datz *v.* Phillips, 137 Pa. 203, 20 Atl. 426, 21 Am. St. Rep. 864. **S. C.**—Bull *v.* Fallaw, 96 S. E. 147; Anthony *v.* Eve, 95 S. E. 513; Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630. **Tenn.**—New River Lumber Co. *v.* Tennessee R. Co., 136 Tenn. 661, 191 S. W. 334; Cock *v.* Evans' Heirs, 9 Yerg. 287, 298. **Va.** Hoster's Committee *v.* Zollman, 94 S. E. 164. **W. Va.**—Welch Pub. Co. *v.* Johnson Realty Co., 78 W. Va. 350, 89 S. E. 707, L. R. A. 1917A, 200; Big Huff Coal Co. *v.* Thomas, 76 W. Va. 161, 85 S. E. 171. **Wis.**—Woldenberg *v.* Ripham, 166 Wis. 433, 166 N. W. 21; Engberry *v.* Rousseau, 117 Wis. 52, 93 N. W. 824. **Eng.**—Joynes *v.* Statham, 3 Atk. 388, 26 Eng. Reprint 1023. **Can.**—Harris *v.* Robinson, 21 Super. Ct. 390.

[a] **Whether the contract relates to real or personal estate,** relief is in the discretion of the court. Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404, 408.

[b] **When a Matter of Right.** Specific performance of a contract to convey real estate is not a matter of right, except as such enforcement may be essential to the maintenance of a legal right to which the movant is clearly and equitably entitled. Murphy *v.* Hohne (Fla.), 74 So. 973.

10. **U. S.**—Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360. **Ala.**—Blackburn *v.* McLaughlin, 80 So. 818; Rushton *v.* McKee & Co., 77 So. 343. **Ark.** Whiting *v.* Beebe, 12 Ark. 421, 551. **Cal.**—Sturgis *v.* Galindo, 59 Cal. 28, 43 Am. Rep. 239. **Fla.**—Murphy *v.* Hohne, 74 So. 973. **Ill.**—Afficani Home P. & Loan Assn. *v.* Carroll, 267 Ill. 380, 108 N. E. 322; Sutton *v.* Miller, 219 Ill. 462, 76 N. E. 838; Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. N. S. 221. **Ia.**—Mitchell *v.* Mutch, 180 Iowa 1281, 164 N. W. 212. **Ky.**—Darnell *v.* Alexander, 178 Ky. 404, 199 S. W. 17; Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **Md.**—Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232. **Mich.**—Kerwin Mach. Co. *v.* Baker, 165 N. W. 625; Friend *v.* Smith, 191 Mich. 99, 157 N. W. 347. **Mo.** Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651. **N. Y.**—Hill *v.* Ressegieu, 17 Barb. 162. **Pa.**—*In re* Kutz's Est., 259 Pa. 548, 103 Atl. 293. **Tenn.**—New River Lumb. Co. *v.* Tennessee R. Co., 136 Tenn. 661, 191 S. W. 334. **Va.** Hoster's Committee *v.* Zollman, 94 S. E. 164.

[a] **Not an arbitrary discretion synonymous** with the mere pleasure of a judge. Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

[b] **Just and Reasonable Discretion.**—Ivory *v.* Murphy, 36 Mo. 534.

11. **U. S.**—Hess *v.* Bowen, 241 Fed. 659, 154 C. C. A. 417. **Fla.**—Dixie Naval Stores Co. *v.* German-American Lumber Co., 79 So. 836. **Ill.**—Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755. **Ky.**—Cox *v.* Burgess, 96 S. W. 577. **Md.**—Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232. **Me.**—Brown & Sons *v.* Boston & Me. R. R. Co., 106

Inflexible rules cannot be laid down for the exercise of the power of the court,[12] and relief will be granted or withheld upon a consideration of all the circumstances of each particular case.[13]

The discretion of the court, however, extends only so far as to require the court to judge whether, under the circumstances of the case, the contract is or is not an equitable one.[14] That being determined, the judicial discretion ceases;[15] so that if the contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much a matter of course for equity to decree a specific performance as to give damages at law.[16] Or as it has been

Me. 248, 255, 76 Atl. 692. **Pa.**—In re Kutz's Estate, 259 Pa. 548, 103 Atl. 293; Rennyson *v.* Rozell, 106 Pa. 407. **Wis.**—Woldenberg *v.* Riphan, 166 Wis. 433, 166 N. W. 21. **Can.**—Harris *v.* Robinson, 21 Super. Ct. 390.

12. **U. S.**—Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Washington Irr. Co. *v.* Krutz, 119 Fed. 279, 56 C. C. A. 1. **Del.**—Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 14 Atl. 27; Godwin *v.* Collins, 3 Del. Ch. 189, 201. **Ill.** Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414. **Ia.**—Sweeney *v.* O'Hora, 43 Iowa 34. **Ky.**—Schmidt *v.* Louisville & N. R. Co., 101 Ky. 441, 480, 41 S. W. 1015, 38 L. R. A. 809. **Pa.**—Edison Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 465, 98 Atl. 652.

13. **U. S.**—Nickerson *v.* Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. ed. 314. **Cal.**—Bruck *v.* Tucker, 42 Cal. 346. **Del.**—Godwin *v.* Collins, 3 Del. Ch. 189, 201. **Ill.**—Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414. **Ind.**—Ames *v.* Ames, 46 Ind. App. 597, 91 N. E. 509. **Ia.**—Zundelowitz *v.* Webster, 96 Iowa 587, 65 N. W. 835. **Kan.**—Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202. **Md.**—Gunther Jr., Brew. Co. *v.* Brywczynski, 107 Md. 696, 69 Atl. 514; Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232. **Minn.**—Buckley *v.* Patterson, 39 Minn. 250, 39 N. W. 490. **N. Y.**—Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261. **Pa.**—Edison Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 465, 98 Atl. 652. **S. C.**—Anthony *v.* Eve, 95 S. E. 513. **Va.**—Hoster's Committee *v.* Zollman, 94 S. E. 164.

14. Godwin *v.* Collins, 3 Del. Ch. 189, 201, 4 Houst. 28, 47 *quoted* in Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 177, 14 Atl. 27; Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651.

15. Godwin *v.* Collins, 3 Del. Ch. 189, 201; Heins *v.* Thompson & Flieth Lumber Co., 165 Wis. 563, 163 N. W. 173.

16. **Ark.**—Greenfield *v.* Carlton, 30 Ark. 547, 553. **Del.**—Godwin *v.* Collins, 3 Del. Ch. 189, 201. **Ill.**—Cummins *v.* Martzen, 273 Ill. 45, 112 N. E. 347; Baltimore & O. S. W. Ry. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414. **Ia.**—Mitchell *v.* Mutch, 180 Iowa 1281, 164 N. W. 212. **Ky.**—Faraday Coal & Coke Co. *v.* Owens, 26 Ky. L. Rep. 243, 80 S. W. 1171. **Minn.**—Abbott *v.* Moldestad, 74 Minn. 293, 77 N. W. 227, 73 Am. St. Rep. 348. **Miss.** Yazoo & M. V. R. Co. *v.* Southern Ry. Co., 83 Miss. 746, 36 So. 74. **Mo.**—Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651; Hardy *v.* Matthews, 42 Mo. 406. **Neb.**—Gorder & Son *v.* Pankonin, 83 Neb. 204, 210, 119 N. W. 449, 131 Am. St. Rep. 629. **N. H.**—Orestes *v.* Galanis, 78 N. H. 514, 102 Atl. 759. **N. Y.**—Hill *v.* Ressegieu, 17 Barb. 162; Goddard *v.* American Queen, 44 App. Div. 454, 61 N. Y. Supp. 133; Bennet *v.* Bennet, 10 App. Div. 550, 42 N. Y. Supp. 435. **N. C.**—Stamper *v.* Stamper, 121 N. C. 251, 28 S. E. 20. **W. Va.** Ballard *v.* Ballard, 25 W. Va. 470; Abbott *v.* L'Hommedieu, 10 W. Va. 677. **Eng.**—Hall *v.* Warren, 9 Ves. Jr. 605, 608, 32 Eng. Reprint 738.

[a] "**The sound discretion referred to in this legal proposition is not by any means so broad** and arbitrary as its language would seem to import. It is a proposition handed down from the old chancery courts of England, which may have been literally enforced by the then chancellors who acted without fixed rules and according to their abstract notions of justice, but it has

stated, in a clear case, the jurisdiction to grant specific performance will be freely exercised.[17]

C. Circumstances Affecting Right to Relief and Exercise of Discretion. — **1. Generally.** — In general, it may be said, that specific relief will be granted only when it is apparent that the ends of justice will be subserved thereby,[18] and will be denied when it would be inequitable, or against conscience and justice to decree performance.[19] To warrant the exercise of the court's discretion, the case must be a clear one,[20] the moving party must come into court with clean hands,[21] and the equities must clearly be with the party seeking such relief.[22] And relief may be denied,[23] although the proof may come far short of

very little force or application in modern equity-courts and practice. The rules and limitations, which govern the present equity courts, are no less absolute and defined than are those governing courts of law. Arbitrary discretion belongs to neither. Both are controlled by established and well settled doctrines. It is this principle which is the foundation of the rule before stated, that where the contract sought to be enforced is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for courts of law to award damages for a breach of it." Ballard *v.* Ballard, 25 W. Va. 470, 479.

[b] "Where all the necessary elements, conditions and incidents are present, relief by way of specific performance should be granted as a matter of right and not as a mere favor." Baltimore & O. S. W. R. R. Co. *v.* Brubaker, 217 Ill. 462, 469, 75 N. E. 523; Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615.

[c] **The rule that relief is discretionary is more a form of expression** than an accurate definition of the rights of the injured party. Edelen *v.* Samuels & Co., 126 Ky. 295, 303, 103 S. W. 360.

[d] **When it appears that compensation in damages is inadequate,** the discretion will be favorably exercised. Gilbert *v.* Bunnell, 92 App. Div. 284, 86 N. Y. Supp. 1123.

[e] **The awarding of specific performance of contracts concerning realty** is almost a matter of course. Gorder & Son *v.* Pankonin, 83 Neb. 204, 210, 119 N. W. 449, 131 Am. St Rep. 629.

17. Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256

18. **U. S.**—Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Washington Irr. Co. *v.* Krutz, 119 Fed. 279, 56 C. C. A. 1; American Fisheries Co. *v.* Lennen, 118 Fed. 869. **Ill.**—Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755. **Ia.**—King *v.* Raab, 123 Iowa 632, 99 N. W. 306. **N. C.**—Tillery *v.* Land, 136 N. C. 537, 549, 48 S. E. 824. **Eng.**—Wilson *v.* Northampton & B. J. Ry., L. R. 9 Ch. 279, 284; Harnett *v.* Yeilding, 2 Sch. & Lef. 549, 552.

19. **Ala.**—Gentry *v.* Rogers, 40 Ala. 442. **Ark.**—Fort Smith *v.* Brogan, 49 Ark. 306, 5 S. W. 337. **Cal.**—Mathews *v.* Davis, 102 Cal. 202, 36 Pac. 358. **Fla.** Murphy *v.* Hohne, 74 So. 973. **Ill.** Sutton *v.* Miller, 219 Ill. 462, 76 N. E. 838. **Ia.**—Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377. **Ky.**—Cox *v.* Burgess, 96 S. W. 577. **Mich.**—Rathbone *v.* Groh, 137 Mich. 373, 100 N. W. 588. **Minn.**—Abbott *v.* Moldestad, 74 Minn. 293, 77 N. W. 227, 73 Am. St. Rep. 348; Buckley *v.* Patterson, 39 Minn. 250, 39 N. W. 490. **Mo.**—Hollmann *v.* Conlon, 143 Mo. 369, 45 S. W. 275. **N. J.**—Brisbane *v.* Sullivan, 86 N. J. Eq. 411, 99 Atl. 197. **N. Y.**—Albany Heights Realty Co. *v.* Vogt, 182 App. Div. 736, 169 N. Y. Supp. 1049. **S. C.** Anthony *v.* Eve, 95 S. E. 513.

20. Triumph Electric Co. *v.* Thullen, 225 Fed. 293; Lake Erie Land Co. *v.* Chilinski, 197 Mich. 214, 163 N. W. 929.

21. See cases in next note following.

22. **Ia.**—Brown *v.* Widen, 103 N. W. 158. **Mich.**—Lake Erie Land Co. *v.* Chilinski, 197 Mich. 214, 163 N. W. 929; Chapman *v.* Morgan, 55 Mich. 124, 20 N. W. 820. **N. H.**—See Eastman *v.* Plumer, 46 N. H. 464. **Eng.**—Harnett *v.* Yeilding, 2 Sch. & Lef. 549, 552.

23. **Del.**—Godwin *v.* Collins, 4 Houst. 28, 47. **Ind.**—Drum *v.* Stevens, 94

a showing sufficient to authorize the court to grant a rescission or cancellation of a contract.

2. The Contract. — Not only must the contract to be enforced be a legal obligation,[24] mutual,[25] certain in its terms,[26] and based on a sufficient consideration,[27] but it must also be equitable, such as a court of equity seeking only to do equity ought to enforce,[28] fair[29] in all

Ind. 181. **Kan.**—Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202. **Mass.**—Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378. **Mo.** Gottfried *v.* Bray, 208 Mo. 652, 106 S. W. 639. **N. Y.**—See Seymour *v.* Delancey, 6 Johns. Ch. 222. **N. C.** Tillery *v.* Land, 136 N. C. 537, 549, 48 S. E. 824; Leigh *v.* Crump, 36 N. C. 299. **Tex.**—Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918. **Wis.** Woldenberg *v.* Riphan, 166 Wis. 433, 166 N. W. 21. **Eng.**—Willan *v.* Willan, 16 Ves. Jr. 72, 83, 33 Eng. Reprint 911.

Compare Bruck *v.* Tucker, 42 Cal. 346.

[a] "**For instance,** a court of equity will not decree a rescission of a contract except for fraud or mistake. Inadequacy, improvidence, surprise and hardship are not sufficient, yet the presence of these, amounting to unfairness, even without fraud or mistake, will prevent a court of equity from ordering performance." Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202.

[b] **Though inadequacy of price** is not a ground for decreeing a rescission generally, yet it may be sufficient for the court to refuse to enforce performance. Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 23, 7 Am. Dec. 513.

[c] **A unilateral mistake** does not warrant a rescission of the contract but it is ground for denying specific performance. Welch Pub. Co. *v.* Johnson Realty Co., 78 W. Va. 350, 89 S. E. 707, L. R. A. 1917A, 200.

24. Bruck *v.* Tucker, 42 Cal. 346; Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610.

[a] **The maxim** is that equity will not enforce the specific performance of an agreement upon which an action will not lie at law for damages. White *v.* Butcher, 59 N. C. 231.

[b] **But sometimes specific relief may be had when the right to sue at law is lost,** as where a party neglects to strictly comply with the stipulations in the contract with regard to time. White *v.* Butcher, 59 N. C. 231.

25. **Mutuality,** see *infra,* I, C, 5.

26. **U. S.**—Triumph Electric Co. *v.* Thullen, 228 Fed. 762. **Cal.**—Magee *v.* Magee, 174 Cal. 276, 162 Pac. 1023; Baumann *v.* Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756. **Fla.**—Rhode *v.* Gallat, 70 Fla. 536, 70 So. 471. **Haw.** Vierra *v.* Ropert, 10 Hawaii 294. **Idaho.** Bear Track Min. Co. *v.* Clark, 6 Idaho 196, 54 Pac. 1007. **Ind.**—Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880; Starkey *v.* Starkey, 136 Ind. 349, 36 N. E. 287. **Md.**—Stoddert *v.* Bowie, 5 Md. 19, 35. **Mo.**—Paris *v.* Haley, 6 Mo. 453. **N. J.**—Neptune Fisheries Co. *v.* Cape May Real Estate Co. (N. J. Eq.), 105 Atl. 212; Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266, 274; Camden & A. R. Co. *v.* Stewart, 18 N. J. Eq. 489. **N. C.**—Tillery *v.* Land, 136 N. C. 537, 550, 48 S. E. 824; Leigh *v.* Crump, 36 N. C. 299. **Tenn.**—Cock *v.* Evans' Heirs, 9 Yerg. 287, 298. **Wash.**—Monroe *v.* Sams, 89 Wash. 51, 153 Pac. 1090. **Wis.**—Auer *v.* Mathews, 129 Wis. 143, 108 N. W. 45.

[a] **The certainty** need only be a reasonable one, satisfactory to the court, in regard to the subject matter of the contract and the circumstances under which it was entered into. Paris *v.* Haley, 61 Mo. 453.

27. See *infra,* I, C, 3.

28. **Cal.**—Cooper *v.* Pena, 21 Cal. 403. **Del.**—Godwin *v.* Collins, 3 Del. Ch. 189, 201. **Ill.**—Iglehart *v.* Vail, 73 Ill. 63.

29. **U. S.**—Clark *v.* Rosario Min. & Mill. Co., 176 Fed. 180, 99 C. C. A. 534; Greison *v.* Winey, 226 Fed. 302. **Cal.**—Agard *v.* Valencia, 39 Cal. 292; Winchester *v.* Becker, 8 Cal. App. 362, 97 Pac. 74. **Del.**—Godwin *v.* Collins, 3 Del. Ch. 189. **Idaho.**—Bear Track Min. Co. *v.* Clark, 6 Idaho 196, 54 Pac. 1007. **Ind.**—Ames *v.* Ames, 46 Ind. App. 597, 91 N. E. 509. **Md.**—Tyson *v.* Watts,

its parts, and just and reasonable as to the party required to perform.[30]

3. **Consideration for the Contract.** — The contract must be based upon a valuable,[31] and in some states, an adequate,[32] consideration. Inadequacy of consideration of itself is not sufficient to defeat specific performance, according to some authorities,[33] unless the inadequacy is so great as to shock the conscience and amount to conclusive evidence of fraud.[34] But it is a circumstance which may be taken into

1 Md. Ch. 13. **Neb.**—Stanton *v.* Driffkorn, 83 Neb. 36, 118 N. W. 1092. **N. Y.**—Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; Seymour *v.* Delancey, 6 Johns. Ch. 222, per Chancellor Kent. **Pa.**—Rennyson *v.* Rozell, 106 Pa. 407; Freetly *v.* Barnhart, 51 Pa. 279, 281. **S. C.**—Anthony *v.* Eve, 95 S. E. 513. **Tex.**—Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918.

[a] **The fairness of the contract must be determined as of the time** when it was made. Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610. *Compare infra,* I, C, 8.

30. **Cal.**—Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Stein *v.* Archibald, 151 Cal. 220, 90 Pac. 536, statute so requires. **Ill.**—Wolf *v.* Lawrence, 276 Ill. 11, 114 N. E. 567; Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755. **Okla.**—Melton *v.* Cherokee Oil & Gas Co., 170 Pac. 691. **Wash.**—Gilman *v.* Brunton, 94 Wash. 1, 161 Pac. 835.

31. **Ala.**—Day *v.* Stewart, 80 So. 289. **Ark.**—Greenfield *v.* Carlton, 30 Ark. 547, 555. **N. Y.**—Malins *v.* Brown, 4 N. Y. 403, 408. **Tex.**—Tumlinson's Admr. *v.* York's Admr., 20 Tex. 694. **Va.**—Horster *v.* Zollman, 94 S. E. 164; Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610, valuable or meritorious consideration. **W. Va.**—Hissam *v.* Parrish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892.

[a] **Even though the instrument is under seal,** there must be an actual consideration. Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755.

32. **Ark.**—Greenfield *v.* Carlton, 30 Ark. 547, 553. **Cal.**—Stein *v.* Archibald, 151 Cal. 220, 90 Pac. 536 (statute so requires); Bruck *v.* Tucker, 42 Cal. 346, 354; Christin *v.* Clark (Cal. App.), 173 Pac. 109. **Idaho.**—Bear Track Min. Co. *v.* Clark, 6 Idaho 196, 54 Pac. 1007. **Ill.**—See Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755, "a sufficient consideration." **Ind.**—Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523. **Kan.**—Greenwood *v.* Greenwood, 96 Kan. 591, 152 Pac. 657. **Mont.** Finlen *v.* Heinze, 28 Mont. 548, 564, 73 Pac. 123. **N. Y.**—Seymour *v.* Delancey, 6 Johns. Ch. 222, per Chancellor Kent.

[a] **Whether the action is brought by the vendor or the vendee,** the rule applies. White *v.* Sage, 149 Cal. 613, 87 Pac. 193.

[b] **The point of time,** to which the question of adequacy relates, is the time of the formation of the contract. Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190; Finlen *v.* Heinze, 28 Mont. 548, 564, 73 Pac. 123.

[c] **But the adequacy of the price paid for an option** is not a material consideration in a suit to enforce the contract resulting from an exercise of the option. Smith *v.* Bangham, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580.

[d] **But a party accepting and retaining the agreed consideration** cannot question its adequacy. Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469; Strachan *v.* Drake, 61 Colo. 444, 158 Pac. 310.

33. **Ill.**—Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221. **Ind.**—Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535. **Kan.**—Greenwood *v.* Greenwood, 96 Kan. 591, 152 Pac. 657. **Mich.**—Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. 660. **Pa.**—Borie *v.* Satterthwaite, 180 Pa. 542, 37 Atl. 102. **Wash.**—Pasco Fruit Lands Co. *v.* Timmermann, 88 Wash. 112, 152 Pac. 675.

34. **U. S.**—Marks *v.* Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317. **Del.**—Godwin *v.* Collins, 4 Houst. 28, 47. **Ill.**—Zempel *v.* Hughes, 235 Ill. 424, 435, 85 N. E. 641; Ullsperger *v.*

consideration with all the facts, in determining whether relief shall be granted or denied.[35] According to other authorities inadequacy of consideration is sufficient of itself to prevent relief,[36] although it may not amount to fraud.[37]

4. Fraud, Mistake, etc. — The contract must not be a hard bargain,[38] or sharp practice.[39] It must be free from fraud,[40] or im-

Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221. **Mass.**—Lee *v.* Kirby, 104 Mass. 420. **Mich.**—Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. 660. **N. Y.**—Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261. But see Seymour *v.* Delancey, 6 Johns. Ch. 222, 232, per Chancellor Kent. **Wash.**—Pasco Fruit Lands Co. *v.* Timmermann, 88 Wash. 112, 152 Pac. 675. **Eng.**—Gwynne *v.* Heaton, 1 Brown Ch. 1, 9, 28 Eng. Reprint 949.

[a] Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance. Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 246, 32 Eng. Reprint 592.

35. Shoop *v.* Burnside, 78 Kan. 871, 876, 98 Pac. 202; Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. 660.

36. **Cal.**—Haddock *v.* Knapp, 171 Cal. 59, 151 Pac. 1140; Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190; Porter *v.* Stockdale, 32 Cal. App. 792, 164 Pac. 33. **Conn.**—Dodd *v.* Seymour, 21 Conn. 476. **Ky.**—Cox *v.* Burgess, 96 S. W. 577. See also Darnell *v.* Alexander, 178 Ky. 404, 199 S. W. 17.

37. Haddock *v.* Knapp, 171 Cal. 59, 151 Pac. 1140; Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190; Kapaakea *v.* Morrison, 2 Hawaii 272, 289. See Greenwood *v.* Greenwood, 96 Kan. 591, 152 Pac. 657.

[a] **The degree of inadequacy** of consideration which will defeat specific performance (1) rests in the discretion of the court. Haddock *v.* Knapp, 171 Cal. 59, 151 Pac. 1140; Cummings *v.* Roeth, 10 Cal. App. 144, 101 Pac. 434; Seymour *v.* Delancy, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270. (2) There is no definite rule "fixing the exact proportion of the actual value of the property to the consideration mentioned in the contract, which the courts will regard as bringing the particular case within the principle. It may be more or less than one-half, depending somewhat upon the circumstances." Cummings *v.* Roeth, 10 Cal. App. 144, 149, 101 Pac. 434.

[b] **The court is not guided solely** by a comparison of the price to be paid with the value of the property to be conveyed. This is a factor; but it is to be viewed by the court in conjunction with all of the other facts and circumstances of the case. Haddock *v.* Knapp, 171 Cal. 59, 151 Pac. 1140. See also Wilson *v.* White, 161 Cal. 453, 119 Pac. 895.

38. **Cal.**—Brück *v.* Tucker, 42 Cal. 346. **Ky.**—Woollums *v.* Horsley, 93 Ky. 582, 20 S. W. 781. **N. J.**—Chubb *v.* Peckham, 13 N. J. Eq. 207. **Tex.**—Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918. **Eng.**—Kimberley *v.* Jennings, 6 Sim. 340, 58 Eng. Reprint 621.

[a] **But the mere fact that the defendant made a bad bargain** will not defeat specific performance. Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141.

[b] **But the court will not weigh nicely the relative advantages** or disadvantages of a bargain fairly made; it will consider whether, either from gross inadequacy of consideration or inequality of terms, such as shocks the common sense of justice, or from anything in the relations of the parties or in the circumstances of the contract, it is unconscientious for a party to exact his advantage. Godwin *v.* Collins, 3 Del. Ch. 189, 201.

39. Blondel *v.* Bolander, 80 Neb. 531, 547, 114 N. W. 574, 580; Engberry *v.* Rousseau, 117 Wis. 52, 57, 93 N. W. 824, 826.

40. **U. S.**—Greison *v.* Winey, 226 Fed. 302. **Cal.**—Kelly *v.* Central Pac. R. Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470; Bruck *v.* Tucker, 42 Cal. 346; Brandt *v.* Krogh, 14 Cal. App. 39, 111 Pac. 275. **Haw.**—Kekaula *v.* Ehu, 10 Hawaii 68. **Ia.**—Stromberg *v.* Alexander, 171 Iowa 707, 154 N. W. 414. **Kan.**—Moorhead *v.* Edmonds, 99 Kan. 343, 161 Pac. 610. **Mich.**—Lake

position,[41] misrepresentation,[42] concealment,[43] mistake,[44] undue advantage,[45] or misapprehension.[46]

5. **Mutuality of Remedy.** — It is a general rule that specific performance cannot be had unless the remedy be mutual or reciprocal,[47]

Erie Land Co. *v.* Chilinski, 197 Mich. 214, 163 N. W. 929. **Mo.**—Hargis *v.* Smith, 178 S. W. 72. **S. C.**—Anthony *v.* Eve, 95 S. E. 513; McChesney *v.* Smith, 105 S. C. 171, 89 S. E. 639. **Tex.**—Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918.

41. **Ia.**—Muench *v.* Barnell, 163 Iowa 352, 144 N. W. 602. **Kan.**—Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202. **Ky.**—Cox *v.* Burgess, 96 S. W. 577.

42. **U. S.**—Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. ed. 414. **Pa.**—Holmes' Appeal, 77 Pa. 50; Miles *v.* Stevens, 3 Pa. 21, 45 Am. Dec. 621. **Tex.**—Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918.

43. Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. ed. 414.

44. **U. S.**—Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. ed. 414. **Haw.** — Armstrong *v.* Keone, 17 Hawaii 342. **Ind.**—Smith *v.* Toth, 61 Ind. App. 42, 111 N. E. 442. **Mo.**—Hargis *v.* Smith, 178 S. W. 72. **N. C.**—Tillery *v.* Land, 136 N. C. 537, 550, 48 S. E. 824. **S. C.**—Anthony *v.* Eve, 95 S. E. 513; McChesney *v.* Smith, 105 S. C. 171, 89 S. E. 639. **Wis.** Woldenberg *v.* Riphan, 166 Wis. 433, 437, 166 N. W. 21, mistake of fact.

[a] **A pure mistake of fact** sometimes precludes relief. Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404.

[b] **Although the plaintiff was not a party to the mistake,** relief will not be granted. Buckley *v.* Patterson, 39 Minn. 250, 39 N. W. 490; Welch Pub. Co. *v.* Johnson Realty Co., 78 W. Va. 350, 89 S. E. 707, L. R. A. 1917A, 200.

[c] **Exception.**—When the contract provides for compensation in case of mistake, the mistake may be compensated for and the contract specifically performed in other respects. Cal. Civ. Code, §3391, sub. 4. See *infra,* I, Q, 2, j, (II).

45. Cox *v.* Burgess (Ky.), 96 S. W. 577.

46. **U. S.**—Greison *v.* Winey, 226 Fed. 302. **Ky.**—Cox *v.* Burgess, 96 S. W. 577, gross misapprehension. **Tex.** Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918.

47. **U. S.**—Marble Co. *v.* Ripley, 10 Wall. 339, 359, 19 L. ed. 955; Triumph Electric Co. *v.* Thullen, 228 Fed. 762; Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61. **Ala.**—Black Diamond Coal Min. Co. *v.* Jones Coal Co., 76 So. 42; Chadwick *v.* Chadwick, 121 Ala. 520, 25 So. 631. **Cal.**—Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Sayward *v.* Houghton, 119 Cal. 545, 548, 51 Pac. 853, 52 Pac. 44; Cooper *v.* Pena, 21 Cal. 403. **Ill.** Cummins *v.* Martzen, 273 Ill. 45, 112 N. E. 347; Welty *v.* Jacobs, 171 Ill. 624, 630, 49 N. E. 723, 40 L. R. A. 98; Parker *v.* Sargent, 201 Ill. App. 574. **Ind.**—Fowler *v.* Utilities Co. *v.* Gray, 168 Ind. 1, 79 N. E. 897, 120 Am. St. Rep. 344. **Ky.**—Ochs *v.* Kramer, 107 S. W. 260. **Mich.**—Voorhies *v.* Frisbie, 25 Mich. 476, 12 Am. Rep. 291. **Minn.**—Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. St. Rep. 438. *Compare infra,* this section. **Mo.** McCall *v.* Atchley, 256 Mo. 39, 164 S. W. 593. **N. J.**—Smith *v.* McVeigh, 11 N. J. Eq. 239. **N. Y.**—Trustees of Hamilton College *v.* Roberts, 223 N. Y. 56, 119 N. E. 97; Wadick *v.* Mace, 191 N. Y. 1, 83 N. E. 571. **N. D.**—Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051. **Ore.**—Skinner *v.* Furnas, 82 Ore. 414, 161 Pac. 962. **Tenn.**—New River Lumber Co. *v.* Tennessee Ry. Co., 136 Tenn. 661, 681, 191 S. W. 334. **Va.**—Hoster's Committee *v.* Zollman, 94 S. E. 164; Asberry *v.* Mitchell, 121 Va. 276, 93 S. E. 638, L. R. A. 1918A, 785. **Eng.**—Duke of Bedford *v.* British Museum, 1 Coop. T. Cott. 90, 93, 47 Eng. Reprint 761.

[a] **When from personal incapacity, the nature of the contract** or from any other cause, a contract is incapable of being enforced against one party, he is equally incapable of enforcing it against the other. Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 359, 19 L. ed. 955. See also Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578. But *compare* I, Q, 2, j, (II).

[b] **A suit for specific performance**

as well as the obligation.[48] In other words, neither party to an obligation can be compelled specifically to perform it unless the other party is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so with full compensation for any want of entire performance.[49] This rule, however, has suffered some relaxation, and is not followed in its fullest extent in some states.[50]

cannot be maintained by an infant for want of mutuality. (1) If he sues after he becomes of age, the action is maintainable. Vassault *v.* Edwards, 43 Cal. 458, 465; Flight *v.* Bolland, 4 Russ. Ch. 298, 28 Rev. Rep. 101, 38 Eng. Reprint 817. But *compare* Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404, 406. (2) But, according to some courts, if specific performance is for the benefit of the infant and a denial of relief would result in serious pecuniary loss to the infant, relief will be granted at the instance of a minor. Seaton *v.* Tohill, 11 Colo. App. 211, 53 Pac. 170; Asberry *v.* Mitchell, 121 Va. 276, 93 S. E. 638, L. R. A. 1918A, 785. (3) If the infant has performed his side of the contract he may sue. **Colo.** Seaton *v.* Tohill, 11 Colo. App. 211, 53 Pac. 170. **Ind.**—La Follett *v.* Kyle, 51 Ind. 446. **Va.**—Asberry *v.* Mitchell, 121 Va. 276, 93 S. E. 638, L. R. A. 1918A, 785. And see *infra*, this section.

[c] **Likewise a married woman** against whom the contract is unenforceable cannot maintain the action. Vassault *v.* Edwards, 43 Cal. 458, 465.

[d] **If the contract provide that the vendor shall not maintain specific performance**, the vendee cannot, because there is no mutuality. Wadick *v.* Mace, 191 N. Y. 1, 83 N. E. 571.

Vendor may sue because the vendee may, see *infra*, I, I, 2, a.

48. U. S.—Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61. **Ala.**—Chadwick *v.* Chadwick, 121 Ala. 580, 25 So. 631. **Cal.**—Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149; Cooper *v.* Pena, 21 Cal. 403. **Idaho.**—Bear Track Min. Co. *v.* Clark, 6 Idaho 196, 54 Pac. 1007. **Ill.** Lunt *v.* Lorscheider, 285 Ill. 589, 121 N. E. 237. **Md.**—Tyson *v.* Watts, 1 Md. Ch. 13. **N. Y.**—Jones *v.* Barnes, 105 App. Div. 287, 94 N. Y. Supp. 695. **Pa.**—*In re* Kutz's Estate, 259 Pa. 548, 103 Atl. 293; Bodine *v.* Glading, 21 Pa. 50, 59 Am. Dec. 749.

But see Mackey Wall Plaster Co. *v.* United States Gypsum Co., 244 Fed. 275, mutuality of remedy, not obligation, is alone required.

49. U. S.—Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61. **Cal.**—Pacific Electric R. Co. *v.* Campbell Johnston, 153 Cal. 106, 94 Pac. 623; Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Jolliffe *v.* Steele, 9 Cal. App. 212, 98 Pac. 544. **Ill.** Bartholomae & Roesing Brew. & Malt. Co. *v.* Modzelewski, 269 Ill. 539, 109 N. E. 1058; Parker *v.* Sargent, 201 Ill. App. 574. **Ind.**—Migatz *v.* Stieglitz, 166 Ind. 361, 77 N. E. 400; Louisville N. A. & C. R. Co. *v.* Bodenschatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703. **Ia.**—Ormsby *v.* Graham, 123 Iowa 202, 209, 98 N. W. 724. **N. D.**—Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051. **Tex.**—Prusiecke *v.* Ramzinski (Tex. Civ. App.), 81 S. W. 771.

[a] **The contract must be such that** either party could have it specifically enforced as against the other. Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334.

[b] **Where the contract gives the purchaser the choice** of performing or forfeiting the purchase price paid, the remedy is not mutual. Carter *v.* Smith (Tex. Civ. App.), 184 S. W. 244.

50. U. S.—Great Lakes & St. L. T. Co. *v.* Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437; Union Bag & Paper Corp. *v.* Bischoff, 255 Fed. 187. **Del.** G. W. Baker Mach. Co. *v.* United States Fire Apparatus Co. (Del.), 97 Atl. 613, the test of jurisdiction in Delaware is inadequacy of legal remedy, not mutuality of remedy. **Minn.** Lamprey *v.* St. Paul & C. Ry. Co., 89 Minn. 187, 94 N. W. 555. **N. H.**—Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404.

[a] **"The mutuality required is** that which is necessary for creating a contract enforceable on both sides in some manner, . . . but not necessarily enforceable on both sides by specific

Time of Mutuality. — As a general rule, the mutuality is to be judged as of the time when the contract is entered into.[51] But mutuality at that time is not always necessary,[52] it being sufficient if there be mutuality when specific performance is decreed.[53]

Exceptions to Rule Requiring Mutuality. — There are some exceptions, real or apparent, to the rule requiring mutuality.[54] For example, specific performance may sometimes be had at the instance of a party who has not signed the contract,[55] or after performance by the com-

performance.'' Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404, 409; Northern Central R. Co. *v.* Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683; Corbet *v.* Oil City Fuel Co., 21 Pa. Super. 80.

[b] **In Minnesota,** the rule is that ''if a contract for the conveyance of real estate is supported by a valid consideration, and there is no other good reason why it should not be specifically enforced except the want of mutuality of remedy, it will be so enforced.'' Lamprey *v.* St. Paul & Chicago Ry. Co., 89 Minn. 187, 94 N. W. 555. See also Brown *v.* Munger, 42 Minn. 482, 44 N. W. 519.

51. U. S.—Norris *v.* Fox, 45 Fed. 406. **Cal.**—Cooper *v.* Pena, 21 Cal. 403. **Ky.**—Ochs *v.* Kramer, 107 S. W. 260. **Md.**—Duvall *v.* Myers, 2 Md. Ch. 401. **N. Y.**—Wadick *v.* Mace, 191 N. Y. 1, 5, 83 N. E. 571.

[a] **Time of.** — The question of mutuality is to be determined by the contract itself and is not affected by circumstances occurring after the contract is made and the rights of the parties are fixed. The fact that the mutuality of remedy is lost by subsequent events does not prevent the specific performance of the contract. Ochs *v.* Kramer (Ky.), 107 S. W. 260; Moore's Admrs. *v.* Randolph, 6 Leigh (33 Va.) 175, 29 Am. Dec. 208.

52. Cal.—Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Vassault *v.* Edwards, 43 Cal. 458. **Ill.** Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578. **N. Y.**—Mutual Life Ins. Co. *v.* Stephens, 214 N. Y. 488, 108 N. E. 856.

But see Norris *v.* Fox, 45 Fed. 406.

53. U. S.—Mackey Wall Plaster Co. *v.* United States Gypsum Co., 244 Fed. 275. **Ill.**—Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578; Mason *v.* Caldwell, 10 Ill. 196, 208, 48 Am. Dec. 330. **Mass.**—Dresel *v.* Jordan, 104 Mass. 407. **Minn.**—Brown *v.* Munger, 42 Minn. 482, 44 N. W. 519. **Neb.**—Seaver *v.* Hall, 50 Neb. 878, 70 N. W. 373. **Ore.**—Skinner *v.* Furnas, 82 Ore. 414, 161 Pac. 962.

[a] **Accordingly where the vendor agrees to convey land he does not own,** the rule as to mutuality (1) is satisfied if he is able to perform at the time the contract is to be performed (Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013), or (2) at the time of decree. Mackey Wall Plaster Co. *v.* United States Gypsum Co., 244 Fed. 275.

54. Cal.—Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Cooper *v.* Pena, 21 Cal. 403, 411. **Ill.**—Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578. **Minn.**—First Nat. Bank *v.* Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

[a] **From the rule that equity may specifically enforce a part of a contract** which is clearly severable from the remainder (see *infra,* I, Q, 2, d), it follows that the plaintiff may have specific performance while the defendant would be remitted to his action in damages. Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61.

Where the vendor's title is defective, see *infra,* I, Q, 2, j.

55. Ark.—Vance *v.* Newman, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42. **Cal.**—Vassault *v.* Edwards, 43 Cal. 458, 465. **N. J.**—Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Richards *v.* Green, 23 N. J. Eq. 536. **Eng.**—Martin *v.* Mitchell, 2 Jac. & W. 413, 37 Eng. Reprint 685.

[a] **Where one of the parties has not signed the contract,** the requirement of mutuality of remedy is satisfied when he brings suit, since by the act of instituting the action, he empowers the court with authority to decree specific performance against him. Harper *v.* Goldschmidt, 156 Cal. 245, 251, 104 Pac. 451, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689.

[b] **But this rule can have no ap-**

plainant of the acts not specifically enforceable.[56] Specific performance may also be had of unilateral contracts,[57] such as options.[58] And furthermore, the want of mutuality may be waived by the subsequent conduct of the person.[59]

6. Remedy at Law. — a. *Generally.* — To warrant specific performance it must appear that the plaintiff has no adequate remedy at law by an action for damages for breach of the contract,[60] for the right

plication where the suit is not brought until the other party has withdrawn from the contract, or has conveyed the property involved, so he cannot perform it. Nason *v.* Lingle, 143 Cal. 363, 77 Pac. 71.

56. **U. S.**—Montgomery Traction Co. *v.* Montgomery Light & W. Power Co., 229 Fed. 672, 144 C. C. A. 82; T. B. Harms & F. D. & H. *v.* Stern, 229 Fed. 42, 145 C. C. A. 2. **Ark.**—Wynn *v.* Garland, 19 Ark. 23, 36, 68 Am. Dec. 190. **Cal.**—Brown *v.* Sebastopol, 153 Cal. 704, 96 Pac. 363, 19 L. R. A. (N. S.) 178; Cooper *v.* Pena, 21 Cal. 403; Shannon *v.* Cavanaugh, 12 Cal. App. 434, 107 Pac. 574. **Ia.**—Stutsman *v.* Crain, 170 N. W. 806. **Kan.**—Burnell *v.* Bradbury, 67 Kan. 762, 74 Pac. 279. **Neb.**—Rank *v.* Garvey, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666. **Nev.**—Turley *v.* Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667. **N. J.**—Safford *v.* Barber, 74 N. J. Eq. 352, 70 Atl. 371. **N. D.**—Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051. **Vt.**—Boston & M. R. R. *v.* Union Mut. F. Ins. Co., 101 Atl. 1012. **Va.** Asberry *v.* Mitchell, 121 Va. 276, 93 S. E. 638, L. R. A. 1918A, 785. **W. Va.** Boyd *v.* Brown, 47 W. Va. 238, 34 S. E. 907. **Eng.**—Lawrensen *v.* Butler, 1 Schoales & L. 13. *Compare* Hope *v.* Hope, 8 De G. M. & G. 731, 746, 26 L. J. Ch. 417, 3 Jur. (N. S.) 454, 5 Wkly. Rep. 387, 44 Eng. Reprint 572.

Contra, Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61; Norris *v.* Fox, 45 Fed. 406.

[a] **Thus,** although specific performance of a contract to render personal services cannot be had, an enforceable obligation entered into in consideration of such services, may be enforced after their performance. Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961; Howard *v.* Throckmorton, 48 Cal. 482; Asberry *v.* Mitchell, 121 Va. 276, 93 S. E. 638, L. R. A. 1918A, 785.

[b] **But the performance of a collateral agreement** is not required. Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536.

[c] **An offer of performance** suffices. Sayward *v.* Houghton, 119 Cal. 545, 548, 51 Pac. 853, 52 Pac. 44; Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107. *Contra,* Cooper *v.* Pena, 21 Cal. 403, 413; Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051.

57. Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

58. Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360; Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149.

[a] **Upon the acceptance of the option,** the requirement of mutuality is satisfied. Jones *v.* Barnes, 105 App. Div. 287, 94 N. Y. Supp. 695.

[b] **Upon the filing of the bill,** the contract becomes mutual. Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Richards *v.* Green, 23 N. J. Eq. 536.

59. King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961; Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578.

[a] **Thus** where the purchaser knows of the vendor's want of title and acquiesces therein, want of mutuality is waived. Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578, *quoting* Fry on Specific Performance, §286.

60. **U. S.**—Clark *v.* Rosario Min. & M. Co., 176 Fed. 180, 99 C. C. A. 534; Newton *v.* Wooley, 105 Fed. 541. **Cal.** Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Senter *v.* Davis, 38 Cal. 450; Christin *v.* Clark (Cal. App.), 173 Pac. 109. But see Shannon *v.* Cavanaugh, 12 Cal. App. 434, 107 Pac. 574, since the amendment of 1874 it seems relief is not now dependent upon the legal remedy. **Colo.**—Leach *v.* Fuller, 173 Pac. 427. **Del.**—G. W. Baker Mach. Co. *v.* United States Fire Apparatus Co. (Del.), 97 Atl. 613. **Haw.** Wailuku Sugar Co. *v.* Parke, 4 Hawaii 89. **Ill.**—Rowell *v.* Covenant Mut. L.

to a decree of performance is based upon the principle that the remedy at law is inadequate.[61] The jurisdiction of the court turns upon the inadequacy of the remedy at law,[62] and does not turn at all upon the question whether the contract relates to real or personal property.[63] Land, however, is deemed to have a peculiar and special value for

Assn., 84 Ill. App. 304. **Ind.**—Louisville N. A. & C. R. Co. *v.* Bodenschatz-B. Stone Co., 141 Ind. 251, 263, 39 N. E. 703; Indiana Union Traction Co. *v.* Seisler, 58 Ind. App. 507, 106 N. E. 911, 108 N. E. 44. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **La.**—Caperton *v.* Forrey, 49 La. Ann. 872, 21 So. 600. **Me.**—Goding *v.* Bangor & A. R. Co., 94 Me. 542, 48 Atl. 114; Porter *v.* Frenchman's Bay & Mt. D. L. & Water Co., 84 Me. 195, 24 Atl. 814. **Mass.**—Cashman *v.* Bean, 226 Mass. 198, 115 N. E. 574; Cook *v.* Richardson, 178 Mass. 125, 59 N. E. 675; Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733. **Mo.**—Herryford *v.* Moore, 181 S. W. 389. **Mont.**—Ide *v.* Leiser, 10 Mont. 5, 15, 24 Pac. 695, 24 Am. St. Rep. 17. **N. H.**—Eckstein *v.* Downing, 64 N. H. 248, 259, 9 Atl. 626, 10 Am. St. Rep. 404. **N. J.**—Bosch Magneto Co. *v.* Rushmore, 85 N. J. Eq. 93, 95 Atl. 614; Brown *v.* Brown, 33 N. J. Eq. 650. **Ore.**—Cartwright *v.* Oregon Elec. R. Co., 88 Ore. 596, 171 Pac. 1055. **Pa.**—Edison Illuminating Co. *v.* Eastern Pennsylvania Power Co., 253 Pa. 457, 98 Atl. 652; Ralston *v.* Ihmsen, 204 Pa. 588, 54 Atl. 365. **Tenn.** New River Lumber Co. *v.* Tennessee R. Co., 136 Tenn. 661, 191 S. W. 334. **Wash.**—Templeton *v.* Warner, 89 Wash. 584, 154 Pac. 1081, 157 Pac. 458. **Eng.** Harnett *v.* Yeilding, 2 Sch. & Lef. 549, 552.

But see Greenfield *v.* Carlton, 30 Ark. 547 (in this class of cases, equity exercises a broader jurisdiction and may grant relief in many cases when the legal remedies are concurrent); Bishop *v.* Tartt, 48 Tex. Civ. App. 551, 107 S. W. 359, action to enforce contract for sale of land.

[a] **There are two classes of cases** within the rule; where the law affords no remedy, and where the compensation and damages would be difficult, if not impossible. Bateman *v.* Straus, 86 App. Div. 540, 83 N. Y. Supp. 785.

[b] **The fact that there may be some difficulty in producing evidence as to the amount of damages sustained,** does not render the legal remedy inadequate. Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360.

[c] **The fact that the relief sought could have been set up as an equitable defense** does not deprive the court of jurisdiction. Cook *v.* Richardson, 178 Mass. 125, 59 N. E. 675.

[d] **If the defendant fails to demur on this ground,** the court may entertain the cause although a suit at law is more appropriate. Sunbury & Erie R. Co. *v.* Cooper, 33 Pa. 278.

61. **Ala.**—Kirksey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768. **D. C.**—Hazelton *v.* Miller, 25 App. Cas. 337. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **Mo.**—Chicago & A. R. Co. *v.* Kansas City, I. & P. Ry. Co., 110 Mo. 510, 19 S. W. 826. **N. J.**—Brown *v.* Brown, 33 N. J. Eq. 650. **N. C.** Tillery *v.* Land, 136 N. C. 537, 553, 48 S. E. 824, per Douglas, J. **Pa.**—Smaltz's Appeal, 99 Pa. 310, 39 Leg. Int. 304. **Eng.**—Tasker *v.* Small, 3 Myl. & C. 63, 6 Sim. 625, 5 L. J. Ch. (N. S.) 321, 40 Eng. Reprint 848; Harnett *v.* Yeilding, 2 Sch. & Lef. 549, 552.

62. Wait *v.* Kern River Min., Mill. & Dev. Co., 157 Cal. 16, 106 Pac. 98; Senter *v.* Davis, 38 Cal. 450; Shannon *v.* Cavanaugh, 12 Cal. App. 434, 107 Pac. 574.

63. **U. S.**—Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360. **Ark.**—Cooper *v.* Roland, 95 Ark. 569, 130 S. W. 559. **Cal.**—Wait *v.* Kern River Min., Mill. & Dev. Co., 157 Cal. 16, 106 Pac. 98; Senter *v.* Davis, 38 Cal. 450. See Shannon *v.* Cavanaugh, 12 Cal. App. 434, 107 Pac. 574. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **N. H.**—Eckstein *v.* Downing, 64 N. H. 248, 259, 9 Atl. 626, 10 Am. St. Rep. 404.

[a] **The rule** for determining whether contracts for the transfer of personal property may be specifically enforced is that which applies to contracts for the transfer of realty,—viz., Is it necessary in order to give ade-

which damages is not regarded as adequate compensation,[64] whereas personalty is not generally deemed to have a special value and therefore contracts relating thereto cannot be specifically enforced,[65] unless special circumstances are alleged and proved which show the remedy by damages is inadequate. If that is done contracts relating to personalty will be specifically enforced to the same extent as contracts relating to realty.[66]

Remedy Must Be Adequate. — The mere existence of a remedy at law does not defeat equitable jurisdiction.[67] The legal remedy which will bar relief must be as efficient both in respect to the final relief and

quate relief? Fleishman *v.* Woods, 135 Cal. 256, 67 Pac. 276.

64. **Del.**—Godwin *v.* Collins, 3 Del. Ch. 189, 202. **D. C.**—Hazelton *v.* Miller, 25 App. Cas. 337. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **Ore.**—Larrabee *v.* Bjorkman, 79 Ore. 467, 155 Pac. 974. **S. C.** Singleton *v.* Cuttino, 107 S. C. 465, 92 S. E. 1046. **Eng.**—Adderly *v.* Dixon, 2 L. J. Ch. (O. S.) 103, 1 Sim. & St. 607, 610, 24 Rev. Rep. 254, 57 Eng. Reprint 239; Cud *v.* Rutter, 1 P. Wms. 570, 5 Vin. Abr. 538 pl. 21, 24 Eng. Reprint 521.

[a] **It is presumed** that the legal remedy is inadequate in such case. Orfield *v.* Harney, 33 N. D. 568, 157 N. W. 124.

[b] **But if the inference is negatived** by express allegations in the bill, there is no jurisdiction. Hazelton *v.* Miller, 25 App. Cas. (D. C.) 337.

65. **U. S.**—Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360. **Ark.**—Cooper *v.* Roland, 95 Ark. 569, 130 S. W. 559. **Cal.**—Gilfallan *v.* Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784; Christin *v.* Clark (Cal. App.), 173 Pac. 109. **Del.**—Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 179, 14 Atl. 27; Godwin *v.* Collins, 3 Del. Ch. 189, 202. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **Mich.**—Cole *v.* Cole Realty Co., 169 Mich. 347, 135 N. W. 329. **N. H.**—Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. **N. Y.**—St. Regis Paper Co. *v.* Santa Clara Lumber Co., 55 App. Div. 225, 67 N. Y. Supp. 149. **Ore.**—Livesley *v.* Johnston, 45 Ore. 30, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783. **R. I.**—Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811; Chafee *v.* Sprague, 16 R. I. 189, 13 Atl. 121. **Eng.**—Buxton *v.* Lister, 3 Atk. 383, 26 Eng. Reprint 1020.

[a] **It is presumed** that an action for damages is an adequate remedy when the contract relates to personalty. Gilfallan *v.* Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784, note.

[b] **The Presumption Is a Disputable One.**—Gilfallan *v.* Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784.

66. **U. S.**—Hyer *v.* Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. ed. 547; Mutual Oil Co. *v.* Hills (C. C. A.), 248 Fed. 257; American Smelt. & R. Co. *v.* Bunker Hill & S. Min. & C. Co., 248 Fed. 172, 182. **Cal.** Fleishman *v.* Woods, 135 Cal. 256, 67 Pac. 276. **Del.**—Elliott *v.* Jones, 101 Atl. 872; Godwin *v.* Collins, 3 Del. Ch. 189, 202. **Ill.**—Cazier *v.* Mohr, 197 Ill. App. 550. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **N. Y.**—Butler *v.* Wright, 103 App. Div. 463, 93 N. Y. Supp. 113; Bateman *v.* Straus, 86 App. Div. 540, 83 N. Y. Supp. 785; Menier *v.* Donald, 98 Misc. 684, 165 N. Y. Supp. 50. **Ore.**—Deitz *v.* Stephenson, 51 Ore. 596, 95 Pac. 803. **W. Va.**—Hogg *v.* McGuffin, 67 W. Va. 456, 68 S. E. 41; 31 L. R. A. (N. S.) 491.

[a] **Only where a chattel has a peculiar value** not to be measured in damages will contracts for chattels be specifically enforced. Godwin *v.* Collins, 3 Del. Ch. 189, 202; Cole *v.* Cole Realty Co., 169 Mich. 347, 135 N. W. 329.

Specific performance of contracts for sale of stock, see the title "**Stock and Stockholders.**"

67. Edison Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 465, 98 Atl. 652.

the method of obtaining it as the remedy in equity.[68] And it has been held that a bill may be sustained solely on the ground that it furnishes a more convenient remedy.[69]

Insolvency. — Insolvency of the defendant standing alone will authorize a specific performance, according to some authorities,[70] although such insolvency may be a potent factor in determining jurisdiction when other equitable grounds exist.[71]

c. *Effect of Provisions for Liquidated Damages and Penalties.* — A provision in the contract fixing a certain amount as liquidated damages or a penalty does not prevent equitable relief if the provision is simply a mean of enforcing the contract,[72] but it is otherwise if the contract were in the alternative so as to give the defendant an option of paying the stipulated sum or of performing the contract.[73] Whether the provision is one for a penalty or for liquidated damages must be determined from its language and its presumed intent is to be gathered from the circumstances of the parties and the nature of the agreement.[74] In general, courts of equity are inclined to treat the provision as a mode of securing due performance.[75]

7. Specific Performance Impracticable or Impossible. — Specific performance will not be decreed when performance is impracticable,[76] or when a performance is or has become impossible,[77] or difficult or

68. **U. S.**—Gormley *v.* Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909. **Ore.**—Livesley *v.* Johnston, 45 Ore. 30, 50, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783. **Pa.**—Gray *v.* Citizens' Gas. Co., 206 Pa. 303, 55 Atl. 988.

69. Edison Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 465, 98 Atl. 652.

70. **Conn.**—See Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432. **N. Y.**—Mapleson *v.* Del Puente, 13 Abb. N. C. 144. **Ore.** Livesley *v.* Johnston, 45 Ore. 30, 50, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783. **Pa.**—Heilman *v.* Union Canal Co., 37 Pa. 100.

Contra, McNamara *v.* Home Land & Cattle Co., 105 Fed. 202.

71. **Mass.**—Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733. **N. M.**—Gillett *v.* Warren, 10 N. M. 523, 62 Pac. 975. **Ore.**—Livesley *v.* Johnston, 45 Ore. 30, 50, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783. **Pa.**—Heilman *v.* Union Canal Co., 37 Pa. 100. **W. Va.** Hogg *v.* McGuffin, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491.

72. **U. S.**—McCaull *v.* Braham, 21 Blatchf. 278, 16 Fed. 37. **Ill.**—Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871. **Ind.**—Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143. **Ia.**—Kettering *v.* Eastlack, 130 Iowa 498, 107 N. W. 177. **Ky.**—Ochs *v.* Kramer, 107 S. W. 260. **Mich.**—Miner *v.* Husted, 191 Mich. 25, 157 N. W. 442.

[a] **The courts regard the penalty as a mere security** for the conveyance of the land, unless the contract clearly indicates a contrary meaning. Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143.

73. **Conn.**—Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432. **Ill.**—Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871. **Ia.**—Kettering *v.* Eastlack, 130 Iowa 498, 107 N. W. 177. **N. Y.** Mapleson *v.* Del Puente, 13 Abb. N. C. 144.

74. M'Caull *v.* Braham, 21 Blatchf. 278, 16 Fed. 37, 41; Ochs *v.* Kramer (Ky.), 107 S. W. 260.

[a] **The mere form of words used** is given but little weight. Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432; Ochs *v.* Kramer (Ky.), 107 S. W. 260.

75. Ochs *v.* Kramer (Ky.), 107 S. W. 260, *quoting* Fry on Specific Performance, §128.

76. Tobey *v.* Bristol, 3 Story 800, 824, 23 Fed. Cas. No. 14,065; Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360.

77. **Cal.**—Smith *v.* Pacific Bank, 137

practically impossible.[78] Nor will this relief be decreed when it would be a vain and imperfect act,[79] or when the decree cannot be enforced by the ordinary means and instrumentalities.[80] Thus specific performance will not be granted where the subject matter is no longer in existence,[81] or when the defendant may at any time terminate the contract,[82] or when the defendant cannot comply with the decree,[83] even though the inability were brought about by the defendant himself,[84] or when the performance of the contract depends upon the consent of a third person and that consent is withheld.[85]

When the vendor has no title or interest in the land at all,[86] and can-

Cal. 363, 70 Pac. 184. **Colo.**—McDermott *v.* Lindquist, 179 Pac. 147. **Fla.** Williams *v.* Mansell, 19 Fla. 546. **Ia.** Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247. **Kan.**—Neuforth *v.* Hall, 6 Kan. App. 902, 51 Pac. 573. **Ky.**—Jenkins *v.* Dawes, 207 S. W. 689; Chesapeake & O. Ry. Co. *v.* Dayton, 177 Ky. 502, 197 S. W. 969. **Mo.**—McCall *v.* Atchley, 256 Mo. 39, 164 S. W. 593. **N. J.** Copper *v.* Wells, 1 N. J. Eq. 10. **N. Y.** Glasser *v.* Loughran, 103 Misc. 20, 170 N. Y. Supp. 190. **Okla.**—Beatty *v.* Wintrode Land Co., 155 Pac. 574. **S. C.** Davenport *v.* Latimer, 53 S. C. 563, 573, 31 S. E. 630. **Va.**—Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

Compensation when specific performance is impossible, see *infra,* I, Q, 3, b.

78. Anderson *v.* Neal Institutes Co. (Cal. App.), 173 Pac. 779.

79. Tobey *v.* Bristol Co., 3 Story 800, 824, 23 Fed. Cas. No. 14,065; De Rivafinoli *v.* Corsetti, 4 Paige (N. Y.) 264, 25 Am. Dec. 532.

80. **Ala.**—Browning *v.* Kelly, 124 Ala. 645, 27 So. 391. **Cal.**—Tropico Land & Imp. Co. *v.* Lambourn, 170 Cal. 33, 148 Pac. 206. **Tex.**—Franklin Fire Proofing Co. *v.* Dallas, 29 Tex. Civ. App. 448, 68 S. W. 820. **Va.**—Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

81. Smith *v.* Pacific Bank, 137 Cal. 363, 70 Pac. 184.

[a] **But because the defendant has collected the note** he agreed to assign as part of the purchase price will not prevent specific performance. Equity will follow the proceeds and compel a delivery thereof. Larrabee *v.* Bjorkman, 79 Ore. 467, 155 Pac. 974.

82. Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319; Triumph Electric Co. *v.* Thullen, 228 Fed. 762.

83. Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630; Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841.

84. Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630; Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223; Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841.

[a] **But when his inability to comply is the result of his own fault,** equity may require him to render compensation in a proper case. Davenport *v.* Latimer, 53 S. C. 563, 574, 31 S. E. 630. See *infra,* I, Q, 3, b.

85. Citronelle Turpentine Co. *v.* Buhlig, 184 Ala. 404, 63 So. 951; Musgrove *v.* Hodges, 46 Kan. 764, 27 Pac. 121.

[a] **Where the wife refuses to join in executing a conveyance,** specific performance will not be decreed, (1) where there is no proof of fraud on the vendor's part in her refusal (**Mo.** Aiple-Hemmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652. **N. J.**—Peeler *v.* Levy, 26 N. J. Eq. 330, 335; Reilly *v.* Smith, 25 N. J. Eq. 158. **Pa.**—Riesz's Appeal, 73 Pa. 485, 490. **Va.**—Haden *v.* Falls, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034; Clarke *v.* Reins, 12 Gratt. [53 Va.] 98; McCann *v.* Jones, 1 Rob. [40 Va.] 256), unless (2) the purchaser is willing to pay the full purchase money and accept a deed without her joining. Flaharty *v.* Blake, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886; Graybill *v.* Braugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133. In some jurisdictions an abatement of the purchase price may be had, see *infra,* p. 1067.

86. **Ark.**—Shields *v.* Trammell, 19 Ark. 51. **Cal.**—Smith *v.* Bangham, 156 Cal. 359, 364, 104 Pac. 689, 28 L. R. A. (N. S.) 522; Farnum *v.* Clarke, 148 Cal. 610, 84 Pac. 166; Gregg *v.* Carey,

not obtain title,[87] as where the defendant has conveyed the entire premises to an innocent purchaser,[88] specific performance will not be decreed. Neither can a vendor compel a purchaser to specifically perform his contract of purchase, when the vendor cannot give a title free from reasonable doubt,[89] or free from incumbrances for the payment of which, out of the purchase money, provision cannot be and is not made,[90] although if he can confer good title on his purchaser at the time of the decree, it is sufficient.[91] If, however, the purchaser elects to enforce the contract, the vendor cannot object that his title is not perfect, or that he cannot convey the entire premises contracted for.[92]

4 Cal. App. 354, 88 Pac. 282. **Fla.** Williams *v.* Mansell, 19 Fla. 546. **Ia.** Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724. **N. J.**—Klausner *v.* Watson, 86 N. J. Eq. 220, 98 Atl. 271. **Tex**—Blair *v.* Lowrey (Tex. Civ. App.), 164 S. W. 14.

[a] **The Rule Allowing the Purchaser To Waive Full Performance Does Not Apply.**—Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724.

[b] **Another reason for denying relief** is the want of mutuality of remedy. Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724.

87. See *infra*, this note.

[a] **But if the vendor is in such a situation** that it is only necessary for him to pay a sum of money to the holder of the legal title with whom he has a contract of purchase, the court will require him to pay such sum and will decree specific performance. Beekman *v.* Sonntag Inv. Co., 67 Fla. 293, 64 So. 948.

88. **Ill.**—Boone *v.* Graham, 215 Ill. 511, 74 N. E. 559. **Me.**—Coleman *v.* Dunton, 99 Me. 121, 58 Atl. 430. **N. J.** Copper *v.* Wells, 1 N. J. Eq. 10. **Okla.** Beatty *v.* Wintrode Land Co., 155 Pac. 574. **R. I.**—Flackhamer *v.* Himes, 24 R. I. 306, 53 Atl. 46. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 574, 31 S. E. 630; Doar *v.* Gibbes, Bailey Eq. 371.

89. **U. S.**—Adams *v.* Valentine, 33 Fed. 1. **Cal.**—Civ. Code, §3394. **Ill.** Fletcher *v.* Osborn, 282 Ill. 143, 118 N. E. 446. **Kan.**—Guild *v.* Atchison, T. & S. F. R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77. **Mass.**—Park *v.* Johnson, 7 Allen 378. **Mich.**—Bradway *v.* Miller, 200 Mich. 648, 167 N. W. 15. **N. J.**—Van Riper *v.* Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020, Ann. Cas. 1912A, 319, 30 L. R. A. (N. S.) 25. **Va.**—Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610.

See *infra*, I, Q, 2, j, (II).

[a] **Though the doubt rests upon grounds which are merely debatable,** relief will be denied, if they might visit upon the purchaser litigation in that regard. Van Riper *v.* Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020, Ann. Cas. 1912A, 319, 30 L. R. A. (N. S.) 25.

[b] **When the Title Would Expose the Purchaser to Litigation.**—**Ia.** Brown *v.* Widen (Iowa), 103 N. W. 158. **N. Y.**—Bullard *v.* Bicknell, 26 App. Div. 319, 49 N. Y. Supp. 666. **Eng.** Price *v.* Strange, 6 Madd. 159, 56 Eng. Reprint 1052.

90. Guild *v.* Atchison, T. & S. F. R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77.

[a] **Converse.**—But where an incumbrance can be removed merely by the application of the purchase money, and the court is able to provide for the conveyance of a clear title to the vendee, specific performance may be decreed. Guild *v.* Atchison, Topeka & S. F. R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77.

91. Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9.

92. **Cal.**—Farnum *v.* Clarke, 148 Cal. 610, 84 Pac. 166; Marshall *v.* Caldwell, 41 Cal. 611; McGinn *v.* Willey, 24 Cal. App. 303, 141 Pac. 49. **Ia.**—Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247. **Neb.**—Lutjeharms *v.* Smith, 76 Neb. 260, 107 N. W. 256. **N. C.**—Tillery *v.* Land, 136 N. C. 537, 48 S. E. 24.

[a] **If the vendor has any interest in the property,** (1) the vendee may enforce the contract as to what interest he possesses and the vendor cannot object that his title is not perfect. Farnum *v.* Clarke, 148 Cal. 610, 84 Pac. 166. (2) But if he has no interest

In such case compensation for the deficiency may be awarded.[93]

When the act to be performed depends upon the skill, experience and cultivated judgment of the person who has obligated himself for its performance, specific relief will not be granted.[94]

Where Contract Requires Continuous Acts. — As a general rule, specific performance will not be granted when the decree cannot be wholly performed at once, and when any decree must be for the performance of a perpetual duty requiring protracted supervision and direction.[95] There has been some relaxation of the rule, however, in the case of contracts relating to the operation of railroads,[96] and of con-

at all, it is otherwise, see *supra*, this section.

[b] **Or the vendee may be willing to take a defective title without abatement in price** and later recover on the vendor's warranty. Paris *v.* Golden, 96 Kan. 668, 153 Pac. 528.

[c] **But the Court Cannot Direct the Vendor To Perfect His Title.** Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292.

[d] **The refusal of the vendor's wife to execute a deed** does not prevent specific performance, if the plaintiff is willing to accept a conveyance with that incumbrance upon it. **Ala.** Williams *v.* Kilpatrick, 195 Ala. 563, 70 So. 742. **N. Y.**—Jones *v.* Barnes, 105 App. Div. 287, 94 N. Y. Supp. 695. **Pa.**—Hughes *v.* Antill, 23 Pa. Super. 290. **Va.**—Steadman *v.* Handy, 102 Va. 382, 46 S. E. 380. Compensation therefor, see *infra*, I, Q, 2, j, (II).

93. See *infra*, I, Q, 2, j, (II).

94. **U. S.**—Chicago & A. R. Co. *v.* New York, L. E. & W. R. Co., 24 Fed. 516. **Haw.**—Paris *v.* Greig, 12 Hawaii 274. **Mass.**—Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180. **N. Y.**—Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854. **Pa.** Edison Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 464, 98 Atl. 652.

95. **U. S.**—Texas & P. R. Co. *v.* Marshall, 136 U. S. 393, 406, 10 Sup. Ct. 846, 34 L. ed. 385; Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955; Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61; Berliner Gramophone Co. *v.* Seaman, 110 Fed. 30, 49 C. C. A. 99. **Ala.**—American Laundry Co. *v.* E. & W. Dry-Cleaning Co., 74 So. 58. **Cal.** Stanton *v.* Singleton, 126 Cal. 657, 665, 59 Pac. 146, 47 L. R. A. 344; Lattin *v.* Hazard, 91 Cal. 87, 27 Pac. 515; Crane *v.* Roach, 29 Cal. App. 584, 156 Pac. 375. **Ga.**—Rosenkrantz *v.* Chattahoochee Brick Co., 147 Ga. 730, 95 S. E. 225. **Haw.**—Paris *v.* Greig, 12 Hawaii 274. **Ill.**—Hernreich *v.* Lidberg, 105 Ill. App. 495. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **Me.**—Brown & Sons *v.* Boston & Maine R. R. Co., 106 Me. 248, 257, 76 Atl. 692. **N. J.**—Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266. **N. Y.**—Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854; Syracuse Reduction & M. Co. *v.* Syracuse, 172 App. Div. 224, 159 N. Y. Supp. 213; St. Regis Paper Co. *v.* Santa Clara Lumber Co., 55 App. Div. 225, 67 N. Y. Supp. 149. **Ore.**—Clarno *v.* Grayson, 30 Ore. 111, 144, 46 Pac. 426. **W. Va.** Martin *v.* South Bluefield Land Co., 81 W. Va. 62, 94 S. E. 493.

[a] "A court will not undertake to frame a decree of specific performance where it involves a continuous and long series of acts of supervision requiring special knowledge and skill, and repeated examinations and new directions." Stanton *v.* Singleton, 126 Cal. 657, 665, 59 Pac. 146, 47 L. R. A. 334.

[b] **This fact does not deprive the court of jurisdiction** but justifies a refusal in its discretion to exercise it. Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 68, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854.

[c] **Illustrations.**—(1) Building contracts. Mastin *v.* Halley, 61 Mo. 196; Colton *v.* Rookledge, 19 Grant's Ch. (Can.) 121. (2) Ordinary agreements for work and labor to be performed. Wolverhampton & W. R. Co. *v.* London & N. W. R. Co., Law Rep., 16 Eq. Cas. 433.

96. **U. S.**—Joy *v.* St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843; Central Trust Co. *v.* Wabash St. L. &

tracts of public service corporations,[97] where the public interests are involved.[98]

8. When Relief Would Produce Hardship and Injustice. — Relief by specific performance will be denied when it would produce hardship or injustice to either of the parties without corresponding benefits to the other,[99] either by reason of the unconscionable provisions of

P. Ry. Co., 29 Fed. 546. / **Ky.**—Schmidt *v.* Louisville & N. R. Co., 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809. **N. Y.** Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610, a contract granting a right of way over tracks for twenty-one years to another railroad company. See Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854. **Tenn.**—New River Lumber Co. *v.* Tennessee Ry. Co., 136 Tenn. 661, 677, 191 S. W. 334; Louisville & N. R. Co. *v.* Mississippi & T. R. Co., 92 Tenn. 681, 22 S. W. 920.

97. Edison Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 464, 98 Atl. 652.

98. Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360.

[a] **The rule "has not been modified further** than in those cases wherein the general public has an interest." Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360.

[b] **These cases indicate a tendency** on the part of the courts of equity to extend the former jurisdiction to new cases arising under modern conditions. Standard Fashion Co. *v.* Siegel-Cooper Co., 30 App. Div. 564, 52 N. Y. Supp. 433; Eastern Illuminating Co. *v.* Eastern Pa. Power Co., 253 Pa. 457, 465, 98 Atl. 652. See also Great Lakes & St. L. T. Co. *v.* Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437; Jones *v.* Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485.

99. **U. S.**—Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Washington Irr. Co. *v.* Krutz, 119 Fed. 279, 56 C. C. A. 1. **Ark.**—Carnall *v.* Wilson, 14 Ark. 482. **Cal.**—Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Gates *v.* Green, 151 Cal. 65, 90 Pac. 189; Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3. **Del.**—Godwin *v.* Collins, 3 Del. Ch. 189, 203. **Ill.**—Baltimore & O. S. W. Ry. Co. *v.* Brubaker, 217 Ill. 462, 469, 75 N. E. 523. **Ind.**—Louisville N. A. & C. R. Co. *v.* Bodenschatz-B. Stone Co., 141 Ind. 251, 263, 39 N. E. 703; Hills *v.* Hills, 94 Ind. 436, 440. **Ia.** King *v.* Raab, 123 Iowa 632, 99 N. W. 306; Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724; Smith *v.* Shepherd, 36 Iowa 253. **Ky.**—Williamson *v.* Dils, 114 Ky. 962, 72 S. W. 292; Schmidt *v.* Louisville & N. R. Co., 101 Ky. 441, 474, 41 S. W. 1015, 38 L. R. A. 809. **Me.**—Mansfield *v.* Sherman, 81 Me. 365, 17 Atl. 300. **Mich.**—Bradway *v.* Miller, 200 Mich. 648, 167 N. W. 15. **N. Y.**—Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 159, 39 N. E. 17, 26 L. R. A. 610; Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261. **N. C.** Leigh *v.* Crump, 36 N. C. 299. **S. C.** McChesney *v.* Smith, 105 S. C. 171, 89 S. E. 639. **Tex.**—Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918. **Wash.**—Pasco Fruit Lands Co. *v.* Timmermann, 88 Wash. 112, 152 Pac. 675.

[a] **That loss may result** from enforcing a contract which has a number of years to run, affords no reason for denying relief within the rule. Schmidt *v.* Louisville & N. R. Co., 101 Ky. 441, 474, 41 S. W. 1015, 38 L. R. A. 809.

[b] **But the mere fact that the value of the property has increased** or depreciated after the vendee has partly performed, and has become bound for the purchase price is not enough to stay the chancellor's hand. Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267. To same effect, see Ill. — Adams *v.* Larson, 279 Ill. 268, 116 N. E. 658; Emerson *v.* Fleming, 246 Ill. 353, 92 N. E. 890. **Ia.**—Larson *v.* Smith, 174 Iowa 619, 156 N. W. 813. **Md.**—Maryland Const. Co. *v.* Kuper, 90 Md. 529, 45 Atl. 197. **Mich.**—Kerwin Mach. Co. *v.* Baker, 165 N. W. 625; Ogooshevitz *v.* Arnold, 197 Mich. 203, 163 N. W. 946, 165 N. W. 633. *Compare* Smith *v.* Lawrence, 15 Mich. 499, where party was guilty of laches. **Mont.**—Finlen *v.* Heinze, 28 Mont. 548, 564, 73 Pac. 123.

the contract,[1] by reason of circumstances attending the making of the contract,[2] or by reason of circumstances intervening between the making of the contract and the bringing of the action,[3] unless that result can be obviated by the imposition of terms.[4] But hardships fairly and voluntarily assumed as a part of the contract to be enforced do not stay a specific performance.[5]

If it would injuriously affect third parties not before the court, specific relief may be denied.[6]

9. When Enforcement Would Violate Public Policy. — If the specific performance of the contract would be violative of public policy,[7] or if the contract to be enforced is against public policy,[8] specific relief will be denied.

10. Laches. — Laches of the plaintiff preclude relief by specific performance[9] under the general rules relating to laches.[10]

D. In Rem or In Personam. — A bill for specific performance is in personam,[11] but it becomes substantially in rem when service by publication is authorized,[12] or when the court passes title by decree.[13] So also the remedy of the vendor against the assignee of the pur-

1. **Ky.**—Williamson *v.* Dils, 114 Ky. 962, 72 S. W. 292. **Tenn.**—Cock *v.* Evans' Heirs, 9 Yerg. 287, 298. **Wash.** Pasco Fruit Lands Co. *v.* Timmermann, 88 Wash. 112, 152 Pac. 675.

2. Gotthelf *v.* Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455; Cock *v.* Evans' Heirs, 9 Yerg. (Tenn.) 287, 298.

3. **Ind.**—Claypool *v.* Board of School Comrs., 132 Ind. 261, 31 N. E. 665. **N. Y.**—Gotthelf *v.* Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455; Bruce *v.* Tilson, 25 N. Y. 194. **Tenn.** Cock *v.* Evans' Heirs, 9 Yerg. 287, 298.

[a] **As where from events subsequent to the contract,** it would work a hardship. King *v.* Raab, 123 Iowa 632, 99 N. W. 306.

4. Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501; Hills *v.* Hills, 94 Ind. 436.

Imposition of terms, see *infra,* I, Q, 2, l, (II).

5. Bosch Magneto Co. *v.* Rushmore, 85 N. J. Eq. 93, 95 Atl. 614.

6. **U. S.**—Mackey Wall Plaster Co. *v.* United States Gypsum Co., 244 Fed. 275. **Mo.**—McGinness *v.* Brodrick, 192 S. W. 420. **N. Y.**—See Goddard *v.* American Queen, 44 App. Div. 454, 61 N. Y. Supp. 133.

7. Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428.

[a] **Contracts of Railroad Companies to Locate Stations.**—See Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428.

8. Fairlawn Cemetery Assn. *v.* Street, 54 Okla. 136, 153 Pac. 637.

9. **Cal.**—O'Donnell *v.* Jackson, 69 Cal. 622, 11 Pac. 251; Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674. **Ga.** Louisville & N. R. Co. *v.* Nelson, 145 Ga. 594, 89 S. E. 693. **Tex.**—Walker *v.* Emerson, 20 Tex. 706, 711, 73 Am. Dec. 207.

10. See the title "**Laches.**"

11. **D. C.**—Griffith *v.* Stewart, 31 App. Cas. 29. **Ill.**—See Fowler *v.* Fowler, 204 Ill. 82, 102, 68 N. E. 414. **Ia.**—Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816. **Kan.**—Timma *v.* Timma, 72 Kan. 73, 82 Pac. 481; Close *v.* Wheaton, 65 Kan. 830, 70 Pac. 891. **Ky.**—McQuerry *v.* Gilliland, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. 454. **Mass.**—Brown *v.* Desomd, 100 Mass. 267; Spurr *v.* Scoville, 3 Cush. 578. **Mont.**—Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940. **Tex.**—Banco Minero *v.* Ross, 106 Tex. 522, 172 S. W. 711.

12. Boswell's Lessee *v.* Otis, 9 How. (U. S.) 336, 348, 13 L. ed. 164. See the title, "**Service of Process and Papers.**"

13. Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816; Burrall *v.* Eames, 5 Wis. 260.

chaser taking with notice is in rem rather than in personam.[14]

E. ELECTION OF REMEDIES. — The remedies upon contract by an action at law for damages and by a suit in equity for specific performance are alternative, but not inconsistent remedies.[15] The latter is not merely a remedy to which the plaintiff may resort at his bare election,[16] but is a supplementary remedy, to effect more complete justice in cases where damages afford an inadequate redress.[17]

An unsuccessful suit for reformation does not prevent a suit for specific performance.[18]

If the vendor aliens the land after making the contract, the purchaser has an option to recover the proceeds of the sale, or the land itself in the hands of the assignee.[19]

F. CONDITIONS PRECEDENT. — **1. Generally.** — As a general rule, to be entitled to specific performance of a contract the plaintiff must not be in default.[20] He must have fully and fairly performed,[21] or

14. Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761; Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

[a] **The reason is** that the vendor cannot have a personal decree against the assignee unless he in his purchase assumed the payment of the unpaid purchase money as part of the price of the original vendee's interest. But the estate is liable. Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761. Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

15. Slaughter *v.* La Compagnie Francaises Des Cebles Telegraphiques, 119 Fed. 588, 57 C. C. A. 19 *affirming* 113 Fed. 21; Connihan *v.* Thompson, 111 Mass. 270.

But a suit for specific performance bars an action for damages, see 5 STANDARD PROC. 120.

An election may be required if the plaintiff brings separate actions. See 5 STANDARD PROC. 120, note 3.

After dismissal of the equity suit, an action at law may be brought, see *infra*, I, R.

[a] **Since land is deemed to have a peculiar value,** (1) a purchaser (Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682), or (2) a vendor (Waters *v.* Pearson, 163 Iowa 391, 399, 144 N. W. 1026; Perrin *v.* Chidester, 159 Iowa 31, 139 N. W. 930; Anderson *v.* Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247; Hogan *v.* Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910), of land has an election to sue either at law for damages, or in equity for specific performance. See more fully the title, "**Vendor and Purchaser.**" (3) He cannot resort to both remedies (Singleton *v.* Cuttino, 107 S. C. 465, 92 S. E. 1046), and (4) if he elects to pursue the equitable remedy, the court of chancery has exclusive jurisdiction thereafter. Singleton *v.* Cuttino, 107 S. C. 465, 92 S. E. 1046. See 5 STANDARD PROC. 120.

[b] **After judgment against the vendor** in an action against him at law, he cannot bring a suit for specific performance. Moore's Admrs. *v.* Randolph, 6 Leigh (33 Va.) 175, 29 Am. Dec. 208.

16. Godwin *v.* Collins, 3 Del. Ch. 189, 202.

17. Godwin *v.* Collins, 3 Del. Ch. 189, 202.

[a] **Specific performance is a substitute for the legal remedy** of compensation whenever the remedy at law is inadequate or impracticable. Brown & Sons *v.* Boston & Me. R. R. Co., 106 Me. 248, 76 Atl. 692; New River Lumber Co. *v.* Tennessee Ry. Co., 136 Tenn. 661, 191 S. W. 334.

They are alternative remedies, see 5 STANDARD PROC. 120.

18. See 5 STANDARD PROC. 119.

19. **Ill.**—Oliver *v.* Croswell, 42 Ill. 41. **N. J.**—Keim *v.* Lindley (N. J. Eq.), 30 Atl. 1063. **N. C.**—Sugg *v.* Stowe, 58 N. C. 126.

20. Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635; Smith *v.* Barber, 97 Wash. 18, 165 Pac. 873; Packard *v.* Booth, 62 Wash. 333, 113 Pac. 774.

21. **U. S.**—Kelsey *v.* Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. ed.

have offered to perform,[22] or he must be ready and willing to perform[23] the contract on his part.

An assignee of the purchaser seeking to enforce the contract must comply with its terms.[24]

2. Substantial Performance. — Although the plaintiff may not have literally performed his side of the contract, specific performance may be had where his failure to perform is only partial and either entirely immaterial,[25] or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default.[26] So also specific performance may be decreed notwithstanding a failure to perform a collateral and separate contract.[27]

3. Performance Excused. — A performance or an offer of performance may be excused in a proper case,[28] as where it appears an offer

1017; Eastern Oregon Land Co. *v.* Moody, 198 Fed. 7, 16, 119 C. C. A. 135. **Ala.**—Bell *v.* Thompson, 34 Ala. 633. **Ariz.**—Costello *v.* Friedman, 8 Ariz. 215, 71 Pac. 935. **Cal.**—Civ. Code, §3392; Peck *v.* Coyle, 19 Cal. App. 390, 125 Pac. 1073; Cordano *v.* Ferretti, 15 Cal. App. 670, 115 Pac. 657; Connelly *v.* Eddy, 1 Cal. Unrep. 86. **Ill.**—Clark *v.* Jackson, 222 Ill. 13, 78 N. E. 6; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. **Ia.**—Vennum *v.* Babcock, 13 Iowa 194. **Ky.** Logan *v.* McChord's Heirs, 2 A. K. Marsh. 224; Hemphill's Admr. *v.* Millmore, 1 Ky. L. Rep. 331. **Minn.**—Ahl *v.* Johnson, 1 Minn. 215. **Mo.**—Electric Secret Service Co. *v.* Gill-Alexander E. Mfg. Co., 125 Mo. 140, 28 S. W. 486. **Neb.**—Fisher *v.* Buchanan, 2 Neb. (Unof.) 158, 96 N. W. 339. **N. Y.** Benedict *v.* Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484, per Chancellor Kent. **N. D.**—Nelson *v.* McCue, 37 N. D. 183, 163 N. W. 724. **Pa.**—Irvin *v.* Bleakley, 67 Pa. 24. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630. **Tex.** Gober *v.* Hart, 36 Tex. 139. **Va.**—Kelly *v.* Jones, 6 Call (10 Va.) 204. **W. Va.** Thompson *v.* Robinson, 65 W. Va. 506, 511, 64 S. E. 718.

[a] "Whichever party first desired to enforce performance was bound to regard his part of his contract as a condition precedent and perform or tender it." Irvin *v.* Bleakley, 67 Pa. 24, *quoted* in Thompson *v.* Robinson, 65 W. Va. 506, 511, 64 S. E. 718.

22. **Ala.**—Bell *v.* Thompson, 34 Ala. 633. **Ill.**—Wood *v.* Sheffer, 248 Ill. 617, 631, 94 N. E. 24. **Ky.**—Logan *v.* McChord's Heirs, 2 A. K. Marsh. 224. **Neb.**—Fisher *v.* Buchanan, 2 Neb. (Unof.) 158, 96 N. W. 339. **Pa.**—Irvin *v.* Bleakley, 67 Pa. 24. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630.

23. **Ill.**—Wood *v.* Sheffer, 248 Ill. 617, 631, 94 N. E. 24; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. **Ia.**—Dow *v.* McVey, 174 Iowa 553, 156 N. W. 706. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 572, 31 S. E. 630.

24. Craver *v.* Spencer, 40 Fla. 135, 23 So. 880; Ricker *v.* Moore, 77 Me. 292.

25. Cal. Civ. Code, §3392; Sheplar *v.* Green, 96 Cal. 218, 31 Pac. 42; Modlen *v.* Snowball, 31 L. J. Ch. (Eng.) 44.

[a] **Noncompliance not going to the essence** of the contract does not defeat the action. Farris *v.* Bennett's Exrs., 26 Tex. 568.

[b] **A failure to make payments on time** will not (1) preclude relief when time is not of the essence of the contract. Porten *v.* Peterson, 139 Minn. 152, 166 N. W. 183; Packard *v.* Booth, 62 Wash. 333, 113 Pac. 774. (2) Where great injury will result to the plaintiff if the other party to the contract is allowed to repudiate it, it may be specifically enforced, notwithstanding some breach of its conditions by the plaintiff. This is particularly true, if the breach is a violation of some condition relating to the payment of the purchase price Packard *v.* Booth, 62 Wash. 333, 113 Pac. 774.

26. Cal. Civ. Code, §3392.

27. Stewart *v.* Metcalf, 68 Ill. 109.

28. Noyes *v.* Schlegel, 9 Cal. App.

of performance would be a useless ceremony.[29]

4. Tender or Offer of Performance. — *a. By the Vendee.* **(I) Tender of Purchase Money.** — (A.) GENERALLY. — There is a conflict of authority as to the necessity of a tender of the purchase price by a vendee seeking to enforce a contract of sale with mutual and dependent obligations to pay the purchase price and to deliver a deed.

When time is of the essence of the contract, the vendee cannot enforce the contract without tendering payment within the time limited by the contract,[30] unless there has been a waiver of the provision.[31]

But where time is not of the essence it is held by some courts that in order to put the other party in default, a "tender" of performance and a demand for the deed must be made,[32] unless it is excused.[33]

516, 99 Pac. 726; Fisher *v.* Buchanan, 2 Neb. (Unof.) 158, 96 N. W. 339.

[a] **But poverty of the plaintiff does not excuse** a performance of his part of the contract. Machold *v.* Farnan, 14 Idaho 258, 269, 94 Pac. 170; Wood *v.* Sheffer, 248 Ill. 617, 631, 94 N. E. 24.

29. See *infra*, I, F, 4, a, (I), (D).

30. **U. S.**—Eastern Oregon Land Co. *v.* Moody, 198 Fed. 7, 16, 119 C. C. A. 135. **Cal.**—Bennett *v.* Hyde, 92 Cal. 131, 28 Pac. 104; Grey *v.* Tubbs, 43 Cal. 359. **Idaho.**—Machold *v.* Farnan, 14 Idaho 258, 94 Pac. 170. **Ind.**—Maris *v.* Masters, 31 Ind. App. 35, 67 N. E. 699. **Ia.**—Lockman *v.* Anderson, 116 Iowa 236, 89 N. W. 1072. **Neb.**—Brown *v.* Ulrich, 48 Neb. 409, 67 N. W. 168. **N. Y.**—Benedict *v.* Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484. **W. Va.**—Thompson *v.* Robinson, 65 W. Va. 506, 511, 64 S. E. 718.

[a] **"The authorities all seem to hold** to this general doctrine." Machold *v.* Farnan, 14 Idaho 258, 268, 94 Pac. 170.

[b] **A vendor resisting an action** to enforce a contract in which time is of the essence, need not tender a deed to put the purchaser in default. Bennett *v.* Hyde, 92 Cal. 131, 28 Pac. 104.

31. Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Brown *v.* Ulrich, 48 Neb. 409, 67 N. W. 168.

32. **U. S.**—Kelsey *v.* Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. ed. 1017, the plaintiff must "tender" performance. **Fla.**—Shouse *v.* Doane, 39 Fla. 95, 21 So. 807. **Ill.**—Roby *v.* Cossitt, 78 Ill. 638; Hedenberg *v.* Jones, 73 Ill. 149; Parker *v.* Sargent, 201 Ill. App. 574. **Ia.**—Vennum *v.* Babcock, 13 Iowa 194, both a "tender" of money **and a demand for a deed are required.** But see Iowa cases cited *infra* this section. **N. Y.**—Hubbell *v.* Von Schoening, 49 N. Y. 326. **N. C.**—Bateman *v.* Hopkins, 157 N. C. 470, 73 S. E. 133. **Pa.**—Dwyer *v.* Wright, 162 Pa. 405, 29 Atl. 754; Bell *v.* Clark, 111 Pa. 92, 2 Atl. 80. **Tex.**—Polk *v.* Kyser, 21 Tex. Civ. App. 676, 53 S. W. 87. **Wash.** Virtue *v.* Stanley, 87 Wash. 167, 151 Pac. 270 ("tender" of performance and demand for deed required); Lewis *v.* Wellard, 62 Wash. 590, 114 Pac. 455.

But see Snodgrass *v.* Wolf, 11 W. Va. 158.

[a] **"The principle is based on equity, and means,** of course, that where there has been any departure or indulgence from the express and vital terms of the contract permitted by either party to the other, either expressly or by conduct, or the contract has lost any of its vitality, the party who has permitted such departure, in order to establish the contract upon its original terms, must demand strict performance by the other party, and offer full and strict performance on his own part. . . . It has no application to a case where the vendee . . . is in no wise in default, or has not waived express terms of the contract." Virtue *v.* Stanley, 87 Wash. 167, 151 Pac. 270, 274.

[b] **The purchaser must allege and prove a tender** of the purchase price still unpaid and bring it into court. Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

[c] **An averment of willingness** to pay the amount due is insufficient. Vennum *v.* Babcock, 13 Iowa 194; Stone *v.* First Nat. Bank, 4 Ky. L. Rep. 438.

33. See *infra*, I, F, 4, a, (I), (D).

The word "tender" may not always be used in a strictly technical sense in these cases,[34] and indeed, many courts have specifically held that in suits for specific performance, a strict tender of the agreed consideration is not required.[35] It is sufficient if the vendee in good faith and with the ability to perform make an offer of performance before suit.[36] And in the case of mutual and dependent covenants, a tender is sufficient when made on condition that the other party perform his part of the contract.[37]

To Whom Made. — The tender may be made to the vendor's grantee with notice.[38]

(B.) TENDER IN PLEADING. — According to some authorities, an offer

34. Consult the cases in the preceeding note. *Contra,* Eastern Oregon Land Co. *v.* Moody, 198 Fed. 7, 16, 119 C. C. A. 135; Terry *v.* Keim, 122 Ga. 43, 49 S. E. 736, holding there must be an absolute and unconditional tender of the purchase price.

35. **Ala.**—Zirkle *v.* Ball, 171 Ala. 568, 54 So. 1000. But see Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473. **Ill.** Fitzhugh *v.* Smith, 62 Ill. 486, 492. **Ind.** Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143; Ames *v.* Ames, 46 Ind. App. 597, 91 N. E. 509. But see Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699. **Ky.**—Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267; Hart *v.* Brand, 1 A. K. Marsh. 159, 10 Am. Dec. 715. **Md.**—Jaeger *v.* Shea, 130 Md. 1, 7, 99 Atl. 954. **Mass.**—Cole *v.* Killam, 187 Mass. 213, 72 N. E. 947; Irvin *v.* Gregory, 13 Gray 215. **Mich.**—Frazer *v.* Hovey, 195 Mich. 160, 161 N. W. 887. **Minn.**—Minneapolis St. P. & S. S. M. Ry. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63. **Neb.**—See Johnson *v.* Higgins, 77 Neb. 35, 108 N. W. 168. **N. J.** Schreiber *v.* Menningham, 73 N. J. Eq. 134, 75 Atl. 818; Worch *v.* Woodruff, 61 N. J. Eq. 75, 47 Atl. 725; Bidwell *v.* Garrison (N. J. Eq.), 36 Atl. 941. **Tex.**—Fordtran *v.* Dunovant, 54 Tex. Civ. App. 564, 118 S. W. 768. **Eng.** Hunter *v.* Daniel, 4 Harr. 420, 14 L. J. Ch. 194, 9 Jur. 526, 67 Eng. Reprint 712.

[a] **An actual tender of lawful money,** such as would sustain a plea of tender in an action at law, is not required. Worch *v.* Woodruff, 61 N. J. Eq. 75, 47 Atl. 725.

[b] **When the vendee appears at the appointed time and place** ready and willing to pay, and the vendor fails to appear, sufficient tender has been made. Frazer *v.* Hovey, 195 Mich. 160, 161 N. W. 887; Worch *v.* Woodruff, 61 N. J. Eq. 75, 47 Atl. 725.

[c] **Tender Need Not Be Kept Good.**—Peck *v.* Coyle, 19 Cal. App. 390, 125 Pac. 1073; Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107.

Purchase Money Need Not Be Brought Into Court.—See *infra,* I, F, 7.

36. See Johnson *v.* Higgins, 77 Neb. 35, 108 N. W. 168. See McCourt *v.* Johns, 33 Ore. 561, 53 Pac. 601, the statute makes a written offer equivalent to an actual tender. Powell *v.* Dayton S. & G. R. R. Co., 12 Ore. 488, 8 Pac. 544.

Offer in pleading, see *infra,* I, F, 4, a, (I), (B).

37. **Ind.**—Storey *v.* Krewson, 55 Ind. 397, 400, 23 Am. Rep. 668; Maris *v.* Masters, 31 Ind. App. 235, 242, 67 N. E. 699. **Mass.**—Irvin *v.* Gregory, 13 Gray 215. **N. J.**—Oakey *v.* Cook, 41 N. J. Eq. 350, 7 Atl. 495. **N. Y.**—Birdsall *v.* Waldron, 2 Edw. Ch. 315.

Contra, Eastern Oregon Land Co. *v.* Moody, 198 Fed. 7, 16, 119 C. C. A. 135; Terry *v.* Keim, 122 Ga. 43, 49 S. E. 736.

[a] **The reason is** that the performance of the covenants must be simultaneous. It is sufficient that when the time comes for the transaction the purchaser is able and prepared to pay and demands the deed. That is a sufficient tender of performance. Cole *v.* Killam, 187 Mass. 213, 72 N. E. 947.

[b] **If the vendor is able to convey only one-half** of the property contracted for, he need pay or tender as purchase money only one-half of the contract price. Marshall *v.* Caldwell, 41 Cal. 611, 615.

38. St. Paul Div. No. 1 Sons of Temperance *v.* Brown, 9 Minn. 157.

or tender previous to the action need not be made.[39] It is sufficient that an offer be made in the bill or complaint.[40] The failure to make a tender before suit under this holding can only affect the question of costs.[41]

(C.) In Actions To Enforce Options. — The authorities are also conflicting as to the necessity of a tender when the contract to be enforced is an option, or rather is the contract arising from the exercise of an option.[42] Usually the language of the option is controlling.[43]

39. Minneapolis St. P. & S. S. M. Ry. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63; Schreiber *v.* Menningham, 73 N. J. Eq. 134, 75 Atl. 818.

40. **U. S.**—Cheney *v.* Bilby, 74 Fed. 52, 67, 20 C. C. A. 291. **Ala.**—Zirkle *v.* Ball, 171 Ala. 568, 54 So. 1000. **Ind.** Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143. **Ia.**—Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; McWhirter *v.* Crawford, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021. **Ky.**—Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267. **Mass.** Irvin *v.* Gregory, 13 Gray 215. **Minn.** Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63. **N. J.**—Schreiber *v.* Menningham, 73 N. J. Eq. 134, 75 Atl. 818; Bidwell *v.* Garrison (N. J. Eq.), 36 Atl. 941. **N. Y.** McCotter *v.* Lawrence, 4 Hun 107, 6 Thomp. & C. 392. **Tex.**—Fordtran *v.* Dunovant, 54 Tex. Civ. App. 564, 118 S. W. 768.

[a] "In equity, a tender can be made in the pleadings, and need not be necessarily made before the bringing of the suit." Bidwell *v.* Garrison (N. J. Eq.), 36 Atl. 941.

[b] **A tender in the bill and an offer** to bring the money into court whenver the court should direct is sufficient. Cheney *v.* Bilby, 74 Fed. 52, 67, 20 C. C. A. 291.

[c] **An averment of readiness and ability** to comply with the contract is sufficient. Jaeger *v.* Shea, 130 Md. 1, 7, 99 Atl. 954.

41. **Ala.**—Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541. **Minn.**—Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63; Lewis *v.* Prendergast, 39 Minn. 301, 39 N. W. 802. **N. J.**—Schreiber *v.* Menningham, 73 N. J. Eq. 134, 75 Atl. 818. **N. Y.** Murray *v.* Harbor & Suburban B. & S. Assn., 184 N. Y. 596, 77 N. E. 1191; Stevenson *v.* Maxwell, 2 N. Y. 408.

42. See Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123, 24 L. R. A. (N. S.) 91, note, it is inaccurate to speak of the specific performance of an option, for before the remedy can be invoked, it has ceased to be an option, and has ripened into a mutually binding contract.

[a] **The rule in the case of a mutual contract for the sale of land is more stringently applied** in the case of an optional sale where time is of the essence of the contract. Kelsey *v.* Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. ed. 1017.

[b] **In the absence of any express provision** it must be presumed that the option to be exercised is not simply the making of an election, but the payment of money. Therefore a failure to tender the purchase money within the time limited defeats the right to specific performance. Lockman *v.* Anderson, 116 Iowa 236, 89 N. W. 1072.

[c] **Tender of Purchase Price and Refusal Is Required.—U. S.**—Kelsey *v.* Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. ed. 1017. **Cal.**—Levy *v.* Lyon, 153 Cal. 213, 94 Pac. 881; Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163. **Ia.**—Lockman *v.* Anderson, 116 Iowa 236, 89 N. W. 1072. **Ky.**—Stembridge *v.* Stembridge, 87 Ky. 91, 7 S. W. 611. **Vt.**—Reynolds *v.* Hooker, 76 Vt. 184, 56 Atl. 988. **W. Va.**—See Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220, *limiting* Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

[d] **Character of Tender.**—Before suing to enforce a mere naked option which requires affirmative action on the part of the vendee before it develops into a contract, a full and proper tender must be made. A tender coupled with a demand for a receipt for a larger sum than the amount received is not sufficient. Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123, 24 L. R. A. N. S. 91.

43. Breen *v.* Mayne, 141 Iowa 399, 118 N. W. 441. See also Pomeroy on Contracts, §387.

(D.) TENDER EXCUSED. — A tender of the purchase money is excused when, from the facts stated in the bill or in the evidence, it appears the tender would be a mere form.[44] Thus a tender is not required where the defendant has repudiated the contract and would refuse a tender,[45] or when he is unable to deliver a deed within the stipulated period.[46] Nor is a tender required[47] when the plaintiff is unable to find

[a] "**The only fixed rule** regarding the manner of the exercise of an option under a contract granting it is to discover from the language of the instrument, construed in the light of competent parol testimony, the intent of the parties with reference thereto. It may be that under the terms of a given option the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price. On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take the land—the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case, there is an election to sell, upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and in the other there is an election to take the land upon the terms proposed, payment of the purchase price being a condition subsequent, or rather the performance of an executory contract theretofore entered into. It is important in such cases to distinguish that which pertains to the performance of a contract from that which pertains to its making." Breen *v.* Mayne, 141 Iowa 399, 118 N. W. 441.

44. U. S.—Moore *v.* Crawford, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. ed. 878. **Ga.**—Turman *v.* Smarr, 145 Ga. 312, 89 S. E. 214. **Ind.**—Bronnenberg *v.* Indiana Union Traction Co., 59 Ind. App. 495, 109 N. E. 784; Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143. **Mich.**—Ogooshevitz *v.* Arnold, 197 Mich. 203, 163 N. W. 946, 165 N. W. 633. **Eng.**—Hunter *v.* Daniel, 4 Hare 420, 14 L. J. Ch. 194, 9 Jur. 526, 67 Eng. Reprint 712.

[a] **Where an option** is sought to be enforced. **Ia.**—Butler *v.* Threlkeld, 117 Iowa 116, 90 N. W. 584. **Mont.** Winslow *v.* Dundom, 46 Mont. 71, 125 Pac. 136. **Neb.**—Harper *v.* Runner, 85 Neb. 343, 123 N. W. 313; Smith *v.* Gibson, 25 Neb. 511, 41 N. W. 360.

[b] But see Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163, holding that the rule that a repudiation of an executory contract by one party relieves the other of the necessity of a tender does not apply to unilateral contracts, as there is no contract to repudiate.

45. Cal.—Sheplar *v.* Green, 96 Cal. 218, 31 Pac. 42; Dowd *v.* Clarke, 54 Cal. 48. **Haw.**—Green *v.* Pope, 6 Hawaii 235. **Ill.**—Webster *v.* French, 11 Ill. 254. **Ind.**—Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143. **Ia.** Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291. **Kan.**—Niquette *v.* Green, 81 Kan. 569, 581, 106 Pac. 270. **Ky.** Bolen *v.* Jenkins, 167 Ky. 295, 180 S. W. 351. **Mass.**—Tobin *v.* Larkin, 183 Mass. 389, 67 N. E. 340. **Minn.**—Brown *v.* Eaton, 21 Minn. 409. **Neb.**—Harper *v.* Runner, 85 Neb. 343, 123 N. W. 313. **N. J.**—Trenton St. Ry. Co. *v.* Lawlor, 73 N. J. Eq. 203, 75 Atl. 996; McCormick *v.* Hickey, 56 N. J. Eq. 848, 42 Atl. 1019. **N. C.**—Bateman *v.* Hopkins, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642. **Ore.**—West *v.* Washington R. Co., 49 Ore. 436, 449, 90 Pac. 666. **Pa.**—Whiteside *v.* Winans, 29 Pa. Super. 244. **S. D.**—McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723. **Vt.**—Boston & M. R. R. *v.* Union Mut. Fire Ins. Co., 101 Atl. 1012. **Eng.**—Hunter *v.* Daniel, 4 Hare 420, 433, 14 L. J. Ch. 194, 9 Jur. 526, 67 Eng. Reprint 712.

[a] **Where the vendor commences an action to quiet title,** he repudiates the contract so a tender is not required before filing a cross complaint for specific performance in such suit. Sheplar *v.* Green, 96 Cal. 218, 31 Pac. 42.

46. Rice *v.* Rice (Ala.), 75 So. 21; Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220.

47. Emerson *v.* Fleming, 246 Ill. 353, 360, 92 N. E. 890.

[a] **The plaintiff must make an honest effort** to comply with the contract, however. Emerson *v.* Fleming, 246 Ill. 353, 360, 92 N. E. 890.

the defendant. In such case he must make a proper offer in his pleading.[48]

(II.) Tender of Deed. — The purchaser need not prepare a deed and present it to the vendor for execution,[49] unless the contract requires it.[50]

b. *By the Vendor.* — In an action by a vendor, a tender of a deed, unless excused,[51] is sometimes required as a condition precedent to the suit.[52] But some courts hold otherwise,[53] and only require him to make an offer of performance,[54] or only require him to make an offer in his pleading to execute a conveyance.[55]

48. See *infra*, I, J, 2, o.

49. **Ala.**—Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541; *Compare* Gentry *v.* Rogers, 40 Ala. 442. **Ga.**—Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436. **Mich.**—Frazer *v.* Hovey, 195 Mich. 160, 161 N. W. 887; Daily *v.* Litchfield, 10 Mich. 29. **Minn.**—St. Paul Div. No. 1 Sons of Temperance *v.* Brown, 9 Minn. 157. **Wis.**—Seeley *v.* Howard, 13 Wis. 336.

See Mather *v.* Scoles, 35 Ind. 1, query.

[a] **In England,** the rule is otherwise. See Blanton *v.* Kentucky Distilleries & Warehouse Co., 120 Fed. 318, 347.

50. Blanton *v.* Kentucky Distilleries & Warehouse Co., 120 Fed. 318, 347; Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436.

51. **U. S.**—McCullough *v.* Sutherland, 153 Fed. 418; Blanton *v.* Kentucky D. & Warehouse Co., 120 Fed. 318. **N. Y.** Pittsburgh Amusement Co. *v.* Ferguson, 100 App. Div. 453, 91 N. Y. Supp. 666. **R. I.**—Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717.

[a] **Where the contract requires the purchaser to prepare the deeds** for the vendor to execute. Blanton *v.* Kentucky Distilleries & Warehouse Co., 120 Fed. 318, 347. See also Poole *v.* Hill, 6 Mees. & W. (Eng.) 835.

[b] **The personal representative of the deceased vendor** need not aver a tender of a deed from the heirs before suit brought, or offer such a deed with his bill. Kimbrough *v.* Curtis, 50 Miss. 117.

52. **Ala.**—Munford *v.* Pearce, 70 Ala. 452. **Ark.**—Ex parte Hodges, 24 Ark. 197. **Cal.**—Hixson *v.* Hovey, 18 Cal. App. 230, 122 Pac. 1097. **Ga.**—Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436. **Ill.**—Peck *v.* Brighton Co., 69 Ill. 200; Mix *v.* Beach, 46 Ill. 311. **Ind.** See Mather *v.* Scoles, 35 Ind. 1. **Ia.** See Waters *v.* Pearson, 163 Iowa 391, 144 N. W. 1026. **Miss.**—Kimbrough *v.* Curtis, 50 Miss. 117; Klyce *v.* Broyles, 37 Miss. 524. **Mo.**—Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568. **N. Y.** Bennet *v.* Bennet, 10 App. Div. 550, 42 N. Y. Supp. 435. **Wash.**—Lewis *v.* Wellard, 62 Wash. 590, 114 Pac. 455.

[a] **An allegation that the plaintiff is ready and willing** to make title upon the payment of the purchase money is not sufficient. Kimbrough *v.* Curtis, 50 Miss. 117; Klyce *v.* Broyles, 37 Miss. 524.

[b] **The tender must be kept good** by bringing the deed into court, or by an averment of readiness and willingness to execute a sufficient deed. Goodwine *v.* Morey, 111 Ind. 68, 12 N. E. 82.

[c] **It may perhaps be sufficient to notify** the vendee of the deed. Mix *v.* Beach, 46 Ill. 311.

[d] **To Whom Made.**—The tender may be made to the original purchaser although he has assigned the contract. Hedenberg *v.* Jones, 73 Ill. 149; Corbus *v.* Teed, 69 Ill. 205.

[e] **That the vendee's name is misspelled** in the deed tendered does not vitiate the tender. Greffet *v.* Willman, 114 Mo. 106, 21 S. W. 459.

53. Freeson *v.* Bissell, 63 N. Y. 168.

54. Johnson *v.* Higgins, 77 Neb. 35, 108 N. W. 168.

[a] **But a repudiation of the contract excuses** an offer of performance. Johnson *v.* Higgins, 77 Neb. 35, 108 N. W. 168.

55. **Ky.**—Louisville & N. R. Co. *v.* Zaring, 9 Ky. L. Rep. 107. **N. J.** Bidwell *v.* Garrison (N. J. Eq.), 36 Atl. 941. **N. Y.**—Freeson *v.* Bissell, 63 N. Y. 168.

[a] **A failure to make an earlier**

Action by Assignee. — An assignee of the note for the purchase money suing the vendor and vendee need not make a tender of a deed.[56]

5. Demand. — According to some authorities a vendee need not make a demand for a deed or conveyance before bringing suit,[57] but according to others, a demand is required,[58] unless it is excused[59] by the repudiation of the contract by the vendor,[60] or for some other reason.[61] A demand of performance before suit brought has been held to be important only in reference to the question of costs.[62]

6. Restoration of Possession. — A defendant in an ejectment suit by the vendor who seeks to specifically enforce his contract of purchase, is not required to restore or offer to restore the possession of the property.[63]

7. Deposit in Court. — A deposit of the purchase money is not required as a general rule.[64] But some courts hold otherwise.[65]

G. JURISDICTION. — **1. Of Equity Courts.**[66] — Equity has inherent power to grant specific performance,[67] and except as statutes otherwise provide, it has exclusive jurisdiction of suits therefor.[68]

tender affects the question of costs only. Freeson *v.* Bissell, 63 N. Y. 168.

56. Kimbrough *v.* Curtis, 50 Miss. 117.

57. Heinlen *v.* Martin, 53 Cal. 321, 345. See Gray *v.* Dougherty, 25 Cal. 266, 278; Snodgrass *v.* Wolf, 11 W. Va. 158.

[a] **The commencement of the suit** is a sufficient demand. Heinlen *v.* Martin, 53 Cal. 321, 345.

58. Ala.—Bell *v.* Thompson, 34 Ala. 633. **Ind.**—Harshman *v.* Mitchell, 117 Ind. 312, 20 N. E. 228; Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Mather *v.* Scoles, 35 Ind. 1. But *compare* Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699. **Ia.**—Vennum *v.* Babcock, 13 Iowa 194, both a tender of the money and a demand of the deed are required. **Mich.** Bresler *v.* Pitts, 58 Mich. 347, 25 N. W. 311. **N. Y.**—Hubbell *v.* Von Schoening, 49 N. Y. 326; Carpenter *v.* Brown, 6 Barb. 147. **Wis.**—Seeley *v.* Howard, 13 Wis. 336; Dye *v.* Montague, 10 Wis. 18.

[a] **It is the duty of assignees** of the vendee to tender the money and demand a deed. Hedenberg *v.* Jones, 73 Ill. 149.

59. Harshman *v.* Mitchell, 117 Ind. 312, 20 N. E. 228; St. Paul Div. No. 1 Sons of Temperance *v.* Brown, 11 Minn. 356.

60. Harshman *v.* Mitchell, 117 Ind. 312, 20 N. E. 228; Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541.

61. See *infra*, this note.

[a] **A refusal to receive the purchase price** when tendered amounts to a refusal to make a deed, so that a demand therefor is unnecessary. St. Paul Div. No. 1 Sons of Temperance *v.* Brown, 11 Minn. 356.

62. Jones *v.* Petaluma, 36 Cal. 230; Bruce *v.* Tilson, 25 N. Y. 194.

63. Marshall *v.* Caldwell, 41 Cal. 611, 615.

64. U. S.—Cheney *v.* Bilby, 74 Fed. 52, 67, 20 C. C. A. 291. **Ill.**—Webster *v.* French, 11 Ill. 254, 278. **Ky.**—Tyler *v.* Ontzs, 93 Ky. 331, 20 S. W. 256. **Mass.**—Irvin *v.* Gregory, 13 Gray 215. **Minn.**—Lamprey *v.* St. Paul & C. Ry. Co., 86 Minn. 509, 91 N. W. 29. **N. C.** Bateman *v.* Hopkins, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642.

[a] **The bill will not be dismissed** for failure to bring the consideration into court. Webster *v.* French, 11 Ill. 254, 278.

[b] **But the court may order the money to be brought into** court, whenever the rights of the party defendant requires it. Webster *v.* French, 11 Ill. 254.

65. Christiansen *v.* Aldrich, 30 Mont. 446, 452, 76 Pac. 1007; Dwyer *v.* Wright, 162 Pa. 405, 29 Atl. 754; Bell *v.* Clark, 111 Pa. 92, 2 Atl. 80.

66. Adequate remedy at law, see *supra*, I, C, 6.

67. Christ Church *v.* Beach, 7 Wash. 65, 33 Pac. 1053.

68. Haw.—Tong On *v.* Tai Kee, 11 Hawaii 424. **Mass.**—Cashman *v.* Bean, 226 Mass. 198, 115 N. E. 574. **Mo.** Fisher *v.* Davidson, 271 Mo. 195, 195

As Affected by Location of Land. — If the court has jurisdiction of the defendant's person, a specific performance of a contract to convey land situated in another state may be decreed.[69] But it does not follow that the court may make its own decree to operate as such conveyance,[70] or direct a master to execute a deed conveying land in another state.[71]

As Affected by Non Residence of Defendant. — Unless authorized by statute,[72] specific performance of contracts to convey lands within the jurisdiction of the court cannot be decreed upon constructive service on a person who is without the state.[73]

2. Of Probate Courts. — The probate court has no jurisdiction to decree the specific performance of contracts,[74] unless it is conferred by statute.[75] Statutes conferring jurisdiction on such courts do not deprive equity of its jurisdiction as a rule.[76]

3. Of Courts of Law. — Courts of common law have no jurisdiction to entertain suits for specific performance of contracts.[77] But in Pennsylvania, equity jurisdiction is conferred upon the court of common pleas which consequently has jurisdiction over suits for specific performance.[78]

4. Of Justice's Courts. — A justice's court has no jurisdiction of actions for specific performance.[79]

5. Of Supreme Courts. — A supreme court has no original jurisdiction over a bill for specific performance.[80]

6. Of Federal Courts. — The federal equity courts have jurisdic-

S. W. 1024, L. R. A. 1917F, 692. **N. Y.** Matthews *v.* Matthews, 133 N. Y. 679, 31 N. E. 519. **Wash.**—Christ Church *v.* Beach, 7 Wash. 65, 33 Pac. 1053. **W. Va.**—Atherton *v.* Hull, 12 W. Va. 170, 179.

See 8 STANDARD PROC. 410.

[a] **As Involving Title.**—The mere fact that the contract is for the conveyance of real estate does not show that title will be in issue so as to deprive a particular court of jurisdiction. Snideman *v.* Rinker, 42 Ind. 223.

69. See 17 STANDARD PROC. 783.

70. Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

71. Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

72. See the statutes, and Rourke *v.* McLaughlin, 38 Cal. 196; also the title, "**Service of Process and Papers.**" See generally 17 STANDARD PROC. 792, et seq.

[a] **But equity cannot require the performance of personal acts by the** defendant on service by publication. First Nat. Bank *v.* Henry, 156 Ind. 1, 58 N. E. 1057.

73. Fowler *v.* Fowler, 204 Ill. 82, 102, 68 N. E. 414; Merrill *v.* Beckwith, 163 Mass. 503, 40 N. E. 855; Desper *v.* Continental Water Meter Co., 137 Mass. 252; Spurr *v.* Scoville, 3 Cush. (Mass.) 578.

[a] **If the defendant is an active party,** he must be within the jurisdiction of the court. Spurr *v.* Scoville, 3 Cush. (Mass.) 578.

74. Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427; Houston *v.* Killough, 80 Tex. 296, 16 S. W. 56.

75. See the statutes, and see *infra,* IV.

76. **Me.**—Bates *v.* Sargent, 51 Me. 423. **Minn.**—Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977. **Mont.** Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

Contra, Porter *v.* Dougherty, 25 Pa. 405; Myers *v.* Black, 17 Pa. 193.

77. Bruce *v.* Tilson, 25 N. Y. 194.

78. Ralston *v.* Ihmsen, 204 Pa. 588, 54 Atl. 365; White *v.* Patterson, 139 Pa. 429, 438, 21 Atl. 360.

Specific performance by common law actions in Pennsylvania, see *infra,* V.

79. See 17 STANDARD PROC. 968.

80. Sunbury & Erie R. Co. *v.* Cooper, 33 Pa. 278.

tion to decree specific performance of contracts, when the necessary jurisdictional facts exist.[81]

H. VENUE. — Unless statute provides otherwise,[82] actions for specific performance are transitory, and must be brought in the county of the residence of the defendant or in some states of the residence of either party.[83] But it has been held that it may be brought in the county where the land is situated at the option of the plaintiff,[84] and some statutes so provide.[85] It is not a suit for the recovery of land[86] to quiet title thereto,[87] or for the enforcement of liens thereon,[88] within the meaning of the statutes relating to venue. But some courts have held that the action is embraced within a statute making local actions for determination of a right or interest in land,[89] or actions

81. Davis *v.* Davis, 89 Fed. 532, 537. See generally the title, "**United States Courts.**"

[a] **The fact that the property belongs to the estate** of a decedent and that such estate is in process of administration in a state court does not defeat jurisdiction. Davis *v.* Davis, 89 Fed. 532.

82. See the statutes and *infra*, this section.

83. **U. S.**—Hart *v.* Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. ed. 101; Texas Co. *v.* Central Fuel Oil Co. 7, 194 Fed. 1, 114 C. C. A. 21. **Cal.**—Wood *v.* Thompson, 5 Cal. App. 247, 90 Pac. 38. **D. C.**—Griffith *v.* Stewart, 31 App. Cas. 29, 36. **Fla.**—See Morgan *v.* Eaton, 59 Fla. 562, 52 So. 305, 138 Am. St. Rep. 167. **Ind.**—Bethell *v.* Bethell, 92 Ind. 318; Parker *v.* McAllister, 14 Ind. 12; Coon *v.* Cook, 6 Ind. 268. **Kan.**—Timma *v.* Timma, 72 Kan. 73, 82 Pac. 481; Close *v.* Wheaton, 65 Kan. 830, 70 Pac. 891, where the defendant resides or may be served. **Ky.**—Todd *v.* Lancaster, 104 Ky. 427, 47 S. W. 336. **Mass.** Spurr *v.* Scoville, 3 Cush. 578. **Minn.** State *ex rel.* Peterson *v.* District Court, 169 N. W. 420; State *ex rel.* Johnston L. Co. *v.* District Court, 138 Minn. 336, 164 N. W. 1014. **Ore.**—See Johnston *v.* Wadsworth, 24 Ore. 494, 34 Pac. 13, holding the action transitory despite express statute requiring it to be brought where the subject of action is situated. **Tex.**—Cavin *v.* Hill, 83 Tex. 73, 18 S. W. 323; Miller *v.* Rusk, 17 Tex. 170 (not a suit for "recovery of land"); Ballard *v.* Ellerd (Tex. Civ. App.), 199 S. W. 305; Burkitt *v.* Wynne, 62 Tex. Civ. App. 560, 132 S. W. 816. **Wash.**—Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614, does not "affect title."

[a] **Although the Land Is in Another County.**—Wood *v.* Thompson, 5 Cal. App. 247, 90 Pac. 38.

[b] **The rule is inapplicable to suits against nonresidents** of the state. Todd *v.* Lancaster, 104 Ky. 427, 47 S. W. 336.

84. Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816; Burrall *v.* Eames, 5 Wis. 260, applying the rule governing when the defendant is a nonresident of the state.

[a] **Reason.**—While the action is primarily in personam and transitory, the party may invoke the jurisdiction of the rem and require the court to decree conveyance and have the decree performed by the proper officer if he choses. Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816.

85. **Ala.**—Burrow *v.* Clifton, 186 Ala. 297, 65 So. 58. **Kan.**—Horner *v.* Ellis, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446. **Ohio.**—Stanbery *v.* Sillon, 13 Ohio St. 571.

86. Wood *v.* Thompson, 5 Cal. App. 247, 90 Pac. 38; Cavin *v.* Hill, 83 Tex. 73, 18 S. W. 323; Miller *v.* Rusk, 17 Tex. 170.

87. Wood *v.* Thompson, 5 Cal. App. 247, 90 Pac. 38.

88. Wood *v.* Thompson, 5 Cal. App. 247, 90 Pac. 38; Dorsey *v.* Omo, 93 Md. 74, 48 Atl. 741. But see Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, a suit by a vendor for specific performance and to enforce his lien.

89. **Cal.**—Grocers' Fruit Growing Union *v.* Kern County L. Co., 150 Cal. 466, 89 Pac. 120. **Ind.**—Parker *v.* McAllister, 14 Ind. 12. **Ia.**—Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377; Donaldson *v.* Smith, 122 Iowa 388, 98 N. W. 138. **N. Y.**—Turner *v.* Walker, 70 App. Div. 306, 75 N. Y. Supp. 260.

affecting title to real estate.[90]

If the defendant is a nonresident of the state, the proper county is that in which the land is situated.[91]

I. PARTIES. — **1. General Rules as to Parties Plaintiff or Defendant.** — The equity rule as to parties, that all parties in interest ought to be brought in,[92] is applied by many courts to specific performance.[93] Some courts, however, hold that this rule does not have full application to such suits,[94] and hold that the general rule, unless other controlling equities intervene,[95] is that only the parties to the contract,[96] or those claiming under them in privity of estate, of representation, or of title[97] are necessary or proper parties plaintiff or defendant. Strangers to the contract are not necessary parties plaintiff or defendant as a general rule.[98]

Contra, Close *v.* Wheaton, 65 Kan. 830, 70 Pac. 891; State ex rel. Johnston Land Co. *v.* District Court, 138 Minn. 336, 164 N. W. 1014.

90. Ensworth *v.* Holly, 33 Mo. 370; Hall *v.* Gilman, 77 App. Div. 464, 79 N. Y. Supp. 307. *Contra,* Lowe *v.* Mann, 74 Ga. 387; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

[a] **An action to enforce a contract to devise real and personal** property may be brought where some of the realty is situated. Hall *v.* Gilman, 77 App. Div. 464, 79 N. Y. Supp. 307.

91. Burrall *v.* Eames, 5 Wis. 260.

92. See 20 STANDARD PROC. 880.

93. **Ala.**—Hays *v.* Hall, 4 Port. 374, 386, 30 Am. Dec. 530. **Fla.**—Betton *v.* Williams, 4 Fla. 11, 18. **Ill.**—Alexander *v.* Hoffman, 70 Ill. 114. **Mich.**—Baldwin *v.* Fletcher, 48 Mich. 604, 12 N. W. 873. **N. Y.**—International Paper Co. *v.* Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. Supp. 736; McCotter *v.* Lawrence, 4 Hun 107, 6 Thomp. & C. 392. **Pa.**—Williams *v.* Leech, 28 Pa. 89. **Tenn.**—Partee *v.* McAlister, 6 Humph. 408. **Tex.**—Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622. **Va.** Gentry *v.* Gentry, 87 Va. 478, 12 S. E. 966.

[a] "All persons interested in the contract should be made parties to the proceeding." Downing *v.* Risley, 15 N. J. Eq. 93, 95.

94. State Nat. Bank *v.* United States L. Ins. Co., 238 Ill. 148, 158, 87 N. E. 396; Washburn & Moen Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71. But *compare* Gentry *v.* Gentry, 87 Va. 478, 12 S. E. 966.

95. Hays *v.* Hall, 4 Port. (Ala.) 374, 385, 30 Am. Dec. 530.

96. **U. S.**—Willard *v.* Tayloe, 8 Wall. 557, 571, 19 L. ed. 501; Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Bryan *v.* Barriger, 251 Fed. 328. **Ark.**—Tombler *v.* Sumpter, 97 Ark. 480, 134 S. W. 967; Petray *v.* Howell, 20 Ark. 615. **Ill.**—Corbly *v.* Corbly, 280 Ill. 278, 291, 117 N. E. 393; State Nat. Bank *v.* United States L. Ins. Co., 238 Ill. 148, 158, 87 N. E. 396; Gibbs *v.* Blackwell, 37 Ill. 191. **Md.**—Crook *v.* Brown, 11 Md. 158, 172. **Minn.**—Knopf *v.* Hansen, 37 Minn. 215, 33 N. W. 781. **N. J.** Bacot *v.* Wetmore, 17 N. J. Eq. 250. **N. D.**—Bennett *v.* Glaspell, 15 N. D. 239, 107 N. W. 45. **Tex.**—Campbell *v.* McFadden, 9 Tex. Civ. App. 379, 31 S. W. 436. **Va.**—Hoover *v.* Calhoun, 16 Gratt. (57 Va.) 109. **W. Va.**—Miller *v.* Morrison, 47 W. Va. 664, 669, 35 S. E. 905. **Eng.**—Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. N. S. 161, 16 Wkly. Rep. 72; Tasker *v.* Small, 3 Myl. & Craig 63, 6 Sim. 625, 5 L. J. Ch. (N. S.) 321, 40 Eng. Reprint 848.

97. **Ala.**—Hays *v.* Hall, 4 Port. 374, 385, 30 Am. Dec. 530. **Ark.**—Petray *v.* Howell, 20 Ark. 615. **Md.**—Worthington *v.* Lee, 61 Md. 530. **Va.**—Hoover *v.* Calhoun, 16 Gratt. (57 Va.) 109.

See *infra,* I, I, 2 and 3.

98. **U. S.**—Van Reen *v.* Aetna Life Ins. Co., 209 Fed. 691; McCullough *v.* Sutherland, 153 Fed. 418. **Mo.**—Wilkson *v.* Blackwell, 4 Mo. 428. **N. Y.** Heine *v.* Rohner, 29 App. Div. 239, 51 N. Y. Supp. 427. **N. D.**—Bennett *v.* Glaspell, 15 N. D. 239, 107 N W. 45. **Wash.**—Bronx Inv. Co. *v.* National Bank, 47 Wash. 566, 92 Pac. 380. **Wis.** McLennan *v.* Church, 163 Wis. 411, 158 N. W. 73. **Eng.**—Robertson *v.* Great

There should be a privity of contract between the parties to the action.[99] **On the death** of a party to the contract the proper representative of that interest is a necessary party to the action.[1]

2. Parties Plaintiff. — a. *Generally.* — The plaintiff in a bill for specific performance, must, in accordance with the general equity rule, have an interest in the subject of the suit, or a right to the thing demanded.[2] An action to enforce a contract of sale and purchase may be brought by the purchaser,[3] or by the vendor.[4] The action may be

Western Ry. Co., 10 Sim. 314, 9 L. J. Ch. (N. S.) 17, 59 Eng. Reprint 635; Peacock *v.* Penson, 11 Beav. 355, 18 L. J. Ch. 57, 50 Eng. Reprint 854; Tasker *v.* Small, 3 Myl. & C. 63, 6 Sim. 625, 5 L. J. Ch. (N. S.) 321, 40 Eng. Reprint 848; Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. N. S. 161, 16 Wkly. Rep. 72.

[a] **The vendor's wife** (1) is not a necessary party to an action against the vendor. Deniston *v.* Hoagland, 67 Ill. 265; Tewksbury *v.* Howard, 138 Ind. 103, 112, 37 N. E. 355. See *infra*, I, Q, 2, f. (2) The fact that the deed is made to the purchaser and his wife at the purchaser's request does not make her a necessary party to an action by the vendor. Tewksbury *v.* Howard, 138 Ind. 103, 112, 37 N. E. 355.

99. McCarthy *v.* Couch, 37 Minn. 124, 33 N. W. 777; Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622.

[a] **Where an assignee of the vendor's title bond conveys a part of his interest** to another (1) by execution of his own bond, the ultimate assignee cannot bring specific performance against the original vendor without joining the intermediate assignees, as there is no privity of contract. Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622. (2) And in McCarthy *v.* Couch, 37 Minn. 124, 33 N. W. 777, the purchaser of the land before performance of the conditions of the contract contracted to sell to the plaintiff and then refused to complete his contract with the original vendor. It was held that the plaintiff is not a party to or assignee of the original contract, and in an action against his vendor and the original vendor he cannot compel performance of the original contract between them.

1. Craver *v.* Spencer, 40 Fla. 135, 141, 23 So. 880; Rain *v.* Roper, 15 Fla. 121, 126; Miller *v.* Henderson, 10 N. J. Eq. 320.

[a] **Contract To Adopt.**—The proper plaintiff in an action to specifically enforce a contract to adopt a child is the personal representative of the child where the estate of the father consists wholly of personalty. Pair *v.* Pair, 147 Ga. 754, 95 S. E. 295.

2. Gaston *v.* Plum, 14 Conn. 344; Hills *v.* McMunn, 232 Ill. 488, 499, 83 N. E. 963. See 20 STANDARD PROC. 895, et seq.

[a] **One who has conveyed the land with a warranty** has a sufficient interest to maintain a suit to enforce a contract to discharge the land from a mortgage lien. Malins *v.* Brown, 4 N. Y. 403.

3. Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132; Anderson *v.* Wallace Lumber & Mfg. Co., 30 Wash. 147, 154, 70 Pac. 247.

4. **Ark.**—Wilkins *v.* Eanes, 126 Ark. 339, 190 S. W. 99. **Ill.**—Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761. **Me.**—Porter *v.* Frenchman's Bay & Mt. D. L. & Water Co., 84 Me. 195, 24 Atl. 814. **Mich.**—Pearson *v.* Gardner, 168 N. W. 485; Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132. **Minn.**—Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. St. Rep. 438. **Mo.** Paris *v.* Haley, 61 Mo. 453. **Wash.** Anderson *v.* Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247. **W. Va.** Steenrod's Admr. *v.* Wheeling, P. & B. R. Co., 27 W. Va. 1.

But see Kauffman's Appeal, 55 **Pa.** 383.

[a] **Although the relief obtained will be largely a money judgment** for the payment of the purchase price, the vendor may sue. See cases cited *supra*, this note.

[b] The rule is based (1) upon mutuality. Since the vendee can enforce such a contract, the vendor should be allowed to do so. **Ill.**—Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761. **Minn.**—Freeman *v.* Paulson, 107 Minn.

brought by a purchaser of the vendee's title at a judicial sale,[5] or by one who conveys by deed absolute in form but intended as a security for advances.[6] A subsequent mortgagee may enforce a contract to discharge property of a lien.[7] But a creditor at large and before judgment cannot sue for specific execution of contracts of his debtor.[8]

b. *Where Contract Is for Benefit of Third Persons.* — In accordance with general rules elsewhere discussed,[9] a person who contracts for the benefit of another may maintain specific performance[10] without joining the beneficiary,[11] or the beneficiary may sue.[12]

c. *Principal and Agent.* — An undisclosed principal may maintain a suit in his own name to specifically enforce a contract of his agent.[13]

d. *After an Assignment.* — After an absolute assignment of an assignable contract to convey, the assignee is a necessary and proper party to the action.[14] The assignor, having parted with all his in-

64, 119 N. W. 651, 131 Am. St. Rep. 438. **Mo.**—Paris *v.* Haley, 61 Mo. 453. (2) Some courts deny this and hold that the right depends solely upon the ground that his legal remedy is inadequate. G. W. Baker Mach. Co. *v.* United States Fire Apparatus Co. (Del.), 97 Atl. 613; Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. But *compare* Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. St. Rep. 438.

5. Fitzhugh *v.* Smith, 62 Ill. 486.

6. Kidder *v.* Barr, 35 N. H. 235.

7. McLallen *v.* Jones, 20 N. Y. 162.

8. Griffith *v.* Frederick Co. Bank, 6 Gill & J. (Md.) 424, 437.

9. See 20 STANDARD PROC. 907, and 914.

10. Tinkler *v.* Swaynie, 71 Ind. 562, But see Lawyer *v.* Post, 109 Fed. 512, 47 C. C. A. 491.

[a] But a real estate agent who secures an option for the benefit of his client cannot sue on the option when his sole interest in the matter is a commission for his services. The reason is that he is not a real party in interest. Lawyer *v.* Post, 109 Fed. 512, 47 C. C. A. 491.

11. Tinkler *v.* Swaynie, 71 Ind. 562.

12. **Ga.**—Pair *v.* Pair, 147 Ga. 754, 95 S. E. 295; Lansdell *v.* Lansdell, 144 Ga. 571, 87 S. E. 782. **Pa.**—School Dist. *v.* Enterprise Natural Gas Co., 18 Pa. Super. 73. **Eng.**—Hinton *v.* Hinton, 2 Ves. Sr. 631, 28 Eng. Reprint 402.

But see Wait *v.* Wilson, 86 App. Div. 485, 83 N. Y. Supp. 834.

[a] **In an action to specifically enforce a contract to adopt** a child, the child may sue in its own name. He need not sue in his father's name. Lansdell *v.* Lansdell, 144 Ga. 571, 87 S. E. 782.

13. Unruh *v.* Roemer, 135 Minn. 127, 160 N. W. 251; Forgey *v.* Gilbirds, 262 Mo. 44, 170 S. W. 1135; Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419; Kelly *v.* Thuey, 143 Mo. 422, 438, 45 S. W. 300. See generally 21 STANDARD PROC. 543.

[a] **The undisclosed principal may maintain the action whether** the principal was known or unknown during the transaction, or whether the party supposed he was dealing with the agent personally or on his own behalf. Kelly *v.* Thuey, 143 Mo. 422, 438, 45 S. W. 300.

14. **U. S.**—Cheney *v.* Bilby, 74 Fed. 52, 64, 20 C. C. A. 291. **Ark.**—Weis *v.* Meyer, 1 S. W. 679. **Cal.**—Owen *v.* Frink, 24 Cal. 171. **Fla.**—Craver *v.* Spencer, 40 Fla. 135, 23 So. 880. **Ga.** Perry *v.* Paschal, 103 Ga. 134, 29 S. E. 703. **Ky.**—Combs *v.* Tarlton's Admr., 2 B. Mon. 191. **Mass.**—Ensign *v.* Kellogg, 4 Pick. 1. **Me.**—Ricker *v.* Moore, 77 Me. 292. **Mich.**—Daily *v.* Litchfield, 10 Mich. 29. **Minn.**—Johnson *v.* Eklund, 72 Minn. 195, 75 N. W. 14. **N. J.** Chas. J. Smith Co. *v.* Anderson, 84 N. J. Eq. 681, 95 Atl. 358. **W. Va.**—Lydick *v.* Baltimore & O. R. Co., 17 W. Va. 427. **Eng.**—Crosbie *v.* Tooke, 1 My. & K. 431, 2 L. J. Ch. (N. S.) 83, 39 Eng. Reprint 745.

See generally the title, "**Assignments.**"

[a] **He is an indispensable party** complainant. Craver *v.* Spencer, 40

terest in the subject matter of the bill, cannot bring the action,[15] and according to some authorities, is not a necessary,[16] although proper,[17] party to the action by the assignee, unless some especial circumstances make the joinder necessary.[18]

When the assignment is not absolute, the assignor is a necessary party.[19] After an assignment by the vendor as collateral security, the assignee may bring the action to enforce the contract,[20] and the assignor is a proper,[21] if not a necessary[22] party to the action.

After a partial assignment, the assignor may enforce the contract[23]

Fla. 135, 23 So. 880. *Contra,* Crook *v.* Brown, 11 Md. 158, 170.

[b] **Mutuality.**—But an assignee who assumes no liabilities under the contract cannot compel specific performance as there is no mutuality. Lunt *v.* Lorscheider, 285 Ill. 589, 121 N. E. 237.

[c] **A purchaser of the vendee's interest at an execution sale** may sue. Alexander *v.* Hoffman, 70 Ill. 114; Fitzhugh *v.* Smith, 62 Ill. 486.

15. Gaston *v.* Plum, 14 Conn. 344. But see Simms *v.* Lide, 94 Ga. 553, 21 S. E. 220, the obligee may sue in behalf of the third person to whom he has sold all his interest, the assignee being a coparty plaintiff as usee.

[a] **A purchaser who has contracted to sell** his interest but who has not actually assigned it may sue. Bittrick *v.* Consolidated Imp. Co., 51 Wash. 469, 99 Pac. 303.

16. **U. S.**—Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291. **Ala.**—Davis *v.* Williams, 121 Ala. 542, 25 So. 704. **Conn.** Gaston *v.* Plum, 14 Conn. 344. **Ind.** Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505. **Mass.**—Currier *v.* Howard, 14 Gray 511. **N. J.**—Miller *v.* Henderson, 10 N. J. Eq. 320. **N. Y.**—Beardsley Scythe Co. *v.* Foster, 36 N. Y. 561, 34 How. Pr. 97.

Contra, **Me.**—Miller *v.* Whittier, 32 Me. 203. **Mich.**—Daily *v.* Litchfield, 10 Mich. 29, he is a necessary party, as a party to the contract. **N. Y.**—Voorhees *v.* De Myer, 3 Sandf. Ch. 614, 624. **Ohio.**—Sykora *v.* Forest City Mut. Ins. Co., 2 Wkly. L. Bull. 223.

[a] **The assignee of a title bond** need not join any of the assignors of the bond. Anderson's Admr. *v.* Wells, 6 B. Mon. (Ky.) 540.

[b] **To a bill by a purchaser at an execution sale of the interest of the** vendee, the vendee is a necessary party. Alexander *v.* Hoffman, 70 Ill. 114, based on Packwood *v.* Gridley, 39 Ill. 388.

[c] **If no objection to the omission of the vendee is made** until the hearing, the delay of making him a party, by obtaining and filing his assent under seal, duly acknowledged, to be bound by the decree. This consent should be recited in the decree and enrolled with it. Voorhees *v.* De Myer, 3 Sandf. Ch. (N. Y.) 614, 624.

[d] **By supplemental bill,** the vendee may be made a party if he refuses to execute the consent mentioned in the preceding paragraph. Voorhees *v.* De Myer, 3 Sandf. Ch. (N. Y.) 614, 624.

17. Kimbrough *v.* Curtis, 50 Miss. 117; Hunter *v.* Gallagher, 4 Mo. 364.

[a] **The purchaser and his vendee may join** in the suit (**Ga.**—See Simms *v.* Lide, 94 Ga. 553, 21 S. E. 220. **Md.** Crook *v.* Brown, 11 Md. 158, 170. **N. Y.** Lord *v.* Underdunck, 1 Sandf. Ch. 46), if (2) their interests are not inconsistent. Crook *v.* Brown, 11 Md. 158, 170.

18. See *infra,* this note.

[a] **Joinder for Purposes of Contribution.**—If the assignee of a bond for conveyance has to pay, as a necessary means to obtain title, more than he is bound to pay, his assignor is a necessary party so that he may be compelled to pay his share of the increased burden. Combs *v.* Tarlton's Admrs., 2 B. Mon. (Ky.) 191.

19. Betton *v.* Williams, 4 Fla. 11, 18.

20. Butler *v.* Rockwell, 14 Colo. 125, 23 Pac. 462.

21. Butler *v.* Rockwell, 14 Colo. 125, 137, 23 Pac. 462 (but the court does not decide that the vendor is an indispensable party); Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091.

22. Miller *v.* Henderson, 10 N. J. Eq. 320. See Woodward *v.* Clark, 15 Mich. 104.

23. Lord *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 46; Hoskins *v.* Dougherty,

without joining the assignees as parties to the action.[24]

Intermediate assignees are necessary parties to an action on a title bond for land, it has been held.[25]

e. *After the Death of a Party.* — **(I.) Of the Purchaser.** — After the death of a purchaser of real property, his heirs at law,[26] or if the property has been devised, the devisees[27] are the proper parties to enforce the contract. The personal representative, who has not control of the realty cannot sue to specifically enforce a contract for the purchase thereof,[28] but if the purchase money has not been paid, he must be joined.[29]

(II.) Of the Vendor. — After the death of the vendor of real property, his personal representatives should bring the action.[30] According to some authorities, the heirs,[31] and if the land was devised by the

29 Tex. Civ. App. 318, 322, 69 S. W. 103.

[a] **One of the assignees** cannot enforce the contract. Lord *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 46.

[b] **The assignor is a necessary** party. Lord *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 46.

24. Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501; Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103.

25. Hancock *v.* Beckham, 5 Litt. (Ky.) 135; Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622. *Compare* McCarthy *v.* Couch, 37 Minn. 124, 33 N. W. 777.

26. **Ga.**—Hadden *v.* Thompson, 118 Ga. 207, 44 S. E. 1001. **Ill.**—Gibbs *v.* Blackwell, 37 Ill. 191. **Mich.**—House *v.* Dexter, 9 Mich. 246. **N. J.**—Hand *v.* Jacobus, 19 N. J. Eq. 79. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630. **Wyo.**—Boburg *v.* Prahl, 3 Wyo. 325, 23 Pac. 70.

[a] **The widow of the vendee** is not a necessary party. Deniston *v.* Hoagland, 67 Ill. 265.

27. Buck *v.* Buck, 11 Paige (N. Y.) 170; Boburg *v.* Prahl, 3 Wyo. 325, 23 Pac. 70.

[a] **The heirs need not be joined** as plaintiffs or defendants to the devisee's action, unless the validity of the well is to be questioned. Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325. See Hubbard *v.* Johnson, 77 Me. 139.

[b] **Revivor.**—If the purchaser dies pending suit, the devisee can obtain the benefit of the former suit only by an original bill in the nature of a bill of revivor. He cannot revive by a bill of revivor. Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325, 330. See the title, "**Revivor.**"

28. Buck *v.* Buck, 11 Paige (N. Y.) 170; Boburg *v.* Prahl, 3 Wyo. 325, 23 Pac. 70.

29. Newark Sav. Institution *v.* Jones' Exrs., 35 N. J. Eq. 406; Downing *v.* Risley, 15 N. J. Eq. 93; Miller *v.* Henderson, 10 N. J. Eq. 320.

[a] **But co-executors who have not proved the will** and who have not accepted the office of executor are not proper parties. Newark Sav. Institution *v.* Jones' Exrs., 35 N. J. Eq. 406.

30. **Ala.**—Hays *v.* Hall, 4 Port. 374, 385, 30 Am. Dec. 530. **D. C.**—Griffith *v.* Stewart, 31 App. Cas. 29, 36. **Ill.** Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761; Burger *v.* Potter, 32 Ill. 66. **Mo.**—Leeper *v.* Lyon, 68 Mo. 216. **N. J.** Coles *v.* Feeney, 52 N. J. Eq. 493, 29 Atl. 172. **W. Va.**—Steenrod's Admr. *v.* Wheeling P. & B. R. Co., 27 W. Va. 1.

[a] **The reason** of the rule in the test is (1) that the purchase money is treated in equity as the personal property of the vendor, and as such goes to his personal representatives. Hays *v.* Hall, 4 Port. (Ala.) 374, 385, 30 Am. Dec. 530. (2) The contract works a conversion of the land from real to personal property. Coles *v.* Feeney, 52 N. J. Eq. 493, 29 Atl. 172; Steenrod's Admr. *v.* Wheeling, P. & B. R. Co., 27 W. Va. 1.

31. **Ala.**—Hays *v.* Hall, 4 Port. 374, 385, 30 Am. Dec. 530. **Miss.**—Kimbrough *v.* Curtis, 50 Miss. 117; Mitchell *v.* Shell, 49 Miss. 118. **W. Va.**—Capehart *v.* Hale, 6 W. Va. 547, 558. *Compare* Steenrod's Admr. *v.* Wheeling, P. & B. R. Co., 27 W. Va. 1.

Contra, Griffith *v.* Stewart, 31 App.

vendor, the devisees,[32] are necessary parties to the action.

f. *After Appointment of a Receiver.* — A receiver may specifically enforce the contracts of the corporation of which he is receiver.[33]

g. *Joinder of Parties Plaintiff.*[34] — If the contract is joint, all the promisees must join as parties plaintiff.[35] If an estate be sold in separate lots to different persons under independent contracts, the purchasers cannot join in one bill against the vendor for specific performance.[36] But where there is but one contract to convey, the purchasers may join although their interests are not joint.[37] In an action by an executor for specific performance of a contract of sale of land made by him, the devisees are not necessary parties.[38]

3. Parties Defendant. — a. *Generally.* — As a general rule, a stranger to the contract is not a proper party defendant.[39] But this rule is subject to exceptions.[40]

b. *Adverse Claimants.* — In an action by the purchaser, all persons claiming any interest in the land connected with the plaintiff's equity or with the title of the vendor should be made parties,[41] but a

Cas. (D. C.) 29, 36 (under the laws of Maryland); Shannon *v.* Taylor, 16 Tex. 413.

[a] **Unless the personal representative tenders a proper deed from the heirs,** they are necessary parties. Kimbrough *v.* Curtis, 50 Miss. 117. But see Leeper *v.* Lyon, 68 Mo. 216.

32. Coles *v.* Feeney, 52 N. J. Eq. 493, 29 Atl. 172; Capehart *v.* Hale, 6 W. Va. 547, 558.

33. Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098. See the title, "**Receivers.**"

34. **Other illustrations** of the rules as to joinder are discussed *supra,* this section.

35. **Ga.**—Williams *v.* Shuman, 141 Ga. 114, 80 S. E. 625. **Ill.**—Davis *v.* Pfeiffer, 213 Ill. 249, 72 N. E. 718. **Mass.**—New Braintree *v.* Southworth, 4 Gray 304.

36. Owen *v.* Frink, 24 Cal. 171; Rayner *v.* Julian, Dick. 677, 21 Eng. Reprint 435. See Laughead *v.* Beale, 24 Pa. Co. Ct. 465.

37. Owen *v.* Frink, 24 Cal. 171.

[a] **The reason is** that the parties have a connected interest among all centering in the point in issue. Owen *v.* Frink, 24 Cal. 171.

[b] **Illustration.**—Where an owner contracts to convey land to another who in turn conveys to several persons, the assignees may join in an action against the original owner, although the lands have come to them respectively in divided moieties. Owen *v.* Frink, 24 Cal. 171.

38. Varble *v.* Collins' Exr., 168 Ky. 247, 181 S. W. 1115, Ann. Cas. 1916D, 448.

39. See *supra,* I, I, 1.

40. See *infra,* this note.

[a] **An undisclosed principal may be** compelled to specifically perform. Forgey *v.* Gilbirds, 262 Mo. 44, 170 S. W. 1135.

[b] **The real purchaser, who signs the name of another to the contract,** is a necessary party to the suit. Cowan *v.* Kane, 211 Ill. 572, 576, 71 N. E. 1097.

[c] **In an action to enforce a contract for the sale of a steamship,** in which it is alleged that the registered owner holds title for the benefit of an individual, the individual is a proper, if not a necessary, party defendant. Menier *v.* Donald, 98 Misc. 684, 165 N. Y. Supp. 50.

[d] **An infant to whom part of the purchase money notes is made payable** is a proper party, although not named in the contract. Gentry *v.* Gentry, 87 Va. 478, 12 S. E. 966.

[e] **A person with whom the deed is left** by the vendor for delivery on payment of the purchase money is a proper but not a necessary party to an action by the purchaser. Rea *v.* Ferguson, 126 Iowa 704, 102 N. W. 778; Davis *v.* Henry, 4 W. Va. 571.

41. **Ark.**—Ashley *v.* Little Rock, 56 Ark. 391, 19 S. W. 1058. **Ky.**—Huber *v.* Johnson, 174 Ky. 697, 192 S. W. 821. **Minn.**—Seager *v.* Burns, 4 Minn. 141. **N. Y.**—International Paper Co. *v.*

claimant whose interest is not so connected should not be joined. He is neither a necessary nor a proper party.[42]

c. *Persons in Possession.* — It has been held that a stranger to the contract in possession of the premises ought not to be made a party defendant.[43]

d. *Holder of Legal Title.* — It has been held that the holder of the legal title to the premises is a necessary party, although not a party to the contract.[44] Undisclosed coowners of the land purchased are proper parties defendant to an action to enforce a contract made by one of them.[45]

e. *Lienors.* — It has been held that prior mortgagees of the premises and lienholders are not proper parties[46] to a suit for specific per-

Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. Supp. 736.

[a] **"All persons having or claiming an interest in the land derived from the vendor** after the contract, and with notice thereof, are necessary defendants in a suit brought by the vendee, or his representatives." International Paper Co. *v.* Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. Supp. 736.

[b] **The widow of the vendor's father** is a proper party to an action by him where the defendant claims his estate is a fee defeasible upon his mother's survival of him. Kornegay *v.* Morris, 123 N. C. 128, 31 S. E. 375.

42. **Ark.**—Ashley *v.* Little Rock, 56 Ark. 391, 19 S. W. 1058. **Md.**—Crook *v.* Brown, 11 Md. 158, 172. **Va.**—Lange *v.* Jones, 5 Leigh (32 Va.) 192. **W. Va.** Miller *v.* Morrison, 47 W. Va. 664, 669, 35 S. E. 905. **Eng.**—Tasker *v.* Small, 3 Myl. & C. 63, 6 Sim. 625, 5 L. J. Ch. (N. S.) 321, 40 Eng. Reprint 848.

[a] **A reason is** that the adverse claimant cannot be deprived of his right to have his title passed on by a jury. Miller *v.* Morrison, 47 W. Va. 664, 671, 35 S. E. 905.

[b] **It is multifariousness** to include in the bill a prayer for relief against third persons claiming an interest in the estate, but unconnected with the sale. Crook *v.* Brown, 11 Md. 158, 172, *citing* Mole *v.* Smith, Jac. 490, 37 Eng. Reprint 935.

43. Crook *v.* Brown, 11 Md. 158; Robertson *v.* Great Western Ry. Co., 10 Sim. 314, 9 L. J. Ch. (N. S.) 17, 59 Eng. Reprint 635, the tenant of the purchaser. But see Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. N. S. 161, 16 Wkly. Rep. 72, holding that where possession is sought by the bill, the person in possession of the premises will be affected by the decree, and should be made a party although a stranger to the contract.

44. **U. S.**—Preston *v.* Walsh, 10 Fed. 315. **Ky.**—Slaughter *v.* Nash, 1 Litt. 322, where the vendor agreed to make a conveyance as soon as he could obtain title from the owner. **N. Y.** Moubray *v.* Dieckman, 9 App. Div. 120, 41 N. Y. Supp. 82, the holder of the legal title for the benefit of the promisor is a necessary party although he has no beneficial interest.

[a] **But the holder of the legal title who is a stranger to the contract is** not a necessary party, where the claims of the parties can be determined without prejudice to the rights of the holder of the title. Sproull *v.* Miles, 82 Ark. 455, 102 S. W. 204. See also 20 STANDARD PROC. 890, note 7.

45. Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46 (where several co-owners authorized one of their number as agent to sell the property); Hopkins *v.* Baremore, 99 Minn. 413, 109 N. W. 831, where the fact of the joint ownership was concealed from the purchaser.

[a] **But a co-owner who is not a party to the contract is not a necessary party where** no relief is sought against him and there is no showing in the complaint that he is not willing to carry out the agreement. Stanton *v.* Singleton (Cal.), 54 Pac. 587.

46. **Ark.**—Jones *v.* School Dist. No. 48, 208 S. W. 798, not a necessary party. **N. Y.**—Chapman *v.* West, 17 N. Y. 125. **Eng.**—Tasker *v.* Small, 3 Myl. & Craig 63, 6 Sim. 625, 5 L. J. Ch. (N. S.) 321, 40 Eng. Reprint 848.

formance of a contract to convey, but subsequent mortgagees are sometimes proper parties.[47]

f. *Creditors.* — Judgment[48] and execution or attachment[49] creditors of the vendor subsequent to the contract are proper parties to an action brought by the purchaser.

g. *Trusts and Trustees.* — It has been held that the beneficiaries should be parties to an action to enforce a contract made by the trustee.[50] Although the vendor is a trustee holding the land or property in trust for another, the beneficiaries need not be joined as co-defendants.[51]

h. *Principal and Agent.* — As a general rule the agent of the vendor is not a proper party defendant.[52] But the principal is a necessary party.[53]

i. *After Assignment.* — **Subsequent Purchasers and Lessees.** — A vendee or lessee may sue and compel specific performance by a subsequent grantee or lessee of the vendor who receives the property with notice of the contract,[54] or who receives the property without parting with

But *compare* Lazzell *v.* Keenan, 77 W. Va. 180, 87 S. E. 80.

[a] And see Bryan *v.* Barriger, 251 Fed. 328, holding equity in its discretion may permit or require lienholders as parties when the conveyance calls for a conveyance free from liens. Equity may then ascertain the amount of the lien, so as to enable it to judge how much the purchase price should be abated.

[b] **Where the vendor agrees to pay the encumbrances or suffer** an abatement of the purchase price, the lienor is not a necessary party to his suit. McCullough *v.* Sutherland, 153 Fed. 418.

47. International Paper Co. *v.* Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. Supp. 736, where a trustee of a mortgage to secure the payment of bonds none of which have been issued for value was joined.

48. Seager *v.* Burns, 4 Minn. 141.

49. Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. 115.

50. Trustees of Internal Imp. Fund *v.* Gleason, 15 Fla. 384, 399. See the title "**Trusts and Trustees.**"

51. Washburn & Moen Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71; Gibbs *v.* Blackwell, 37 Ill. 191.

[a] **When the legal title is in a trustee for a corporation** vendor, the trustee is a necessary party. Morrow *v.* Lawrence, 7 Wis. 574.

52. **Ark.**—Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46. **Ill.**—Roby *v.* Cossitt, 78 Ill. 638. **Ind.** Dahoney *v.* Hall, 20 Ind. 264.

See 21 STANDARD PROC. 548.

53. Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46.

54. **Ill.**—Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. **Ind.**—Jordan *v.* Johnson, 50 Ind. App. 213, 98 N. E. 143. **Kan.**—Wilson *v.* Emig, 44 Kan. 125, 24 Pac. 80. **Mich.**—Putnam *v.* Tinkler, 83 Mich. 628, 633, 47 N. W. 687; Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844. **N. J.**—Cranwell *v.* Clinton Realty Co., 67 N. J. Eq. 540, 58 Atl. 1030; Brinton *v.* Scull, 55 N. J. Eq. 747, 757, 35 Atl. 843; Downing *v.* Risley, 15 N. J. Eq. 93. **N. Y.**—Champion *v.* Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343. **N. D.** Hunter *v.* McDevitt, 12 N. D. 505, 97 N. W. 869. **W. Va.**—Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220. **Eng.**—Taylor *v.* Stibbert, 2 Ves. Jr. 437, 30 Eng. Reprint 713.

[a] **Otherwise as to Bona Fide Purchasers.**—Halsell *v.* Renfrow, 202 U. S. 287, 26 Sup. Ct. 610, 50 L. ed. 1032; Charlton *v.* Columbia Real Estate Co., 64 N. J. Eq. 631, 54 Atl. 444, *reversed*, 67 N. J. Eq. 629, 60 Atl. 192, 110 Am. St. Rep. 495, 69 L. R. A. 394. See *supra*, I, C, 7.

[b] **Sublessees** are necessary parties to an action to enforce a covenant to renew a lease. Yip Lan *v.* Ahulii, 23 Hawaii 307.

a valuable consideration.[55] He is a necessary party to the action.[56] The original vendor is a proper[57] but not a necessary[58] party to an action against his assignee or grantee.

The assignee of a purchase money note is a necessary party to an action against the vendor.[59]

Assignee of Vendee.— It has been held that the vendor cannot bring specific performance against the assignee of the vendee[60] unless there is a novation.[61] The assignee, however, has been held to be a proper,[62] although not a necessary,[63] party to an action against the original purchaser.

Assignment Pendente Lite. — Purchasers of the property pending an action against the vendor may or may not be brought in at the election of the complainant.[64] But it has been held they are necessary parties.[65]

55. Chicago & E. I. R. Co. *v.* Hay, 119 Ill. 507, 10 N. E. 34.

56. **Cal.**—Estate of Corwin, 61 Cal. 160. **Kan.**—Atchison, T. & S. F. Ry. Co. *v.* Benton, 42 Kan. 698, 22 Pac. 698. **La.**—Briel *v.* Postal Telegraph Co., 112 La. 412, 36 So. 477. **Mich.**—Chapman *v.* Morgan, 55 Mich. 124, 20 N. W. 820. **Miss.**—Stone *v.* Buckner, 12 Smed. & M. 73. **Mo.**—Hunter *v.* Gallagher, 4 Mo. 364.

57. **Del.**—Long *v.* Chandler (Del. Ch.), 98 Atl. 189. **La.**—Briel *v.* Postal Tel. Co., 112 La. 412, 36 So. 477. **Mich.** Daily *v.* Litchfield, 10 Mich. 29. **Eng.** Potter *v.* Sanders, 6 Hare 1, 67 Eng. Reprint 1057.

58. **Fla.**—Betton *v.* Williams, 4 Fla. 11. **Haw.**—Oherá *v.* Ackerman, 9 Hawaii 597. **Ill.**—Grafton Dolomite Stone Co. *v.* St. Louis, C. & St. P. R. Co., 199 Ill. 458, 65 N. E. 424. **Kan.** Topeka Water Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715. **Mich.**—See Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844.

See also 20 STANDARD PROC. 889, 890, note 94.

[a] **If the complainant accepts the assignee instead of the assignor,** there is no necessity of joining the assignor. But if no contract relations between the vendee and the vendor's assignee are established, the original vendor may be joined. Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844.

59. Pollock *v.* Wilson, 3 Dana (Ky.) 25.

60. Corbus *v.* Teed, 69 Ill. 205; Suydam *v.* Dunton, 84 Hun 506, 32 N. Y. Supp. 333; Forbes *v.* Reynard, 46 Misc. 154, 93 N. Y. Supp. 1097; Champion *v.* Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343. **But see Robinson *v.* Appleton,** 124 Ill. 276, 15 N. E. 761. The vendor may likewise enforce the contract against subsequent purchasers and assignees of the vendee taking with notice. And *compare* Betton *v.* Williams, 4 Fla. 11, 21, holding that in an action against the assignee of the vendee, the vendee is a proper, but not a necessary, party.

[a] **The reason** is that the assignment transfers the assignor's demand but does not transfer his liabilities without some agreement upon the assignee's part to assume them. Forbes *v.* Reynard, 46 Misc. 154, 93 N. Y. Supp. 1097.

[b] **A clause in the contract** that the promise is binding on the vendee's assigns does not alter the rule. Forbes *v.* Reynard, 46 Misc. 154, 93 N. Y. Supp. 1097.

[c] **Remedy.**—But the vendor by virtue of his lien may call upon the assignee to pay the money, or surrender the possession of the land, or have it sold for the benefit of the vendor. Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

61. Suydam *v.* Dunton, 84 Hun 506, 32 N. Y. Supp. 333; Forbes *v.* Reynard, 46 Misc. 154, 93 N. Y. Supp. 1097.

62. Rose *v.* Swann, 56 Ill. 37.

63. Rose *v.* Swann, 56 Ill. 37.

64. Steele *v.* Taylor, 1 Minn. 274. See Goddin *v.* Vaughn's Exrx., 14 Gratt. (55 Va.) 102.

65. Casady *v.* Scallen, 15 Iowa 93; Haughwout *v.* Murphy, 22 N. J. Eq. 531, 545. *Contra,* Edwards *v.* Norton, 55 Tex. 405.

[a] **By supplemental bill,** the vendor's grantee pendente lite should be brought in. Casady *v.* Scallen, 15 Iowa 93.

j. *After Death of a Party.* — After the death of the vendor, an action for specific performance of a contract to convey real property should be brought against the heirs, or devisees.[66] The personal representative is a necessary party as the money must be paid to him.[67] Under some statutes, the action may be brought against the personal representative,[68] or against the personal representative or the heirs or devisees of the vendor at the option of the plaintiff.[69]

In an action to enforce a contract to convey personal property, the executor is a necessary party.[70]

Contract To Make a Will. — When a person contracts to give all his real and personal property on his death to the promisee, it has been held that the personal representative is a necessary party.[71]

After the death of the vendee, the personal representative, if there is one,[72] and the heirs or devisees[73] are necessary parties to the action.

k. *Joinder.* — Joint obligors must be joined as parties defendant.[74] But a bill to enforce several distinct contracts against different defendants is multifarious.[75]

4. Intervention. — A prior purchaser of real property may be permitted to come into and defend a suit by a subsequent purchaser to enforce his contract of sale.[76]

J. Bill or Complaint. — **1. In General.** — The bill or complaint for specific performance must state a cause of action for such relief in accordance with the general rules.[77]

66. **Ia.**—Judd *v.* Mosely, 30 Iowa 423. **Ky.**—Craig *v.* Johnson, 3 J. J. Marsh. 572. **N. H.**—Kidder *v.* Barr, 35 N. H. 235, 253. **N. J.**—Miller *v.* Henderson, 10 N. J. Eq. 320. **N. Y.**—Hill *v.* Ressegieu, 17 Barb. 162. **W. Va.** Gallatin Land, Coal & Oil Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747.

[a] **Although not named in the contract,** the heir of the deceased vendor may be required to specifically perform the contract of his ancestor. Hill *v.* Ressegieu, 17 Barb. (N. Y.) 162.

[b] **After the heirs have conveyed their title to the administrator** to enable him to transfer the title, they are no longer necessary parties. Schroeppel *v.* Hopper, 40 Barb. (N. Y.) 425.

[c] **Such heirs as have already conveyed to the plaintiff** need not be joined. Barnard *v.* Macy, 11 Ind. 536.

67. Potter *v.* Ellice, 48 N. Y. 321.

68. Judd *v.* Mosely, 30 Iowa 423.

[a] **This statute is permissive** and does not preclude suing the heirs in the first instance. In such action the personal representative is not a necessary party. Judd *v.* Mosely, 30 Iowa 423.

69. See the statutes, and Looney *v.* Trent Trust Co., 23 Hawaii 208.

70. Kempton *v.* Bartine, 60 N. J. Eq. 411, 45 Atl. 966.

71. Kempton *v.* Bartine, 59 N. J. Eq. 149, 44 Atl. 461, an action to enforce an agreement to give and devise all the real and personal property to the plaintiff. But see McCabe *v.* Healy, 138 Cal. 81, 70 Pac. 1008 (the administrator is a mere stakeholder with no interest in the result of the litigation and is not a necessary party); Eastman *v.* Eastman (Me.), 104 Atl. 1.

72. **Miss.**—Jackson *v.* McCoy, 56 Miss. 781. **N. J.**—Downing *v.* Risley, 15 N. J. Eq. 93, he alone, and not the heirs, is liable for the purchase money. **Pa.**—Anshutz's Appeal, 34 Pa. 375.

[a] **Otherwise If No Administration is Granted.**—Jackson *v.* McCoy, 56 Miss. 781.

73. Jackson *v.* McCoy, 56 Miss. 781; Anshutz's Appeal, 34 Pa. 375.

74. Clements *v.* Miller, 13 N. D. 176, 100 N. W. 239.

75. Laughead *v.* Beale, 24 Pa. Co. Ct. 465.

76. Carter *v.* Mills, 30 Mo. 432. See generally the title "**Intervention.**"

77. Steele *v.* Steele, 112 Ill. App. 409.

Specific Performance by Way of Cross-Action. — The rules applying to bills for specific performance apply to cross-complaints for specific performance filed in actions of ejectment and other suits.[78]

2. **Particular Allegations** — a. *The Contract.* — The bill or complaint must allege the contract,[79] state its terms[80] with clearness[81] and

[a] **The complaint must allege facts which** are sufficient upon a default to enable the court to draft a decree from its averments. Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880.

[b] **Ambiguity Must Be Avoided.** Wakeham *v.* Barker, 82 Cal. 46, 22 Pac. 1131; Durkee *v.* Cota, 74 Cal. 313, 16 Pac. 5

[c] **Complaints held sufficient to state a cause of action,** see the following: **Cal.**—Boone *v.* Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Farnum *v.* Clarke, 148 Cal. 610, 84 Pac. 166; Marshall *v.* Caldwell, 41 Cal. 611. **Ga.**—Turman *v.* Smarr, 145 Ga. 312, 89 S. E. 214; Gartrell *v.* McCravey, 144 Ga. 688, 87 S. E. 917; Patillo *v.* Jones, 113 Ga. 330, 38 S. E. 745. **Ind.**—Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287. **Mich.**—Chicago Lumbering Co. *v.* Powell, 120 Mich. 51, 78 N. W. 1022. **Minn.**—Halvorsen *v.* Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320. **Neb.**—Solt *v.* Anderson, 62 Neb. 153, 86 N. W. 1076, *reversed* on rehearing, 63 Neb. 734, 89 N. W. 306. **Okla.**—Baumhoff *v.* Oklahoma City Elec. & G. & P. Co., 14 Okla. 127, 77 Pac. 40. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630. **S. D.** Burgess *v.* Burgess, 17 S. D. 44, 95 N. W. 279. **Utah.**—Gammon *v.* Bunnell, 22 Utah 421, 64 Pac. 958. **Wash.** Young *v.* Porter, 27 Wash. 551, 68 Pac. 362. **Wis.**—Morrow *v.* Lawrence, 7 Wis. 574.

Forms of bills and complaints, see 9 STANDARD PROC. 1159.

[d] **An executor should not describe himself merely as "personal representative"** of a person deceased, but as the executor of his testator. Capehart *v.* Hale, 6 W. Va. 547.

[e] **That the plaintiff was induced to enter into the contract through material misrepresentations** of the defendant need not be alleged. Cashman *v.* Bean, 226 Mass. 198, 115 N. E. 574, because the suit is founded upon an affirmance of the contract.

78. Nunez *v.* Morgan, 77 Cal. 427, 19 Pac. 753.

[a] See the following cases in which cross-complaints for specific performance were filed. **Ark.**—Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46. **Cal.**—Marshall *v.* Caldwell, 41 Cal. 611. **Ill.**—Hoopeston Public Library *v.* Eaton, 283 Ill. 449, 119 N. E. 647. **Kan.**—Stramel *v.* Hawes, 97 Kan. 120, 154 Pac. 232. **W. Va.**—Hinchman *v.* Ballard, 7 W. Va. 152.

79. **Ala.**—Pepper *v.* Horn, 197 Ala. 395, 73 So. 46. **Cal.**—Senter *v.* Davis, 38 Cal. 450. **Ill.**—Finty *v.* Kinder, 194 Ill. App. 115. **Ind.**—Drum *v.* Stevens, 94 Ind. 181; Horner *v.* Clark, 27 Ind. App. 6, 60 N. E. 732. **Md.**—McDowell *v.* Biddison, 120 Md. 118, 87 Atl. 752; Dixon *v.* Dixon, 92 Md. 432, 48 Atl. 152. **Mich.**—Wright *v.* Wright, 31 Mich. 380. **Ore.**—Skinner *v.* Furnas, 82 Ore. 414, 161 Pac. 962. **Va.**—Edichal Bullion Co. *v.* Columbia Gold Min. Co., 87 Va. 641, 13 S. E. 100. **Wis.**—Morrow *v.* Lawrence, 7 Wis. 574.

Allegation of agency where the contract is made by an agent, see 21 STANDARD PROC. 555.

[a] **Who the purchaser is** should be shown. Brainard *v.* Jordan (Tex. Civ. App.), 60 S. W. 784.

[b] **That the purchaser promised or agreed to pay the consideration** must be alleged in a bill by the vendor. Capehart *v.* Hale, 6 W. Va. 547.

Requisites of the contract, see *supra,* I, C, 1, et seq.

80. **Ala.**—Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473. **Cal.**—Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401. **Fla.** Dixie Naval Stores Co. *v.* German American Lumber Co. (Fla.), 79 So. 836. **R. I.**—Romano *v.* Di Cola, 24 R. I. 239, 52 Atl. 987; Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717. **Tex.**—Jones *v.* Jones, 49 Tex. 683. **Wash.**—O'Connor *v.* Jackson, 23 Wash. 224, 62 Pac. 761.

81. **Ala.**—Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473. **Conn.**—Patterson *v.* Farmington St. Ry. Co., 76 Conn. 628, 57 Atl. 853. **Fla.**—Dixie Naval Stores Co. *v.* German-American Lumber

particularity, and its consideration,[82] and allege its execution.[83] The contract may be pleaded in haec verba,[84] or according to its legal effect.[85] If any terms of the contract are omitted by mistake, that fact must be alleged.[86]

b. *The Consideration.* — The complaint must allege a consideration for the contract sued upon,[87] unless the contract reciting receipt of a consideration is made a part of the pleading.[88] In some states it is sufficient to allege a valuable consideration as against a general demurrer;[89] but in others it is necessary to allege facts showing that

Co., 79 So. 836. **Md.**—Fardy *v.* Williams, 38 Md. 493.

[a] **A parol contract** for the sale of land must be (1) distinctly, definitely and precisely averred. Pepper *v.* Horn, 197 Ala. 395, 73 So. 46; Allen *v.* Young, 88 Ala. 338, 340, 6 So. 747. (2) It must be set out with reasonable certainty. Baldenberg *v.* Warden, 14 W. Va. 397.

82. See *infra*, I, J, 2, b.

83. Hanchett *v.* McQueen, 32 Mich. 22.

[a] **Delivery.** — An allegation that the defendants "made and entered into" the agreement sufficiently imports a delivery. Stanton *v.* Singleton (Cal.), 54 Pac. 587.

[b] **That the contract was signed** by the party need not be alleged. Blakeney *v.* Ferguson, 8 Ark. 272, 276; Capehart *v.* Hale, 6 W. Va. 547.

Allegation of agency when the contract is made by an agent, see generally the title "**Principal and Agent.**"

84. Durkee *v.* Cota, 74 Cal. 313, 16 Pac. 5; Joseph *v.* Holt, 37 Cal. 250, 253.

[a] **Pleading in Haec Verba Is Preferred.**—Joseph *v.* Holt, 37 Cal. 250.

[b] **Requisites of Contract.**—A contract to be pleaded in haec verba must show upon its face in direct terms, and not by implication, all the facts which the pleader would be required to allege when pleading according to its legal effect. Thus a note or memorandum of the contract is insufficient when pleading in haec verba. Joseph *v.* Holt, 37 Cal. 250. See also Ramono *v.* Di Cola, 24 R. I. 239, 52 Atl. 987.

[c] **If the contract set out in haec verba is uncertain,** the pleader must put some definite construction upon it by averment. Durkee *v.* Cota, 74 Cal. 313, 16 Pac. 5; Harrigan *v.* Dodge, 200 Mass. 357, 86 N. E. 780.

85. Joseph *v.* Holt, 37 Cal. 250. See 11 STANDARD PROC. 989.

86. Popplein *v.* Foley, 61 Md. 381, 386 (and the plaintiff must ask a reformation of the contract and enforcement as reformed); Coles *v.* Bowne, 10 Paige Ch. (N. Y.) 526, 532. But see Park *v.* Johnson, 4 Allen (Mass.) 259.

[a] **The complaint should not merely state** the agreement as it ought to have been reduced to writing, but must also state the substance of the written agreement, and show wherein it differs from the one actually made. Coles *v.* Bowne, 10 Paige Ch. 526 (N. Y.) 532.

[b] **Fraud or mistake** must be alleged. Rittenhouse *v.* Tomlinson's Exrs., 27 N. J. Eq. 379.

87. **Cal.**—Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386. **Ga.**—Patillo *v.* Jones, 113 Ga. 330, 38 S. E. 745. **Mass.**—Moore *v.* Elmer, 180 Mass. 15, 61 N. E. 259. **Mont.**—Finlen *v.* Heinze, 28 Mont. 548, 563, 73 Pac. 123; Mayger *v.* Cruse, 5 Mont. 485, 6 Pac. 333. **Tex.**—Tumlinson's Admr. *v.* York's Admr., 20 Tex. 694.

In actions at law, see 11 STANDARD PROC. 987.

[a] **Although the contract is under seal,** a consideration must be alleged, if the contract does not recite a consideration. Tumlinson's Admr. *v.* York's Admr., 20 Tex. 694.

[b] **If the option is not the contract sued on,** the plaintiff need not allege the option is founded on a valuable consideration. Patillo *v.* Jones, 113 Ga. 330, 38 S. E. 745.

88. Byars *v.* Thompson, 80 Tex. 468, 15 S. W. 1087; Tumlinson's Admr. *v.* York's Admr., 20 Tex. 694.

[a] **Otherwise if the Contract Contains No Such Recital.**—Tumlinson's Admr. *v.* York's Admr., 20 Tex. 694.

89. Patillo *v.* Jones, 113 Ga. 330, 38 S. E. 745.

the consideration is adequate in amount and not disproportionate to the value of the property to be conveyed or the acts to be performed.[90] This fact may be shown by alleging the value of the property contracted for,[91] and the sum or value of the consideration therefor,[92] or by alleging other facts showing the adequacy of the consideration.[93] The plaintiff is not, however, required to make a specific allegation that the contract is supported by an adequate consideration.[94]

90. McRae *v.* Ross, 170 Cal. 74, 148 Pac. 215; Lynn *v.* Knob Hill Improvement Co. (Cal.), 169 Pac. 1009; Joyce *v.* Tomasini, 168 Cal. 234, 142 Pac. 67; Kaiser *v.* Barron, 153 Cal. 788, 96 Pac. 806; Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Bruck *v.* Tucker, 42 Cal. 346; Porter *v.* Anderson, 14 Cal. App. 716, 113 Pac. 345. See also Bear Track Min. Co. *v.* Clark, 6 Idaho 196, 201, 54 Pac. 1007. *Compare* Brown *v.* Sebastopol, 153 Cal. 704, 96 Pac. 363, 19 L. R. A. (N. S.) 178.

[a] *Contra,* Finlen *v.* Heinze, 28 Mont. 548, 563, 73 Pac. 123, holding that although the statutes of California and Montana are alike, the California cases will not be adopted. The plaintiff must allege the consideration, the burden is upon the defendant to show its inadequacy.

[b] **In other words,** that the value of the land and the price to be paid are in reasonable approximation to equality. Dore *v.* Southern Pac. Co., 163 Cal. 182, 196, 124 Pac. 817.

[c] **An allegation of the conclusion** that the contract is supported by an adequate consideration, etc., is not sufficient. Joyce *v.* Tomasini, 168 Cal. 234, 142 Pac. 67; Walter G. Reese Co. *v.* House, 162 Cal. 740, 124 Pac. 442; Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231.

[d] **An allegation that the contract is fair,** equitable and reasonable is insufficient to show adequacy of consideration. Smiley *v.* Read, 163 Cal. 644, 126 Pac. 486.

[e] **The recital in the bond that it is for value received** and an averment that the agreement was made for a valuable consideration are insufficient. Bruck *v.* Tucker, 42 Cal. 346.

[f] **But if the defendant has accepted and retained the consideration,** its adequacy need not be shown. Fleishman *v.* Woods, 135 Cal. 256, 261, 67 Pac. 276; Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778; Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469.

[g] **But in a suit to enforce a contract to exchange property,** it is not necessary to allege that one property is of the value of the other. Davenport *v.* Plano Implement Co., 70 Ill. App. 161.

91. Lynn *v.* Knob Hill Improvement Co. (Cal.), 169 Pac. 1009; Walter G. Reese Co. *v.* House, 162 Cal. 740, 124 Pac. 442; White *v.* Sage, 149 Cal. 613, 87 Pac. 193; Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386. *Contra,* Brainard *v.* Jordan (Tex. Civ. App.), 60 S. W. 784, holding the value of the land need not be alleged.

[a] **Rule Stated.**—"There must be a showing of the value, at least, so that the court can determine whether or not it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements." White *v.* Sage, 149 Cal. 613, 87 Pac. 193, *quoted* in Cummings *v.* Roeth, 10 Cal. App. 144, 149, 101 Pac. 434.

[b] **An allegation** (1) that the value of the property does not exceed a certain sum which is the consideration mentioned in the contract is sufficient. Boyd *v.* Warden, 163 Cal. 155, 124 Pac. 841; Walter G. Reese Co. *v.* House, 162 Cal. 740, 124 Pac. 442. (2) Such an allegation is an averment of fact. Walter G. Reese Co. *v.* House, 162 Cal. 740, 124 Pac. 442.

[c] **An allegation as to the placing of improvements** on the land does not cure an omission to allege the value of the land. Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386.

92. Bruck *v.* Tucker, 42 Cal. 346.

93. Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469.

94. Boyd *v.* Warden, 163 Cal. 155, 124 Pac. 841; Wait *v.* Kern River Min., etc. Co., 157 Cal. 16, 25, 106 Pac. 98; Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231.

c. *Avoidance of Statute of Frauds.* — A contract within the statute of frauds need not be alleged to be in writing as a general rule.[95] But if the complainant relies on part performance to take the contract out of the statute of frauds, such performance must be alleged.[96] Thus the purchaser of land must allege that he has taken possession of the premises[97] pursuant to the terms of the contract,[98] and if the making of improvements upon the land is also required to take the contract out of the statute of frauds, that must be alleged.[99]

[a] **But it is always safer to aver** that the price paid was a just and fair price and the full value of the premises, in view of the intimation in Fleishman *v.* Woods, 135 Cal. 256, 263, 67 Pac. 276; Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49; Bruck *v.* Tucker, 42 Cal. 346; Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107.

95. **Cal.**—Nunez *v.* Morgan, 77 Cal. 427, 19 Pac. 753; McGinn *v.* Willey, 24 Cal. App. 303, 141 Pac. 49. But *compare* Hines *v.* Copeland, 23 Cal. App. 36, 136 Pac. 728. **Minn.**—Benton *v.* Schulte, 31 Minn. 312, 17 N. W. 621. **Mo.**—Young Men's Christian Assn. *v.* Dubach, 82 Mo. 475. **N. Y.**—Coles *v.* Bowne, 10 Paige Ch. 526. **W. Va.** Capehart *v.* Hale, 6 W. Va. 547.

Contra, Percifield *v.* Black, 132 Ind. 384, 31 N. E. 955; East Ridgelawn Cemetery Co. *v.* Frank (N. J. Eq.), 104 Atl. 594.

See 11 STANDARD PROC. 984, as to actions at law, and see 10 STANDARD PROC. 68 and 70.

96. **Ark.**—Phillips *v.* Jones, 79 Ark. 100, 95 S. W. 164. **Cal.**—Frixen *v.* Castro, 58 Cal. 442. **Mich.**—Bomier *v.* Caldwell, 8 Mich. 463. **Minn.**—Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605. **Tex.**—Fahey *v.* Benedetti (Tex. Civ. App.), 161 S. W. 896. **W. Va.** Capehart *v.* Hale, 6 W. Va. 547.

See generally 10 STANDARD PROC. 72.

[a] **If it is shown by the complaint that the contract is in parol** when required to be in writing, a part performance must be alleged. **Ark.**—Phillips *v.* Jones, 79 Ark. 100, 95 S. W. 164. **Cal.**—Harper *v.* Goldschmidt, 156 Cal. 245, 104 Pac. 451, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689; Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674; Arguello *v.* Edinger, 10 Cal. 150. **Del.**—Clark *v.* Bradford Gas & Power Corp. (Del. Ch.), 98 Atl. 368. **Ga.**—Edwards *v.* Baptist Church, 147 Ga. 15, 92 S. E. 531. **Mont.**—Ducie *v.* Ford, 8 Mont. 233, 240, 19 Pac. 414. **N. Y.**—Phillips *v.* Thompson, 1 Johns. Ch. 131, 149.

On denial of the contract, a parol agreement and part performance cannot be proved unless alleged. See *infra,* I, O.

[b] **Distinctly and clearly** must the acts constituting part performance be stated. Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674.

97. Skinner *v.* Furnas, 82 Ore. 414, 161 Pac. 962. See Hatcher *v.* Hatcher, McMul. Eq. (S. C.) 311, but continuing in possession is insufficient. See also Kroh *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404.

[a] **How he entered,** and whether his entry was upon each of the separate parcels of land or upon only one must be stated. Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674.

98. **Ind.**—Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523. **N. Y.**—Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131, 149. **Ore.**—Skinner *v.* Furnas, 82 Ore. 414, 161 Pac. 962.

[a] **The plaintiff must show** acts unequivocally referring to and resulting from that agreement, such as the party would not have done unless on account of that very agreement, and with a direct view to its performance. Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131, 149, per Chancellor Kent.

99. Skinner *v.* Furnas, 82 Ore. 414, 161 Pac. 962, where the parties are related, the making of improvements must be alleged.

[a] **But if the contract does not call for improvements,** an allegation that the improvements were made *pursuant* to the agreement is not necessary. Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469.

[b] **Showing Required.**—What the valuable improvements consist of, where they are placed, and whether they are temporary or permanent must be stated. Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674.

d. *Reasonableness, etc, of Contract.* — The bill must allege facts showing that as to the defendant the contract was just and reasonable.[1] But such an allegation in haec verba is not required,[2] and would be insufficient standing alone.[3]

e. *Assignment.* — If the contract has been assigned to the plaintiff, he must allege the assignment.[4]

f. *Description of Property.* — If the contract to be enforced relates to land, the bill must describe it,[5] with certainty.[6] The land may be described by metes and bounds,[7] or by name if the boundaries are known and well defined.[8] The name of the county in which the land is situated may be useful as a part of the description,[9] but is not essential if the description is otherwise sufficient.[10]

g. *Value of Property.* — In some states, it is held that the value of the land need not be stated;[11] but in other jurisdictions, such an allegation is made to show the adequacy of the consideration,[12] or to show that the cause is within the jurisdiction of the court.[13]

1. Joyce *v.* Tomasini, 168 Cal. 234, 142 Pac. 67; Dore *v.* Southern Pac. Co., 163 Cal. 182, 196, 124 Pac. 817; Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Agard *v.* Valencia, 39 Cal. 292, 302; Porter *v.* Anderson, 14 Cal. App. 716, 113 Pac. 345.

[a] **In other words** that the consideration is not, as to the other party, an unconscionable, inequitable, or hard bargain. Dore *v.* Southern Pac. Co., 163 Cal. 182, 124 Pac. 817.

[b] **It must be shown** that (1) it would not be inequitable to enforce the contract. Agard *v.* Valencia, 39 Cal. 292, 302, and that (2) specific performance is an equitable and just remedy under the circumstances. Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261.

2. Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231.

3. Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231.

4. Miller *v.* Henderson, 10 N. J. Eq. 320.

Alleging assignment to the plaintiff generally, see 3 STANDARD PROC. 124, et seq.

[a] **When the plaintiff claims title through the heirs at law of an assignee** of the contract who in turn assign to the plaintiff, he should show the right of the heirs to assign. Miller *v.* Henderson, 10 N. J. Eq. 320.

5. **Cal.**—Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401. **Ga.**—Harper *v.* Kellar, 110 Ga. 420, 35 S. E. 667. **Ill.** Hecke *v.* Meyer, 68 Ill. App. 65. **Ind.** Gigos *v.* Cochran, 54 Ind. 593. **Ore.** Sprague *v.* Jessup, 48 Ore. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410. **Tex.**—Brainard *v.* Jordan (Tex. Civ. App.), 60 S. W. 784. **W. Va.** Loar *v.* Wilfong, 63 W. Va. 306, 61 S. E. 333.

6. **D. C.**—McCormick *v.* Hammersley, 1 App. Cas. 313. **Ga.**—Askew *v.* Carr, 81 Ga. 685, 8 S. E. 74. **Ill.**—Hecke *v.* Meyer, 68 Ill. App. 65. **Ky.**—Gray *v.* Davis, 3 J. J. Marsh. 381. **N. C.** Allen *v.* Chambers, 39 N. C. 125.

[a] **With such certainty** (1) that the land can be identified beyond the possibility of future controversy, the land must be described. Hecke *v.* Meyer, 68 Ill. App. 65. See Wooten *v.* Dermott Town-Site Co. (Tex. Civ. App.), 178 S. W. 598. (2) Such a description that the court can decree an immediate conveyance, or can ascertain the land by ordering a survey is required. Allen *v.* Chambers, 39 N. C. 125.

7. Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682.

8. Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401.

9. Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401.

10. Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401.

11. Brainard *v.* Jordan (Tex. Civ. App.), 60 S. W. 784.

12. See *supra*, I, J, b.

13. Raymond *v.* Shawboose, 34 Mich. 142.

h. *Title in the Plaintiff.* — It has been held that a vendor seeking specific performance of a contract to purchase need not allege legal title in himself,[14] although some authorities require such an allegation.[15]

i. *Ability of Defendant To Perform.* — The defendant's ability to perform need not be alleged, being a matter of defense,[16] but there are authorities to the contrary.[17]

j. *Title in Defendant.* — The rule as to alleging the defendant's ability to perform the contract,[18] renders it unnecessary to allege the defendant's ownership of the property to be conveyed,[19] although some courts require such an allegation.[20]

k. *As to Grantee of Vendor.* — If the defendant has conveyed the premises, the bill should allege facts showing that his grantee is not a bona fide purchaser.[21]

l. *As to Adverse Claimants.* — When adverse claimants to the premises are made parties, it is enough for the plaintiff to show his own rights and allege that they have or claim an interest therein.[22]

14. Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9; Tavenner *v.* Barrett, 21 W. Va. 656.

And it is not ground for demurrer that it appears he has not good title. See *infra,* I, L.

15. Baker *v.* Baker, 284 Ill. 537, 120 N. E. 525; Tewksbury *v.* Howard, 138 Ind. 103, 109, 37 N. E. 355. See Goodwine *v.* Morey, 111 Ind. 68, 12 N. E. 82. See also Sturtz *v.* Ommen, 32 S. D. 396, 143 N. W. 288.

[a] **An allegation** that the land is owned by the plaintiff in fee simple is a sufficient averment of title. Daily *v.* Litchfield, 10 Mich. 29. An allegation of preparation of proper deeds is a sufficient allegation of ownership as against a general demurrer. Sturtz *v.* Ommen, 32 S. D. 396, 143 N. W. 288.

16. **Ark.**—Greenfield *v.* Carlton, 30 Ark. 547. **Mass.**—Harrigan *v.* Dodge, 200 Mass. 357, 86 N. E. 780. **Ore.** Columbia River Co. *v.* Smith, 83 Ore. 137, 162 Pac. 831, 163 Pac. 309.

Plaintiff's ability to perform, see *supra,* I, J, 2, h.

17. Brehm *v.* Sperry, 92 Md. 378, 48 Atl. 368; Hollander *v.* Lustik, 79 Misc. 103, 140 N. Y. Supp. 659.

18. See *infra,* I, J, 2, i.

19. **Cal.**—King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961. **Mass.**—Harrigan *v.* Dodge, 200 Mass. 357, 86 N. E. 780. **Mont.** — Christiansen *v.* Aldrich, 30 Mont. 446, 451, 76 Pac. 1007 (where, however, the defect was held to be cured by the answer); Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17. **N. Y.**—Moore *v.* Burrows, 34 Barb. 173. **Ore.**—Columbia River Co. *v.* Smith, 83 Ore. 137, 162 Pac. 831, 163 Pac. 309.

[a] **A complaint against the heirs of a deceased vendor** need not allege the ancestor had any title to the property he agreed to convey. Cottrell *v.* Cottrell, 81 Ind. 87.

20. Hollander *v.* Lustik, 79 Misc. 103, 140 N. Y. Supp. 659; Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811.

[a] **An allegation of ownership** of real property stating (1) that the defendant "being or pretending to be seised and possessed in fee simple" of the land described has been held sufficient. Loar *v.* Wilfong, 63 W. Va. 306, 312, 61 S. E. 333. (2) But a similar allegation as to personal property is insufficient. Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811, where it was alleged that the respondent "being, or pretending to be, possessed of or otherwise, entitled to certain shares of stock."

[b] **Setting out in haec verba the contract to convey** is a sufficient compliance with any requirement to plead ownership in the defendant. Tebeau *v.* Ridge, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367, 372.

21. Farwell *v.* Johnston, 34 Mich. 342, holding allegation sufficient as against general demurrer.

22. Seager *v.* Burns, 4 Minn. 141.

m. *Inadequacy of Legal Remedy.* — The inadequacy of the remedy at law by action for damages should be shown.[23] If the action is for specific performance of a contract to convey land, a specific allegation that the plaintiff has no adequate remedy in damages is generally unnecessary.[24] But if the contract is one for which damages is ordinarily an adequate remedy,[25] such as a contract for the transfer of personal property,[26] the plaintiff must allege special circumstances

Similar allegation in mortgage foreclosure suits, see 19 STANDARD PROC. 954.

23. **Ala.**—Southern Iron & E. Co. *v.* Vaughan (Ala.), 78 So. 212. **Cal.**—Herzog *v.* Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Senter *v.* Davis, 38 Cal. 450; Sherwood *v.* Wallin, 1 Cal. App. 532, 82 Pac. 566. **Colo.**—Leach *v.* Fuller (Colo.), 173 Pac. 427. **Ind.** Mather *v.* Simonton, 73 Ind. 595. **Mont.** Ducie *v.* Ford, 8 Mont. 233, 240, 19 Pac. 414. **Va.**—Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223, irreparable injury.

[a] **Where an action at law may be maintained,** the bill must show that remedy is not plain, adequate and complete. Porter *v.* Frenchman's Bay & Mt. D. L. & W. Co., 84 Me. 195, 24 Atl. 814.

[b] **The plaintiff must state** the relation of the contract to his business plans, showing how they will be affected by a non-performance or how and why the value of the performance cannot be correctly estimated by a jury and taken in lieu of it, or the like. Senter *v.* Davis, 38 Cal. 450.

[c] **Mere statements** that damages cannot be established or that difficulty attends upon making proof of damages sustained, and that the plaintiff will be unable to prove the sum, or does not know what such damages are, etc., are insufficient. Gilbert *v.* Bunnell, 92 App. Div. 284, 86 N. Y. Supp. 1123.

Manner of alleging, see generally 18 STANDARD PROC. 865.

24. **Mass.**—Noyes *v.* Bragg, 220 Mass. 106, 107 N. E. 669. **Mont.** Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007; Ide *v.* Leiser, 10 Mont. 5, 15, 24 Pac. 695, 24 Am. St. Rep. 17. **N. Y.**—Belanewsky *v.* Gallaher, 105 N. Y. Supp. 77; International Paper Co. *v.* Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. Supp. 736. **Pa.** Boric *v.* Satterthwaite, 180 Pa. 542, 37 Atl. 102. **Tex.**—Bishop *v.* Tartt, 48 Tex. Civ. App. 551, 107 S. W. 359. **Wis.**—Morrow *v.* Lawrence, 7 Wis. 574.

Contra.—**D. C.**—Hazelton *v.* Miller, 25 App. Cas. 337. **Me.**—Porter *v.* Frenchman's Bay & Mt. D. L. & W. Co., 84 Me. 195, 24 Atl. 814, an action by a vendor. **Pa.**—Kauffman's Appeal, 55 Pa. 383, action by vendor. But see also Superior California Fruit L. Co. *v.* Grossman, 32 Cal. App. 357, 162 Pac. 1046, holding the code provision that damages are presumed inadequate as to contracts for the sale of real estate does not excuse the plaintiff from showing that damages would be inadequate.

25. Leach *v.* Fuller (Colo.), 173 Pac. 427.

26. **Cal.**—Senter *v.* Davis, 38 Cal. 450. **Fla.**—Graham *v.* Herlong, 50 Fla. 521, 39 So. 111. **N. H.**—Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. **N. Y.**—Butler *v.* Wright, 103 App. Div. 463, 93 N. Y. Supp. 113; Menier *v.* Donald, 98 Misc. 684, 165 N. Y. Supp. 50. **R. I.**—Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811.

[a] **The bill must not only allege** an irreparable injury, (1) but must set up a state of circumstances showing that fact. Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223. (2) The bill must allege that the chattels are of peculiar value and character, the loss of which cannot be fully compensated in damages. Graham *v.* Herlong, 50 Fla. 521, 39 So. 111; Kennedy *v.* Thompson, 97 App. Div. 296, 89 N. Y. Supp. 963; Bateman *v.* Straus, 86 App. Div. 540, 83 N. Y. Supp. 785.

[b] **If the plaintiff puts a fixed value** upon the chattel, this will be taken as adequate compensation and relief will be denied. Marthinson *v.* King, 150 Fed. 48, 52, 82 C. C. A. 360; Dowling *v.* Betjemann, 2 John. & H. 544, 8 Jur. N. S. 538, 6 L. T. N. S. 512, 10 W. R. 574, 70 Eng. Reprint 1175.

taking the case out of the general rule. But insolvency of the defendant need not be shown.[27]

n. *Mutuality of Remedy.* — If the remedy on the contract is not mutual, facts bringing the case within an exception to the rule requiring mutuality must be alleged.[28]

o. *Performance of Conditions Precedent and Tender.* — The plaintiff must allege the performance of any conditions precedent on his part.[29]

The necessity of alleging a tender or offer to perform, where there has not been a full performance, varies with the rules in the different jurisdictions.[30] If a tender or offer of performance is required, it must be alleged,[31] unless an excuse therefor is stated.[32] In such case plaintiff must aver his ability,[33] and his willingness and readiness[34]

27. Bird *v.* Hall, 30 Mich. 374.

28. King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961. See *supra*, —.

[a] **Illustration.**—Where the consideration for the contract is personal services, a performance of such services must be alleged. King *v.* Gildersleeve, 79 Cal. 504, 510, 21 Pac. 961.

29. **U. S.**—McNeil *v.* Magee, 5 Mason 244, 16 Fed. Cas. No. 8,915. **Ark.** Mason *v.* Atkins, 73 Ark. 491, 84 S. W. 630. **Cal.**—Chadbourne *v.* Stockton S. & L. Soc., 88 Cal. 636, 26 Pac. 529; King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961. **Del.**—McFarland *v.* Reeve, 5 Del. Ch. 118. **Ind.**—Mather *v.* Scoles, 35 Ind. 1; Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287. **Ky.**—Stone *v.* First Nat. Bank, 4 Ky. L. Rep. 438. **Mo.**—Lanyon *v.* Chesney, 186 Mo. 540, 550, 85 S. W. 568. **N. Y.**—Bruce *v.* Tilson, 25 N. Y. 194. **Tex.**—Gober *v.* Hart, 36 Tex. 139; Mitchell *v.* Sheppard, 13 Tex. 484, 490; Alling *v.* Vander Stucken (Tex. Civ. App.), 194 S. W. 443. **Va.**—Harman *v.* Moss, 117 Va. 676, 86 S. E. 111. **Eng.**—Walker *v.* Jeffreys, 1 Hare 341, 352, 11 L. J. Ch. 209, 6 Jur. 336, 66 Eng. Reprint 1064. See 6 STANDARD PROC. and the title "**Suits and Actions.**"

[a] **The complainant must show** that the contract has been fully and fairly and in good faith performed. Chicago Mun. Gas Light & F. Co. *v.* Lake, 130 Ill. 42, 60, 22 N. E. 616.

[b] **That the plaintiff furnished an abstract** showing a merchantable title must be alleged when required by the contract. Alling *v.* Vander Stucken (Tex. Civ. App.), 194 S. W. 443.

30. See *supra*, I, F, 4.

Tender in pleading, when a previous tender is not required, see *supra*, I, F, 4, a, (I), (B).

31. **Ala.**—Bass *v.* Gilliland's Heirs, 5 Ala. 761. **Ga.**—Terry *v.* Keim, 122 Ga. 43, 49 S. E. 736; Coleman *v.* Easterling, 93 Ga. 29, 18 S. E. 819. **Ill.**—De Wolf *v.* Pratt, 42 Ill. 198. **Ky.**—Stone *v.* First Nat. Bank, 4 Ky. L. Rep. 438. **Mo.**—Lanyon *v.* Chesney, 186 Mo. 540, 551, 85 S. W. 568. **Mont.** Christiansen *v.* Aldrich, 30 Mont. 446, 452, 76 Pac. 1007.

[a] **An omission of an allegation of an offer cannot be objected to after** the cause is brought to a hearing. De Wolf *v.* Pratt, 42 Ill. 198, 213.

32. Kissack *v.* Bourke, 224 Ill. 352, 79 N. E. 619; Horner *v.* Clark, 27 Ind. App. 6, 60 N. E. 732.

[a] **Where a Waiver Is Shown.** Kissack *v.* Bourke, 224 Ill. 352, 79 N. E. 619.

33. Gober *v.* Hart, 36 Tex. 139. But see Clexton *v.* Tunnard, 119 App. Div. 709, 104 N. Y. Supp. 665, holding an allegation of readiness and willingness to perform, and of a tender of a deed is a sufficient allegation of ability to perform.

Defendant's ability to perform, see *supra*, I, J, 2, i.

34. **U. S.**—Lee *v.* Electric Typo. Co., 68 Fed. 519. **Ala.**—See Blackburn *v.* McLaughlin (Ala.), 80 So. 818. **Ark.** Mason *v.* Atkins, 73 Ark. 491, 84 S. W. 630. **Cal.**—Frixen *v.* Castro, 58 Cal. 442. **Colo.**—Gilpin *v.* Watts, 1 Colo. 479. **Ill.**—Kissack *v.* Bourke, 224 Ill. 352, 79 N. E. 619; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. **Ind.**—Goodwine *v.* Morey, 111 Ind. 68, 12 N. E. 82. **Mont.**—Ducie *v.* Ford, 8 Mont. 233, 240, 19 Pac. 414.

to perform, and make a proper offer or tender in his pleading.[35]

If a demand is required, it must be averred,[36] unless circumstances excusing it are alleged.[37]

Tender of Deed. — The vendee need not allege that he prepared a deed and presented it to the vendor for execution,[38] except when a tender thereof is required.[39]

General Allegation. — Statutes provide that a general allegation of performance is sufficient.[40] This statute relates to the pleading of performance,[41] and not, it has been held, to a tender of performance only.[42]

N. Y.—Bruce *v.* Tilson, 25 N. Y. 194; Clexton *v.* Tunnard, 119 App. Div. 709, 104 N. Y. Supp. 665. **Pa.**—*In re* Kutz's Estate, 259 Pa. 548, 103 Atl. 293. **Tex.**—Gober *v.* Hart, 36 Tex. 139. **Eng.**—Walker *v.* Jeffreys, 1 Hare 341, 352, 11 L. J. Ch. 209, 6 Jur. 336, 66 Eng. Reprint 1064. **Can.**—Harris *v.* Robinson, 21 Super. Ct. 390. But see Hatcher *v.* Hatcher, McMul. Eq. (S. C.) 311, a formal allegation is not required as the fact is implied in the institution of the suit.

[a] **An allegation,** that the plaintiffs were "ready, eager and willing to comply with the terms of said contract," is sufficient. Kissack *v.* Bourke, 224 Ill. 352, 359, 79 N. E. 619.

35. **Ind.**—Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278. **Kan.**—Niquette *v.* Green, 81 Kan. 569, 581, 106 Pac. 270. **Ky.**—Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267. **Mich.**—Palmer *v.* Palmer, 114 Mich. 509, 72 N. W. 322. **Mont.**—Christiansen *v.* Aldrich, 30 Mont. 446, 452, 76 Pac. 1007. **N. Y.** Bruce *v.* Tilson, 25 N. Y. 194, 198. **N. C.**—Bateman *v.* Hopkins, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642. **Ohio.**—Brock *v.* Hidy, 13 Ohio St. 306. **Pa.**—Wilson *v.* Buchanan, 170 Pa. 14, 32 Atl. 620.

[a] **He Should Offer To Bring the Money Into Court.**—De Wolf *v.* Pratt, 42 Ill. 198, 214. But a deposit in court is not required, see *supra,* I, F, 7.

[b] **A deed need not be tendered with** the bill. Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9.

[c] **It is sufficient to aver** that the plaintiff is ready and willing to do all the acts required of him in the specific execution of the contract according to its terms. Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267; Hart *v.* Brand, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715.

[d] **Omission May Be Supplied by Amendment.**—Freeson *v.* Bissell, 63 N. Y. 168.

[e] **A tender in the petition "for the benefit of whom it may concern"** is good. Otto *v.* Young, 227 Mo. 193, 218, 127 S. W. 9.

36. **Ala.**—Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473. **Ind.**—Mather *v.* Scoles, 35 Ind. 1. **Ky.**—Heydrick *v.* Dickey, 154 Ky. 475, 157 S. W. 915.

37. Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287.

38. Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436; Seeley *v.* Howard, 13 Wis. 336.

39. Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436; Poole *v.* Hill, 6 Mees. & W. (Eng.) 835, 9 D. C. P. 300, 10 L. J. Ex. 81. See *supra,* I, F, 4, (II).

40. **Ariz.**—Corbett *v.* Kingan, 16 Ariz. 440, 146 Pac. 922. **Cal.**—Lynn *v.* Knob Hill Improvement Co. (Cal.), 169 Pac. 1009; Gilfallan *v.* Gilfallan, 168 Cal. 23, 32, 141 Pac. 623, Ann. Cas. 1915D, 784; Moritz *v.* Lavelle, 77 Cal. 10, 18 Pac. 803, 11 Am. St. Rep. 229. **Ind.**—Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880. **Mo.**—Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19.

[a] **A specific statement that the plaintiff performed all the conditions of the contract is unnecessary** where facts showing the performance of all the conditions are stated. Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287.

41. Newby *v.* Rogers, 40 Ind. 9.

42. Duff *v.* Fisher, 15 Cal. 375, 381; Burke *v.* Mead, 159 Ind. 252, 262, 64 N. E. 880; Newby *v.* Rogers, 40 Ind. 9, 12. But see Sons of Temperance *v.* Brown, 9 Minn. 151, holding an allegation that the plaintiff offered to perform on his part and that the defendant refused is sufficient. See also

p. *Good Faith and Diligence.* — A plaintiff seeking specific performance must show that he has used due diligence,[43] and has not been guilty of laches,[44] or if not, that his negligence arose from some just cause,[45] or has been acquiesced in.[46]

q. *Breach of Contract.* — A breach of the contract by the defendant must be alleged.[47]

r. *Damages and Amount Due.* — The bill should state the balance due upon the contract,[48] or state a reason why the plaintiff cannot ascertain and allege the balance,[49] and offer to pay any balance due or found to be due.[50] A complaint for specific performance, which is not in the alternative for specific performance or damages, is not insufficient because it does not allege damages.[51]

3. Multifariousness and Joinder of Causes of Action. — A bill for specific performance should avoid multifariousness.[52] But it is proper to join a cause of action for specific performance of a contract and an action for damages for its breach,[53] or an action for the reformation of a contract and for its enforcement as reformed,[54] or an action to

Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127.

[a] **The tender of a specified amount** as the balance due must be alleged. Coleman *v.* Easterling, 93 Ga. 29, 36, 18 S. E. 819. *Contra,* Sons of Temperance *v.* Brown, 9 Minn. 157.

43. **Cal.**—Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149; Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674. **N. Y.**—Benedict *v.* Lynch, 1 Johns. Ch. 370, 379, 7 Am. Dec. 484. **Va.**—Hoster's Committee *v.* Zollman (Va.), 94 S. E. 164. **W. Va.**—Atherton *v.* Hull, 12 W. Va. 170.

[a] **Possession by the party seeking specific performance** does not make the rule different. Weber *v.* Marshall, 19 Cal. 447, 459, *quoted* in Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149.

44. *In re* Kutz's Estate, 259 Pa. 548, 103 Atl. 293.

45. **Cal.**—Lux *v.* Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674; Superior California Fruit Land Co. *v.* Grossman, 32 Cal. App. 357, 162 Pac. 1046. **N. Y.**—Benedict *v.* Lynch, 1 Johns. Ch. 370, 379, 7 Am. Dec. 484. **Tenn.**—Lane *v.* Farmer, 11 Lea 568, 577.

[a] **A failure to perform his part** of the contract **within** the time limited, must be excused by the complainant. Wood *v.* Sheffer, 248 Ill. 617, 630, 94 N. E. 24.

46. Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674; Benedict *v.* Lynch, 1 Johns. Ch. (N. Y.) 370, 379, 7 Am. Dec. 484.

47. **Ala.**—Bell *v.* Thompson, 34 Ala. 633. **Cal.**—Lattin *v.* Hazard, 85 Cal. 58, 24 Pac. 611; Dodge *v.* Clark, 17 Cal. 586. **Tex.**—Younger *v.* Welch's Exrx., 22 Tex. 417; Holman *v.* Criswell, 13 Tex. 38.

[a] **That the defendant refused to comply** with the demand must be alleged. Bell *v.* Thompson, 34 Ala. 633.

[b] **A general allegation** of a breach is sufficient. Holman *v.* Criswell, 15 Tex. 394.

[c] **An allegation that the defendant "neglected"** to execute the deed is a sufficient allegation of a refusal. Woarms *v.* Hammond, 5 App. Cas. (D. C.) 338, 344.

48. Coleman *v.* Easterling, 93 Ga. 29, 18 S. E. 819.

[a] **The plaintiff need not at his peril state the exact balance** which may ultimately be found against him. Hull *v.* Peer, 27 Ill. 312; Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247.

49. Coleman *v.* Easterling, 93 Ga. 29, 18 S. E. 819.

50. Hubbard *v.* Johnson, 77 Me. 139. See *supra,* I, F, 4.

51. Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287.

52. Ashley *v.* Little Rock, 56 Ark. 391, 401, 19 S. W. 1058.

53. See 17 STANDARD PROC. 713.

54. See 14 STANDARD PROC. 713. But see Park *v.* Johnson, 4 Allen (Mass.) 259; Dwight *v.* Pomeroy, 17 Mass. 328,

declare and enforce a trust and for specific performance.[55] A complaint praying for specific performance or for alternative monetary relief is not objectionable as stating two causes of action.[56] And the complaint may ask for specific performance and for the rents and profits for the use and occupation of the land.[57] But a cause of action for specific performance by a conveyance, and one for a return of the purchase money cannot be joined, being inconsistent.[58]

The bill may be framed with a double aspect, stating different grounds for the relief sought.[59]

4. Prayer of Relief. — The bill should contain a prayer for specific performance,[60] and may contain a prayer for general relief.[61] The plaintiff may pray in the alternative for specific performance or for rescission,[62] or for an accounting,[63] or for alternative monetary relief,[64] or for a return of the purchase money.[65] The vendor may ask for a sale of the premises in default of payment of the unpaid purchase money,[66] but it has been held that the purchaser cannot do so.[67] An assignee of the vendee suing the original vendor should ask that title be made to himself, not to the vendee.[68]

5. Verification. — The complaint or bill may be verified.[69]

9 Am. Dec. 148; Attorney General *v.* Sitwell, 1 Y. & C. Exch. (Eng.) 559, 5 L. J. Ex. Eq. 86.

55. Camody *v.* Webster, 197 Ala. 290, 72 So. 622.

56. Messer *v.* Hibernia Sav. & L. Soc., 149 Cal. 122, 84 Pac. 835; San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839; Chicago, M. & St. P. R. Co. *v.* Durant, 44 Minn. 361, 46 N. W. 676.

[a] **The action is one for specific performance with incidental relief** by way of compensation. Chicago, M. & St. P. R. Co. *v.* Durant, 44 Minn. 361, 46 N. W. 676.

57. Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

58. Lynn *v.* Knob Hill Imp. Co. (Cal.), 169 Pac. 1009.

59. Gerrish *v.* Towne, 3 Gray (Mass.) 82. See generally 4 STANDARD PROC. 121.

60. **Ga.**—See Lansdell *v.* Lansdell, 144 Ga. 571, 87 S. E. 782, holding omission does not render petition demurrable. **N. Y.**—Strong *v.* Harris, 84 Hun 314, 32 N. Y. Supp. 349. **Tex.**—Brock *v.* Jones' Exr., 16 Tex. 461, 470.

Form of prayer of relief, see 9 STANDARD PROC. 1164.

61. See the following: **Ala.**—Munford *v.* Pearce, 70 Ala. 452. **Ill.**—Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937. **Tex.**—Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103.

62. Paris *v.* Haley, 61 Mo. 453, 462; International Paper Co. *v.* Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. Supp. 736.

63. A. D. Smith & Sons *v.* Securities Co. (Ala.), 73 So. 892.

64. **Cal.**—Messer *v.* Hibernia Sav. & L. Soc., 149 Cal. 122, 84 Pac. 835. **Kan.**—Brush *v.* Boyer, 178 Pac. 445. **Mich.**—Farwell *v.* Johnston, 34 Mich. 342. **Minn.**—Hopkins *v.* Baremore, 99 Minn. 413, 109 N. W. 831. **N. J.**—Copper *v.* Wells, 1 N. J. Eq. 10, 17, he may not be allowed to do so in every instance. **N. Y.**—Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261; Witherbee *v.* Meyer, 84 Hun 146, 32 N. Y. Supp. 537. See Albany Heights Realty Co. *v.* Vogt, 182 App. Div. 736, 169 N. Y. Supp. 1049. **Tex.**—Mitchell *v.* Sheppard, 13 Tex. 484. *Contra,* Todd *v.* Gee, 17 Ves. Jr. 273, 34 Eng. Reprint 106.

65. Wiley *v.* Mullins, 22 Ark. 394.

66. Fitzhugh *v.* Smith, 62 Ill. 486; Kimbrough *v.* Curtis, 50 Miss. 117.

67. Fitzhugh *v.* Smith, 62 Ill. 486.

68. Hunter *v.* Gallagher, 4 Mo. 364.

69. See generally 4 STANDARD PROC. 148.

[a] **The omission of a verification** should be raised by a motion or rule. Greenfield *v.* Carlton, 30 Ark. 547.

6. Amendment. — The bill or complaint may be amended in accordance with the general rules regulating amendments,[70] but a new cause of action should not be set up.[71]

7. Aider by Verdict, etc. — Defective allegations in the bill or complaint are cured by the answer and judgment in accordance with the general rules.[72]

K. PROCESS. — The requisites of process[73] and the manner of service,[74] conform to the general rules elsewhere discussed. The action being in personam, personal service is generally necessary.[75] But service by publication is sometimes authorized by statute.[76] In an action against the vendor and vendee by an assignee of the vendee, process must be served on the vendee as well as the vendor.[77]

L. DEMURRER. — The defendant may demur to the bill or com-

70. Colo.—Riverside Land & Irr. Co. *v.* Sawyer, 24 Colo. App. 442, 134 Pac. 1011, as to allegation of damages. **Ill.**—D'Wolf *v.* Pratt, 42 Ill. 198. **Ia.** Kettering *v.* Eastlack, 130 Iowa 498, 107 N. W. 177. **Pa.**—Whiteside *v.* Winans, 29 Pa. Super. 244, as to prayer for a special warranty deed.

See the title "**Amendments and Jeofails.**"

[a] **To Set Up Defendant's Ownership.**—Sawyer *v.* Wabash R. Co., 156 Mo. 468, 476, 57 S. W. 108, *quoted* in Tebeau *v.* Ridge, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367.

[b] **To Correct a Mistake in the Description of the Premises.**—**Ill.**—Mason *v.* Bair, 33 Ill. 194. **Ia.**—Crom *v.* Henderson, 165 N. W. 397. **Mo.**—Cashion *v.* Gargus, 267 Mo. 68, 183 S. W. 301.

[c] **To set up part performance** to take the contract out of the operation of the statute of frauds. Capehart *v.* Hale, 6 W. Va. 547, 558.

[d] **To supply an averment of willingness** and an offer to perform plaintiff's part of the contract. D'Wolf *v.* Pratt, 42 Ill. 198; Palmer *v.* Palmer, 114 Mich. 509, 72 N. W. 322, on appeal.

[e] **If the defendant sets up a contract variant from that alleged** in the bill, the plaintiff to avail himself of it must amend his bill. Buck *v.* Dowley, 16 Gray (Mass.) 555, 558; Byrne *v.* Romaine, 2 Edw. Ch. (N. Y.) 445. But *compare* Park *v.* Johnson, 4 Allen (Mass.) 259, to require an amendment would be equivalent to holding the original contract defective.

[f] **Amendment To Conform to the Proof.**—Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788; Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548.

71. Cashion *v.* Gargus, 267 Mo. 68, 183 S. W. 301. See the title "**New Cause of Action or Defense.**"

[a] **An amendment setting up a prayer for alternative monetary relief** does not state a new cause of action. Messer *v.* Hibernia Sav. & L. Soc., 149 Cal. 122, 84 Pac. 835; Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871; Merrill *v.* Beckwith, 168 Mass. 72, 46 N. E. 400.

[b] **An amendment asking a reformation** of the contract and specific performance as amended does not state a new cause of action. Messer *v.* Hibernia Sav. & L. Soc., 149 Cal. 122, 84 Pac. 835.

[c] **An amendment setting up a failure of title to a portion of the premises** and asking compensation does not state a new cause of action. Butte Creek Consol. Dredging Co. *v.* Olney, 173 Cal. 697, 161 Pac. 260.

72. Wolff *v.* Cloyne, 156 Cal. 746, 106 Pac. 104, an allegation as to reasonableness of contract held cured. See the title "**Verdict.**"

73. See the title "**Process.**"

74. See the title "**Service of Process and Papers.**"

75. Ill.—Fowler *v.* Fowler, 204 Ill. 82, 104, 68 N. E. 414. **Mass.**—Spurr *v.* Scoville, 3 Cush. 578. **Mont.**—Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940.

76. See the statutes and the title "**Service of Process and Papers.**" But see Fowler *v.* Fowler, 204 Ill. 82, 104, 68 N. E. 414.

77. Hunter *v.* Gallagher, 4 Mo. 364.

plaint in accordance with general rules elsewhere discussed.[78] Thus he may demur where it appears on the face of the bill or complaint that the party has an adequate remedy at law,[79] that the agreement is within the statute of frauds and does not comply with it,[80] or that the plaintiff is guilty of laches.[81] So also the defendant may demur where no offer of performance is alleged,[82] or, in some states, where it is not shown that the consideration is adequate.[83] But it is not a ground for general demurrer that the granting of relief would require protracted supervision of the court,[84] or that the bill shows that the vendor plaintiff does not have good legal title to the land.[85]

M. Plea or Answer.[86] — The defendant must plead or answer in accordance with the general rules.[87] Accordingly if he wishes to rely upon the defense of the adequacy of the remedy at law,[88] of laches,[89] or the noncompliance with the statute of frauds,[90] or fraud,[91] not appearing on the face of the bill or complaint, he may do so in his

78. See 6 Standard Proc. 845.

On the ground the contract violates the statute of frauds, see 6 Standard Proc. 917.

[a] **The court is not inclined to sustain a demurrer** to a complaint for specific performance, unless it is wholly bare of allegations calling for the exercise of sound discretion. Menier *v.* Donald, 98 Misc. 684, 165 N. Y. Supp. 50.

79. Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360. See generally 18 Standard Proc. 870.

[a] **Where the contract is such that damages is usually adequate,** and the inadequacy of the legal remedy is not shown. Leach *v.* Fuller (Colo.), 173 Pac. 427; Kennedy *v.* Thompson, 97 App. Div. 296, 89 N. Y. Supp. 963, general demurrer.

80. Harper *v.* Goldsmith, 156 Cal. 245, 252, 104 Pac. 451, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689. See 10 Standard Proc. 73.

81. Superior California Fruit Land Co. *v.* Grossman, 32 Cal. App. 357, 162 Pac. 1046. See 18 Standard Proc. 437.

82. D'Wolf *v.* Pratt, 42 Ill. 198.

83. White *v.* Sage, 149 Cal. 613, 617, 87 Pac. 193.

84. Standard Fashion Co. *v.* Siegel Cooper Co., 157 N. Y. 60, 68, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854.

85. Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9.

86. **Forms of answers,** see 9 Standard Proc. 1169.

87. See the titles "**Bills and Answers;**" "**Pleas in Equity.**"

[a] **A tender of a deed by the vendor after suit brought** and before answer may be set up in the answer, although not necessary to entitle him to specific performance. Beebe *v.* Dowd, 22 Barb. (N. Y.) 255.

88. Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360; Snow *v.* Monk, 81 App. Div. 206, 80 N. Y. Supp. 719; Goldberg *v.* Kirschstein, 36 Misc. 249, 73 N. Y. Supp. 358; Witherbee *v.* Meyer, 84 Hun 146, 32 N. Y. Supp. 537, 65 N. Y. St. 806. See generally 18 Standard Proc. 872.

[a] **This defense cannot be availed of unless** pleaded in the answer. Witherbee *v.* Meyer, 84 Hun 146, 32 N. Y. Supp. 537, 65 N. Y. St. 806.

[b] **But under a denial of an allegation of irreparable damage** and inadequacy of the legal remedy, the defense of an adequate remedy at law is available although not affirmatively alleged. Butler *v.* Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

89. **Pleading laches,** see 18 Standard Proc. 437.

90. **Pleading the statute of frauds,** see 10 Standard Proc. 74.

91. **Colo.**—Drennen *v.* Williams, 59 Colo. 301, 148 Pac. 265, Ann. Cas. 1917A, 664. **Ill.**—Fitzpatrick *v.* Beatty, 6 Ill. 454. **Mo.**—Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568.

[a] **Allegations of fraudulent representations** will not be considered where the defendant has indicated no purpose in making them, by claiming damages if abatement of the purchase money

answer. So also he must allege facts showing that it would be inequitable to enforce the contract,[92] or that he is unable to perform it,[93] or that he is a bona fide purchaser from the vendor,[94] or that a different contract from that set up in the complaint was entered into,[95] or that the land is a homestead,[96] or that the plaintiff is estopped to object to the performance by failure to object to the tender.[97] The inability of the vendor plaintiff to convey the title he agreed to convey may be set up in the answer,[98] but a failure to do so does not preclude raising the objection later.[99] The illegality of

is sought, or by offering to restore the premises if a rescission of the contract is desired. Lanyon *v.* Chesney, 186 Mo. 540, 557, 85 S. W. 568.

92. Younger *v.* Welch's Exrx., 22 Tex. 417. But *compare* Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261.

[a] **But where the plaintiff asks specific performance or damages,** he himself raises the question which relief should be granted and the defendant may avail himself of the defense that specific relief is inequitable without specially pleading it. Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 297, 26 N. E. 261.

93. **Ark.**—Greenfield *v.* Carlton, 30 Ark. 547, 556. **Ill.**—Cazier *v.* Mohr, 197 Ill. App. 550. **Ore.**—Columbia River Co. *v.* Smith, 83 Ore. 137, 162 Pac. 831, 163 Pac. 309.

But *compare supra,* I, J, 2, i.

[a] **His want of ownership of the premises** must be alleged. Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

94. Minor *v.* Willoughby, 3 Minn. 225; Galatian *v.* Erwin, 1 Hopkins Ch. (N. Y.) 48.

[a] **The defense of a bona fide purchaser may be made by plea** in bar of discovery and relief, or by answer, in bar of relief only. If made by plea, the payment of the whole of the consideration money must be averred. Proof of payment of the whole purchase money is essential to the defense whether it be made by plea or answer. Haughwout *v.* Murphy, 22 N. J. Eq. 531, 547.

[b] **The defendant must deny** (1) any knowledge of the title of the plaintiff and must deny also any knowledge of circumstances charged from which notice may be reasonably inferred (Minor *v.* Willoughby, 3 Minn. 225; Galatian *v.* Erwin, 1 Hopkins Ch. [N. Y.] 48), although (2) notice is not charged in the bill. Minor *v.* Willoughby, 3 Minn. 225; Dean *v.* Anderson, 34 N. J. Eq. 496. (3) He must deny notice before the execution of the deed to him, and previous to the payment of the consideration. Minor *v.* Willoughby, 3 Minn. 225; Dean *v.* Anderson, 34 N. J. Eq. 496, 503. (4) He must deny notice of the plaintiff's possession of the premises, and of the erection of improvements previous to his purchase, although the plaintiff does not allege that the defendant had notice thereof. Minor *v.* Willoughby, 3 Minn. 225.

95. Thompson *v.* Hawley, 14 Ore. 199, 12 Pac. 276, this is "new matter."

[a] **A cross-bill is not required** to obtain a decree enforcing the contract set up in the answer. Redfield *v.* Gleason, 61 Vt. 220, 227, 17 Atl. 1075, 15 Am. St. Rep. 889.

96. Brown *v.* Eaton, 21 Minn. 409.

97. Smiley *v.* Read, 163 Cal. 644, 126 Pac. 486.

98. Park *v.* Johnson, 7 Allen (Mass.) 378; Lanyon *v.* Chesney, 186 Mo. 540, 551, 85 S. W. 568.

[a] **But where the vendor alleges title and defendant pleads a general denial,** a specific allegation that the plaintiff has not good title is demurrable as raising an issue admissible under the general denial. Tewksbury *v.* Howard, 138 Ind. 103, 109, 37 N. E. 355.

[b] **The defendant must allege** either an entire want of title, or he must point out the particular defects of which he complains. Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013.

99. See *infra,* I, P, 3.

[a] **On the hearing before the master** to whom the case is referred for the purpose of preparing the proper deeds, the incapacity of the vendor plaintiff to execute the proper convey-

the contract need not be specially pleaded.[1] And a vendee need not allege the insolvency of the vendor, before he can resist payment of the purchase money.[2] An allegation that the plaintiff never tendered performance has been held to present an immaterial issue when the plaintiff pleads willingness to perform.[3]

General Denial. — Under the reformed procedure the defendant may make a general denial.[4]

Verification. — An answer denying the execution of the contract is required to be sworn to.[5]

N. CROSS-DEMANDS.[6] — The defendant in an action for specific performance may interpose cross-demands, cross-bills and cross-complaints,[7] in accordance with the general rules regulating such cross-demands.[8] In an action by the vendor the purchaser may counterclaim for the purchase money paid.[9] But where the vendor plaintiff cannot convey such title as the contract requires, the defendant may in his answer, without a cross-bill, insist upon the return of the money paid on the contract.[10] And where the plaintiff by his bill offers to perform the agreement, no cross-bill is necessary to compel him to perform.[11]

O. ISSUES, PROOF AND VARIANCE. — In specific performance, the proof must establish the contract clearly, definitely and satisfactorily.[12]

ance may arise for the first time. Park *v.* Johnson, 7 Allen (Mass.) 378; Warren *v.* Richardson, Younge (Eng.) 1.

1. Gardner Valve Mfg. Co. *v.* Halyburton, 87 N. J. Eq. 689, 102 Atl. 893 (as the court cannot give an illegal contract effect even though the illegality be not pleaded); Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394, 45 Atl. 611.

When available under general denial, see *infra,* I, O.

2. Gober *v.* Hart, 36 Tex. 139.

3. St. Paul Land Co. *v.* Dayton, 39 Minn. 315, 40 N. W. 66.

4. Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68. See the title, "**Denials.**"

Otherwise in equity pleading generally, see 4 STANDARD PROC. 163.

5. See the statutes, and Loar *v.* Wilfong, 63 W. Va. 306, 314, 61 S. E. 333.

6. **Seeking specific performance by way of cross complaint,** etc., see *supra,* I, J, 1.

7. Gish *v.* Ferrea, 10 Cal. App. 53, 101 Pac. 27. See Tobey *v.* Foreman, 79 Ill. 489.

[a] **A cross complaint to quiet title** to the land in question may be filed. Gish *v.* Ferrea, 10 Cal. App. 53, 101 Pac. 27.

[b] **A cross-complaint against a co-defendant, which seeks relief by way of damages** for a breach of covenant and presents no grounds of equitable cognizance, will not be entertained. Hughey *v.* Bratton, 48 Ark. 167, 2 S. W. 698.

[c] **A rescission of the contract** may be asked by way of cross-complaint. Rector *v.* Lewis, 172 Cal. 1, 155 Pac. 75.

[d] **Counterclaim For Specific Performance.**—But in a suit by an insurance company to foreclose a mortgage to secure a loan, the defendant cannot, by way of counterclaim, ask for specific performance of a contract to execute a paid up policy of insurance. Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254.

8. See the titles, "**Cross-Bill,**" "**Cross-Complaint**" and "**Set-off, Counterclaim and Recoupment.**"

9. Fry on Specific Performance, 5th ed., §1483.

10. Adams *v.* Valentine, 33 Fed. 1.

11. Dorsey *v.* Campbell, 1 Bland (Md.) 356.

[a] **Formerly a Cross-bill Was Required.**—Dorsey *v.* Campbell, 1 Bland. (Md.) 356.

12. **Ga.**—Gordon *v.* Spellman, 96 S. E 1006. **Ill.**—Aldrich *v.* Aldrich, 122 N E. 472. **Ind.**—Cutsinger *v.* Ballard,

On denial of a contract within the statute of frauds not alleged to be in writing, the plaintiff must prove a written agreement.[13] And if a general allegation of performance is controverted, the plaintiff must prove the facts showing performance.[14] Under a general denial, it may be shown that the contract is in parol and in violation of the statute of frauds,[15] that the contract is illegal,[16] and that no tender was made as alleged.[17]

Variance. — There must be no substantial variance between the pleadings and the proofs.[18] Immaterial variances will not preclude relief.[19] But some courts require the greatest strictness in the conformation of allegata and probata when specific performance of contracts for the sale of land is sought,[20] especially if the contract is in parol.[21] The plaintiff must prove the contract to be enforced,[22] sub-

115 Ind. 93, 17 N. E. 206. **N. Y.**—Lobdell *v.* Lobdell, 36 N. Y. 327, 4 Abb. Pr. (N. S.) 56, 33 How. Pr. 347. **Va.** Adams *v.* Hazen, 96 S. E. 741.

[a] **But it is within the chancellor's discretion** to determine whether the proof is sufficiently clear and certain. Starkey *v.* Starkey, 136 Ind. 349, 356, 36 N. E. 287; Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206. See also Lobdell *v.* Lobdell, 36 N. Y. 327, 4 Abb. Pr. (N. S.) 56, 33 How. Pr. 347.

13. Wildbahn *v.* Robidoux, 11 Mo. 659; Coles *v.* Bowne, 10 Paige (N. Y.) 526.

[a] **On a denial of the contract, or on a denial of a written contract,** a parol contract and part performance cannot be proved unless the part performance is alleged either in the original bill, or, after the plea or answer, in an amendment. Capehart *v.* Hale, 6 W. Va. 547, 558. See also Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605, conceding but not deciding the point.

14. Corbett *v.* Kingan, 16 Ariz. 440, 146 Pac. 922.

15. Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68.

16. Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505; Lee *v.* Lee, 40 Misc. 251, 81 N. Y. Supp. 986, holding that illegality cannot be availed of under a general denial, where the illegality does not appear on the face of the complaint or necessarily appears from the plaintiff's evidence. See also 11 STANDARD PROC. 895.

17. Lanyon *v.* Chesney, 186 Mo. 540, 551, 85 S. W. 568.

18. Page *v.* Greeley, 75 Ill. 400; Buck *v.* Dowley, 16 Gray (Mass.) 555. See the title "**Variance and Failure of Proof.**"

[a] **The code rule as to variances** applies to specific performance. Lobdell *v.* Lobdell, 36 N. Y. 327, 4 Abb. Pr. (N. S.) 56, 33 How. Pr. 347.

[b] **Material variance as to description of the land** is fatal. Price *v.* Bell, 91 Ala. 180, 8 So. 565.

Variance as to balance due, see I, J, r.

19. **Ala.**—Sherman *v.* Sherman, 190 Ala. 446, 67 So. 255. **Mont.**—Milwaukee Land Co. *v.* Ruesink, 50 Mont. 489, 148 Pac. 396. **Nev.**—Brandon *v.* West, 28 Nev. 500, 83 Pac. 327, 29 Nev. 135, 85 Pac. 449, 88 Pac. 140. **N. J.**—Ashmore *v.* Evans, 11 N. J. Eq. 151.

20. Jones *v.* Mahone, 157 Ala. 105, 47 So. 195; McDonald *v.* Walker, 95 Ala. 172, 10 So. 225.

[a] **Strict proof is required not only as to every essential averment but also** as to every redundant and superfluous averment with respect to a material fact, or descriptive of a matter or thing necessary to be alleged. McDonald *v.* Walker, 95 Ala. 172, 10 So. 225.

[b] **But a variance as to the consideration paid** which does not change the essential rights of the parties, or destroy the right of redress cannot be treated as a variance. Williams *v.* Kirkpatrick, 195 Ala. 563, 70 So. 742; Cooper *v.* Parker, 176 Ala. 122, 57 So. 472.

21. Pepper *v.* Horn, 197 Ala. 395, 73 So. 46; Allen *v.* Young, 88 Ala. 338, 6 So. 747.

22. Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788; McCulley *v.* McLean, 48 W. Va. 625, 37 S. E. 559.

stantially as alleged.[23] He cannot recover on a different contract from that set up in his bill,[24] but immaterial variances do not preclude relief,[25] even though an amendment to conform to the proof is not made.[26]

P. TRIAL. — **1. Preliminary Injunction.** — A preliminary injunction to maintain in statu quo the rights of the parties to the property in question may be granted in a proper case.[27]

2. Receivers. — A receiver may be appointed in a proper case.[28]

3. Reference. — A reference to a master may be ordered in accordance with the general rules elsewhere discussed.[29] Accordingly a reference may be ordered to inquire if good title can be made,[30] to state an account[31] and to ascertain the damages.[32]

23. Banks *v.* Weaver (N. J. Eq.), 48 Atl. 515; Baldenberg *v.* Warden, 14 W. Va. 397, 408.

[a] **In every essential particular** the proof must correspond with the terms of the contract set up. Carswell *v.* Walsh, 70 Md. 504, 17 Atl. 330; Semmes *v.* Worthington, 38 Md. 398.

24. **Del.**—McFarland *v.* Reeve, 5 Del. Ch. 118. **Ill.**—Taylor *v.* Merrill, 55 Ill. 52. **Mass.**—Buck *v.* Dowley, 16 Gray 555. **N. Y.**—Byrne *v.* Romaine, 2 Edw. Ch. 445.

[a] **He cannot show the contract to be different** from the contract set up in the bill. Meshew *v.* Southworth, 133 Mich. 335, 94 N. W. 1047.

[b] **If he alleges a written contract,** he cannot (1) recover on proof of an oral contract (Loop Land & Irr. Co. *v.* Ogburn [Tex. Civ. App.], 180 S. W. 914), and (2) vice versa. Levandowski *v.* Althouse, 136 Mich. 631, 99 N. W. 786; Lennon *v.* Farrell, 46 App. Div. 621, 61 N. Y. Supp. 370.

Where defendant alleges another contract, see *supra*, I, J, 6.

25. **Minn.**—Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548. **N. J.** Ashmore *v.* Evans, 11 N. J. Eq. 151. **S. C.**—Latimer *v.* Marchbanks, 57 S. C. 267, 35 S. E. 481.

See also Lobdell *v.* Lobdell, 36 N. Y. 327, 330, 4 Abb. Pr. (N. S.) 56, 33 How. Pr. 347.

26. Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548.

27. **U. S.**—Lucas *v.* Milliken, 139 Fed. 816; Davis *v.* Davis, 89 Fed. 532. **Del.**—Elliott *v.* Jones (Del. Ch.), 101 Atl. 872. **Ga.**—Rivers *v.* Landrum, 145 Ga. 103, 88 S. E. 576. **Ill.**—Florin *v.* Rayman, 176 Ill. App 106. **N. J.** Swift *v.* Delaware L. & W. R. Co., 66 N. J. Eq. 34, 57 Atl. 456; Hurd *v.* Groch (N. J. Eq.), 51 Atl. 278. **N. Y.** Halstead *v.* Schnitzpahn, 152 N. Y. Supp. 561. **Okla.**—See Quaker Oil & Gas Co. *v.* Jane Oil & Gas Co., 164 Pac. 671. **W. Va.**—Carnegie National Gas Co. *v.* South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548. **Eng.**—Great Western Ry. Co. *v.* Birmingham & O. J. Ry. Co., 2 Ph. 597, 602, 17 L. J. Ch. 243, 12 Jur. (O. S.) 106, 41 Eng. Reprint 1074.

See the title, "**Injunctions,**" and particularly 13 STANDARD PROC. 146 et seq.

[a] **But an injunction will not be granted** (1) where it would interfere with the legitimate use and enjoyment of property (Lucas *v.* Milliken, 139 Fed. 816, 834), (2) or where the vendor plaintiff has not title at the time the injunction is asked. Baldwin *v.* Salter, 8 Paige (N. Y.) 473. (3) But if no injunction is asked, it is sufficient if he have title at the time of decree. See *infra*, I, R, 2, g.

28. Bennett *v.* Abrams, 41 Barb. (N. Y.) 619, 626, money collected on the decree may be paid into court to be applied through the aid of a receiver. See generally the title "**Receivers.**"

29. Herdic's Appeal, 58 Pa. 211. See the title, "**References.**"

30. **Form of order to inquire if good title can be made,** see 9 STANDARD PROC. 1165.

[a] **The objection that the title of the vendor is defective may be raised upon a direct application** to refer the question to a master. Park *v.* Johnson, 7 Allen (Mass.) 378.

31. Hubbard *v.* Johnson, 77 Me. 139.

32. Worrall *v.* Munn, 38 N. Y. 137

4. **Survey.** — The court may direct a survey of the land to be made.[33]

5. **Trial by Jury.** — Specific performance being an equitable action, no right to a jury trial exists,[34] except in a few states.[35]

6. **Issues Out of Chancery.** — An issue out of chancery may be awarded in a proper case.[36]

7. **Hearing.** — In determining the particular case, the question of granting specific performance often turns upon collateral incidents connected with and shedding light upon the contract to be enforced.[37] But equity will not, in the exercise of its discretion, look to circumstances entirely independent of the contract.[38] It requires much less strength of case on the part of the defendant to resist a bill for specific performance than on the part of the plaintiff to enforce it.[39]

Instead of referring the question of damages to a master,[40] or directing an issue quantum damnificatus,[41] the court may, in its discretion, proceed directly with the inquiry itself.[42]

8. **Questions of Law and Fact.** — Questions of law are for the court.[43]

9. **Instructions.** — The instructions to the jury must conform to the rules relating to instructions generally.[44]

(damages for defendant's failure to execute the contract); Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784; Nagle *v.* Newton, 22 Gratt. (63 Va.) 814. See Roberts *v.* Cambridge, 170 Mass. 199, 49 N. E. 84, no evidence being offered on this issue, a reference is unnecessary.

[a] **When Specific Performance Fails.**—Copper *v.* Wells, 1 N. J. Eq. 10; Wiswall *v.* McGowan, 1 Hoff. Ch. (N. Y.) 125. See *infra*, I, Q, 3, b.

[b] **But the question as to the proper abatement of the price** for the incumbrance resulting from the wife's inchoate right of dower cannot be referred to a master as this question requires the exercise of judicial power. Cowan *v.* Kane, 211 Ill. 572, 71 N. E. 1097.

[c] **If the parties can agree upon the computation,** a reference is unnecessary. Voorhees *v.* De Myer, 3 Sandf. Ch. (N. Y.) 614, 624.

33. Herdic's Appeal, 58 Pa. 211.

34. See 16 STANDARD PROC. 907.

35. Corbett *v.* Kingan, 16 Ariz. 440, 146 Pac. 922; Farris *v.* Bennett's Exrs., 26 Tex. 568, the court need not call in the aid of a jury unless it be requested by one of the parties.

36. See the title, **"Issues in Pleading and Practice."**

[a] **To Ascertain Damages.—N. J.** Copper *v.* Wells, 1 N. J. Eq. 10. **N. Y.** Worrall *v.* Munn, 38 N. Y. 137; Wiswall *v.* McGowan, 1 Hoff. Ch. 125. **Va.** Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784; Nagle *v.* Newton, 22 Gratt. (63 Va.) 814.

37. Marthinson *v.* King, 150 Fed. 48, 53, 82 C. C. A. 360.

38. Pulliam *v.* Owen, 25 Ala. 492.

39. Andrews *v.* Mendonca, 5 Hawaii 446; Trigg *v.* Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447.

40. See *supra*, I, P, 3.

41. See *supra*, I, P, 6.

42. Worrall *v.* Munn, 38 N. Y. 137; Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784; Nagle *v.* Newton, 22 Gratt. (63 Va.) 814.

43. See the title **"Province of Judge and Jury."**

[a] **Whether a contract is equitable or inequitable** is a question of law for the court. Whitted *v.* Fuquay, 127 N. C. 68, 71, 37 S. E. 141.

[b] **The question of the abandonment and repudiation of the contract** is for the jury. Groves *v.* Whittenberg (Tex. Civ. App.), 165 S. W. 889.

44. **Ga.**—Landrum *v.* Rivers, 98 S. E. 477; Warren *v.* Gay, 123 Ga. 243, 51 S. E. 302. **Kan.**—Baldwin *v.* Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957. **Tex.**—Lipscomb *v.* Amend, 49 Tex. Civ. App. 300, 108 S. W. 483. See the title, **"Instructions."**

10. Findings. — The court must prepare findings of fact and conclusions of law in accordance with the general rules.[45]

Q. RELIEF GRANTED. — **1. Complete Relief.** — The rule that when equity has once acquired jurisdiction, it will retain the case until complete justice has been done, settling all questions incident to the principal relief,[46] applies to actions for specific performance.[47]

2. When Specific Performance Is Granted. — a. *Generally.* When decreeing specific performance, equity will so far as possible, place the parties in the same position as they would have been in if the contract had been performed according to its terms.[48] It may mould its relief and give redress according to the circumstances of each case.[49]

b. *Conformity to Pleadings.* — The relief granted must be authorized by the pleadings;[50] and it should likewise be in accord with[51] the

45. **Cal.**—Bird *v.* Potter, 146 Cal. 286, 79 Pac. 970; Morrison *v.* Lods, 39 Cal. 381. **Ind.**—Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042. **Utah.**—Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. (N. S.) 870.

See the title, "**Findings and Conclusions.**"

[a] **After finding there is no contract** to perform, a finding that the plaintiff is not entitled to specific performance is not necessary. Gish *v.* Ferrea, 10 Cal. App. 53, 101 Pac. 27.

[b] **That the plaintiff is ready and desirous to perform** on his part, should be found. Owen *v.* Frink, 24 Cal. 171.

[c] **That the contract is in writing** need not be found, although the statute of frauds requires a writing. Nunez *v.* Morgan, 77 Cal. 427, 19 Pac. 753.

46. See 6 STANDARD PROC. 773.

47. **Ala.**—Hays *v.* Hall, 4 Port. 374, 388, 30 Am. Dec. 530. **Ill.**—Robinson *v.* Appleton, 124 Ill. 276, 284, 15 N. E. 761. **Mich.**—Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. 115. **Minn.** Thwing *v.* Hall & Ducey Lumber Co., 40 Minn. 184, 41 N. W. 815. **Mo.** Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568. **Neb.**—Lacey *v.* Zeigler, 98 Neb. 380, 152 N. W. 792. **N. J.**—Melick *v.* Cross, 62 N. J. Eq. 545, 51 Atl. 16. **N. Y.**—Witherbee *v.* Meyer, 84 Hun 146, 32 N. Y. Supp. 537, 65 N. Y. St. 806. **Va.**—Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841; Nagle *v.* Newton, 22 Gratt. (63 Va.) 814.

See *infra*, I, Q, 3, b.

[a] **Thus damages** may be awarded, so that complete justice may be done without resorting to any other forum. Nagle *v.* Newton, 22 Gratt. (63 Va.) 814.

[b] **Where an attachment has been levied** on the vendor after the making of the contract, the court will adjust the conflicting claims to the purchase money. Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. 115.

48. **Cal.**—McGinn *v.* Willey, 24 Cal. App. 303, 141 Pac. 49. **N. Y.**—Worrall *v.* Munn, 38 N. Y. 137. **N. D.**—Pillsbury *v.* J. B. Streeter Jr., Co., 15 N. D. 174, 107 N. W. 40. **S. D.**—Brace *v.* Doble, 3 S. D. 110, 117, 52 N. W. 586.

49. Bennett *v.* Abrams, 41 Barb. (N. Y.) 619, 626; Post *v.* West Shore R. Co., 50 Hun 301, 3 N. Y. Supp. 172, 20 N. Y. St. 180.

50. **Cal.**—Quarg *v.* Scher, 136 Cal. 406, 69 Pac. 96; Holman *v.* Vallejo, 19 Cal. 498. **Ga.**—Rosenkrantz *v.* Chattahooche Brick Co., 147 Ga. 730, 95 S. E. 225. **Mich.**—Levandowski *v.* Althouse, 136 Mich. 631, 99 N. W. 786. **Mo.** Whiting *v.* Enterprise Land & Sheep Co., 265 Mo. 374, 177 S. W. 589. **N. J.** Davimos *v.* Green, 83 N. J. Eq. 596, 92 Atl. 96. **N. Y.**—Theall *v.* Port Chester, 110 App. Div. 776, 97 N. Y. Supp. 442.

51. **Md.**—Mills *v.* Zion Chapel, 119 Md. 510, 87 Atl. 257. **Mo.**—Aiple-Hemmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480. **W. Va.**—Rosenour *v.* Rosenour, 47 W. Va. 554, 35 S. E. 918.

See Logan *v.* Flattau, 73 N. J. Eq. 222, 67 Atl. 1007.

Compare Kuntz *v.* Schnagg, 99 App. Div. 191, 90 N. Y. Supp. 933, holding specific performance may be granted although compensation only is asked.

See generally 6 STANDARD PROC. 754.

prayer of relief, especially if there is a default.[52]

c. *Conformity to the Contract.* — In an action for specific performance, the relief granted must be warranted by the contract.[53] Equity cannot make a new contract between the parties, and then compel the execution of the new contract,[54] although in a proper case, it may reform the contract and enforce it as reformed.[55] And if specific performance be impracticable, approximate relief in some other form may be rendered.[56]

d. *Enforcing Whole Contract.* — It is a general rule that specific performance will not be granted unless the court can enforce the whole contract;[57] the court will not enforce a part of a contract unless that part is clearly separable from the remainder.[58] Accordingly the court will not decree specific performance unless it can enforce both

[a] Where there is (1) a prayer for general relief, see Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103. (2) Under a general prayer for relief, compensation may be awarded if the facts warrant it. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937. (3) Or if the vendor fails to allege an offer to convey, his bill may be treated as a bill to foreclose a vendor's lien. Munford *v.* Pearce, 70 Ala. 452.

52. A. D. Smith & Sons *v.* Securities Co. (Ala.), 73 So. 892.

[a] **Otherwise where there is no default,** according to some cases. Harms *v.* Stern, 229 Fed. 42, 145 C. C. A. 2; Bryan *v.* Canady, 169 N. C. 579, 86 S. E. 584.

53. **Ill.**—Louisville & N. R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Fitzhugh *v.* Smith, 62 Ill. 486, 493. **N. J.**—Bosch Magneto Co. *v.* Rushmore, 85 N. J. Eq. 93, 95 Atl. 614. **Tex.**—Carter *v.* Smith (Tex. Civ. App.), 184 S. W. 244. **Va.**—Dickenson *v.* Scott, 119 Va. 497, 89 S. E. 869; Pence *v.* Life, 104 Va. 518, 52 S. E. 257. **Wash.**—State *ex rel.* Faucett *v.* Mackintosh, 99 Wash. 341, 169 Pac. 831; Richardson *v.* Sears, 74 Wash. 499, 133 Pac. 1010.

[a] **Where the contract calls for payment in specie,** the decree should so direct. Fitzhugh *v.* Smith, 62 Ill. 486, 493.

54. **U. S.**—Hunt *v.* Rousmaniere, 1 Pet. 1, 7 L. ed. 27. **Del.**—Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 177, 14 Atl. 27. **Ill.**—Bennett *v.* Giles, 111 Ill. App. 428. **Neb.**—Anderson *v.* Schertz, 94 Neb. 390, 143 N. W. 238. **N. J.**—Bosch Magneto Co. *v.* Rushmore, 85 N. J. Eq. 93, 95 Atl. 614. **N. Y.** Johnston *v.* Long Island Inv. & Imp. Co., 85 App. Div. 60, 82 N. Y. Supp. 961. **Okla.**—Clark *v.* Frazier, 177 Pac. 589. **Wash.**—State *ex rel.* Faucett *v.* Mackintosh, 99 Wash. 341, 169 Pac. 831. **Eng.**—Halsey *v.* Grant, 13 Ves. Jr. 73, 76, 33 Eng. Reprint 222.

But *compare* Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

55. See *supra*, I, J, 3.

56. Bennett *v.* Abrams, 41 Barb. (N. Y.) 619, 626.

57. **Colo.**—Riverside Land & Irr. Co. *v.* Sawyer, 24 Colo. App. 442, 134 Pac. 1011. **Ia.**—Olson *v.* Rogness, 173 Iowa 331, 155 N. W. 301. **Mich.**—Bilansky *v.* Hogan, 190 Mich. 463, 157 N. W. 13. **Tex.**—Burnett *v.* Mitchell (Tex. Civ. App.), 158 S. W. 800. **Eng.**—Gervais *v.* Edwards, 2 Dr. & W. 80, 1 Con. & L. 242, 4 Ir. Eq. 555; Goring *v.* Nash, 3 Atk. 186, 190, 26 Eng. Reprint 909.

[a] **Equity has power,** by its decree, as against all the parties before it, to enforce all the terms of the agreement. Grant *v.* Beronia, 97 Cal. 496, 32 Pac. 556.

[b] **Equity "must act ex vigore** and carry the contract into execution with unmitigated severity." Seymour *v.* Delancey, 6 Johns. Ch. (N. Y.) 222, 232; Hills *v.* Croll, 1 Coop. & Cott. 83, 2 Ph. 60, 47 Eng. Reprint 758.

58. **U. S.**—Harms *v.* Stern, 229 Fed. 42, 145 C. C. A. 2; Pantages *v.* Grauman, 191 Fed. 317, 112 C. C. A. 61. **Haw.**—Paris *v.* Greig, 12 Hawaii 274. **Ill.**—Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98. **Ky.**—Edelen *v.* Samuels & Co., 126 Ky. 295, 103 S. W. 360. **Mass.**—Adams *v.* Messenger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679. **Mich.**—Baldwin *v.* Fletcher, 48 Mich. 604, 12 N. W. 873.

sides of the contract.[59] It must require a performance by the plaintiff as well as by the defendant.[60]

e. *Execution of Conveyance.* — **(I.) Generally.** — The court of equity having acquired jurisdiction of the parties to the contract may direct the parties to execute a deed,[61] and if they refuse, direct the execution of a deed by a master in chancery.[62] A decree vesting title is sometimes made.[63]

(II.) Form of Conveyance Directed. — If the contract to convey prescribes the form of conveyance, the decree should direct the execution of the deed in accordance with the terms of the contract.[64] If the contract is silent as to the nature of the conveyance, some courts hold that a deed with covenants of warranty or title cannot be directed,[65] for the reason that such covenants are not necessary to the transfer of the title;[66] but other courts hold that a deed with the usual covenants

59. **Ind.**—Sterling *v.* Klepsattle, 24 Ind. 94, 87 Am. Dec. 319. **Md.**—Dorsey *v.* Campbell, 1 Bland 356. **Mich.**—Bilansky *v.* Hogan, 190 Mich. 463, 157 N. W. 13. **N. J.**—Smith *v.* Smith, 84 N. J. Eq. 299, 93 Atl. 890.

[a] **This Rule Has Some Exceptions.**—Sterling *v.* Klepsattle, 24 Ind. 94, 87 Am. Dec. 319.

[b] **Where the consideration is entire** and the performance separate the rule does not always prevail. Sterling *v.* Klepsattle, 24 Ind. 94, 87 Am. Dec. 319.

[c] **Formerly a cross-bill was necessary** in order that each party might be decreed to perform that to which he had bound himself. But this circuitous course is no longer deemed necessary. Dorsey *v.* Campbell, 1 Bland. (Md.) 356.

60 Holman *v.* Lowrance, 102 Ark. 252, 144 S. W. 190; Schreiber *v.* Menningham, 73 N. J. Eq. 134, 75 Atl. 818. See *infra,* I, R, 2, and 3.

61. Wolf *v.* Lawrence, 276 Ill. 11, 114 N. E. 567. See Myers' Heirs *v.* Hite's Devisees, 2 A. K. Marsh. (Ky.) 393.

Conveyance by wife, see *infra,* I, Q, 2, f.

62. Rourkee *v.* McLaughlin, 38 Cal. 196; Wolf *v.* Lawrence, 276 Ill. 11, 23, 114 N. E. 567. See also Wharton *v.* Stoutenburgh, 39 N. J. Eq. 299.

[a] **The defendant must be given a day** in which to execute the conveyance, before execution by the commissioner. Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

[b] **If the defendant is an infant** (1) the execution of a conveyance by a commissioner should be directed, reserving to the defendant the usual time after arriving at full age to show cause against the decree. Hogan *v.* McMurtry, 5 J. J. Marsh. (Ky.) 633. (2) A decree requiring execution by the infant after he arrives of full age is erroneous. Hogan *v.* McMurtry, 5 J. J. Marsh. (Ky.) 633. (3) Otherwise if the land is in another state. Sutphen *v.* Fowler, 9 Paige (N. Y.) 280, and the court may authorize the plaintiff to take and retain possession of the property in the meantime.

63. See *infra,* I, R, 2.

64. D'Arby's Heirs *v.* Richardson, 3 J. J. Marsh. (Ky.) 544; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435.

[a] **Even Though the Action Is Brought Against the Vendor's Assignee.**—Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844.

[b] **Judgment Construed.**—A judgment requiring the making of a "deed of conveyance" will be interpreted as requiring a warranty deed, where the contract calls for such a deed. Paris *v.* Golden, 96 Kan. 668, 153 Pac. 528. See also Gibbs *v.* Blackwell, 37 Ill. 191.

65. **Conn.**—Dodd *v.* Seymour, 21 Conn. 476; Potter *v.* Tuttle, 22 Conn. 512. **Neb.**—Peterson *v.* Ramsey, 78 Neb. 235, 110 N. W. 728. **N. J.**—Sargent *v.* Realty Traders, 82 N. J. Eq. 331, 88 Atl. 1043, Ann. Cas. 1915C, 488; Lounsbery *v.* Locander, 25 N. J. Eq. 554. **Tex.**—Hall *v.* Layton, 10 Tex. 55.

66. Sargent *v.* Realty Traders, 82 N. J. Eq. 331, 88 Atl. 1043, Ann. Cas. 1915C, 488.

may be directed.[67] The minor heirs of the vendor, however, will not be compelled, ordinarily, to enter into personal covenants in pursuance of an agreement by the ancestor.[68]

(III.) To Whom Conveyance Made. — In an action by an assignee, a conveyance directly to him may be directed.[69]

f. *Relief Against Strangers to the Contract.* — No decree can be made to affect the rights of persons not parties to the contract.[70] The wife of the vendor, not a party to the contract, cannot be compelled to execute a deed or unite with her husband in conveying the land.[71]

g. *Allowing Vendor Time To Perfect Title.* — When time is not of the essence of the contract, and the vendor in good faith believes his title to be sufficient, or has lost an opportunity to perfect his title before decree by reason of the conduct of the plaintiff[72] the court may hold open the hearing of the case,[73] or may allow him a reasonable time even after the entry of the decree,[74] to enable him to perfect his title, provided it can be done without hardship to the vendee.[75]

67. **Minn.**—Drake *v.* Barton, 18 Minn. 462. **Mich.**—Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844. **Mo.**—McGinness *v.* Brodrick, 192 S. W. 420. **N. C.**—Henry *v.* Liles, 37 N. C. 407. **Ohio.**—Stanley *v.* Bedinger, 2 Ohio C. C. 344, 1 Ohio Cir. Dec. 522. **Wis.**—McClellan *v.* Cross, 35 Wis. 693.

[a] **The "usual covenants for title" include** what is understood by "a warranty deed with full covenants." Drake *v.* Barton, 18 Minn. 462.

68. Hill *v.* Ressegieu, 17 Barb. (N. Y.) 162.

[a] **Adults and Infants Contrasted.** Infant heirs will be directed to convey without covenants, and adult heirs will be directed to convey with covenants against their own acts. Hill *v.* Ressegieu, 17 Barb. (N. Y.) 162, 170. See Hyatt *v.* Seeley, 11 N. Y. 52.

69. Denton *v.* White, 26 Wis. 679.

70. Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256.

71. **U. S.**—Dixon *v.* Anderson (C. C. A.), 252 Fed. 694. **Del.**—Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256. **Ill.** Bartak *v.* Isvolt, 261 Ill. 279, 103 N. E. 967; Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709. **Ia.**—Venator *v.* Swenson, 100 Iowa 295, 69 N. W. 522. **Ky.**—Plum *v.* Mitchell, 16 Ky. L. Rep. 162, 26 S. W. 391. **Mich.**—Solomon *v.* Shewitz, 185 Mich. 620, 152 N. W. 196; Shipman *v.* Campbell, 79 Mich. 82, 44 N. W. 171. **Minn.**—Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548. **N. J.**—Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25. **N. C.**—Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682. **Va.**—Haden *v.* Falls, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034.

But *compare* Young *v.* Porter, 27 Wash. 551, 68 Pac. 362.

[a] **The vendor cannot be required to obtain a release of the rights** of his wife under penalty of imprisonment for failure to do so. Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256.

[b] **But if the vendor and his wife execute a deed** which is before the court as an exhibit, the court may decree the delivery of the deed already executed. Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Hulmes *v.* Thorpe, 5 N. J. Eq. 415.

72. Van Riper *v.* Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020, Ann. Cas. 1912A, 319, 30 L. R. A. (N. S.) 25. *Compare* Christian *v.* Cabell, 22 Gratt. (63 Va.) 82, but this indulgence will not be granted when the defect was known to the vendor or his attorney at the time of making the contract, and was concealed from the purchaser.

73. **Ky.**—Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013; Pulliam *v.* Pulliam's Heirs, 4 Dana 123. **N. Y.**—Grillenberger *v.* Spencer, 7 Misc. 601, 27 N. Y. Supp. 864, 58 N. Y. St. 756. **Va.**—Christian *v.* Cabell, 22 Gratt. (63 Va.) 82.

74. Van Riper *v.* Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020, Ann. Cas. 1912A, 319, 30 L. R. A. (N. S.) 25, and note.

75. Van Riper *v.* Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020, Ann. Cas.

h. *Discharge of Incumbrances.* — If there is a mortgage or other lien on the property, a court of equity may in its discretion enter judgment for a sufficient sum to cancel such lien,[76] or it may cause the money to be brought into court, and distributed directly to the holders of the encumbrances, although not parties to the action,[77] or the vendee may be authorized to procure a release of incumbrances and allowed an abatement of the purchase money for the amount paid.[78]

i. *Vacating Conveyances in Avoidance of Decree.* — Conveyances made to avoid specific performance may be set aside.[79]

j. *Monetary Relief in Addition to Specific Performance.* — **(I.) Generally.** — In a proper case the court may award relief by way of compensation in addition to specific performance[80] if prayed for.[81]

(II.) For Deficiency. — Compensation for deficiency or abatement from the purchase price may be decreed in a proper case.[82] This relief is incidental to the main action,[83] and is not authorized when specific performance fails.[84]

In Actions by Purchaser. — Where there is a deficiency as to the subject-matter of a contract to convey land, the general rule is that the vendee may, if he chooses, enforce performance as to the part which the vendor can perform, and recover compensation for the balance,[85]

1912A, 319, 30 L. R. A. (N. S.) 25; Christian *v.* Cabell, 22 Gratt. (63 Va.) 82.

76. West *v.* Washington Ry. Co., 49 Ore. 436, 451, 90 Pac. 666.

Abatement of purchase price, see *infra,* I, Q, 2, j.

77. Grant *v.* Beronia, 97 Cal. 496, 32 Pac. 556.

78. Hunt *v.* Smith, 139 Ill. 296, 28 N. E. 809.

79. Bull *v.* Bell, 4 Wis. 54, 63.

80. **U. S.**—Lynch *v.* Wright, 94 Fed. 703. **Idaho.**—Deeds *v.* Stephens, 8 Idaho 514, 69 Pac. 534. **N. M.**—Mundy *v.* Irwin, 20 N. M. 43, 145 Pac. 1080, Ann. Cas. 1918D, 713. **Ore.**—West *v.* Washington Ry. Co., 49 Ore. 436, 451, 90 Pac. 666. **Va.**—Nagle *v.* Newton, 22 Gratt. (63 Va.) 814.

[a] **The rule is more liberal in favor of vendees than vendors.** Mundy *v.* Irwin, 20 N. M. 43, 145 Pac. 1080, Ann. Cas. 1918D, 713.

81. See *infra,* this note.

[a] **Under a prayer for general relief,** a money decree may be rendered. Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937; Barlow *v.* McDowell, 118 Ill. App. 506.

82. See *infra,* this section.

83. Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051.

84. Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051; Cartwright *v.* Oregon Electric Ry. Co., 88 Ore. 596, 171 Pac. 1055, where the legal remedy is adequate.

85. **Ala.**—Bell *v.* Thompson, 34 Ala. 633. **Ark.**—Bonner *v.* Little, 38 Ark. 397, 402. **Cal.**—Sheplar *v.* Green, 96 Cal. 218, 31 Pac. 42; Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394. **Del.**—Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256. **Haw.**—Jones *v.* Petersen, 14 Hawaii 427. **Ill.**—Eppstein *v.* Kuhn, 225 Ill. 115, 80 N. E. 80, 10 L. R. A. (N. S.) 117, note; Lancaster *v.* Roberts, 144 Ill. 213, 33 N. E. 27. **Ia.**—Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724. **Mass.**—Cashman *v.* Bean, 226 Mass. 198, 115 N. E. 574. **Minn.**—Drake *v.* Barton, 18 Minn. 462. **N. J.**—Brisbane *v.* Sullivan, 83 N. J. Eq. 182, 93 Atl. 705; Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292; Melick *v.* Cross, 62 N. J. Eq. 545, 51 Atl. 16; Lounsbery *v.* Locander, 25 N. J. Eq. 554. See Planer *v.* Equitable L. Assur. Soc. (N. J. Eq.), 37 Atl. 668, holding the purchaser must show that the defendant undertook to convey what he knew he did not own. **N. M.**—Mundy *v.* Irwin, 20 N. M. 43, 145 Pac. 1080, Ann. Cas. 1918D, 713. **N. Y.**—Sternberger *v.* McGovern, 56 N. Y. 12, 15 Abb. Pr. (N. S.) 257; Hill *v.* Ressegieu, 17 Barb. 162; Wiswall *v.* McGown, 2 Barb. 270. **N. C.**—Flowe *v.* Hartwick, 167 N. C. 448, 83 S. E. 841; Tillery *v.* Land, 136

provided that he contracted without knowledge of the defect in title or quantity,[86] that the granting of relief will not work great hardship or injustice to the vendor,[87] and that the compensation is assessable and capable of computation,[88] and that the relief is prayed for.[89] But where the difference is substantial, relief has been denied, on the ground that the vendor could not have specifically enforced the contract in such case.[90] The right to relief is sometimes influenced by specific provisions in the contract with respect to quantity, etc.[91]

But in an action brought by the vendor, the purchaser cannot be compelled to accept less[92] than he contracted for with indemnity for the

N. C. 537, 542, 48 S. E. 824. **S. C.** Harbers *v.* Gadsden, 6 Rich. Eq. 284, 62 Am. Dec. 390. **Tex.**—Williams *v.* Pearman (Tex. Civ. App.), 164 S. W. 43. **Eng.**—Hill *v.* Buckley, 17 Ves. Jr. 394, 11 Rev. Rep. 109, 34 Eng. Reprint 153; Mortlock *v.* Buller, 10 Ves. Jr. 292, 315, 32 Eng. Reprint 857; Rutherford *v.* Acton-Adams, (1915) A. C. 866, Ann. Cas. 1915D, 1106.

[a] **Basis of Rule.**—Compensation is given more for the purpose of adjusting the equities between the parties, with regard to the subject matter already properly before the court, than actual damages for nonperformance. Bonner *v.* Little, 38 Ark. 397, 402.

[b] **The want of mutuality of remedy** (see *infra,* I, C, 5) is supplied by the waiver of full performance by the purchaser. Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724.

[c] **Thus the value of incumbrances** may be allowed. Eppstein *v.* Kuhn, 225 Ill. 115, 80 N. E. 80, 10 L. R. A. (N. S.) 117.

[d] **When the vendor's wife refuses to join in the conveyance,** (1) abatement of purchase price may be had according to some authorities. **Minn.** Sanborn *v.* Nockin, 20 Minn. 178. **Mo.** Tebeau *v.* Ridge, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367, (if the purchaser does not know the vendor is married, he may have an abatement of the purchase price), *overruling* Aiple-Hemmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652, 671, note. **N. C.**—Bethell *v.* McKinney, 164 N. C. 71, 80 S. E. 162 but (2) not according to others. Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256; Kuratli *v.* Jackson, 60 Ore. 203, 118 Pac. 192, 1013, Ann. Cas. 1914A, 203, 38 L. R. A. (N. S.) 1195. See *supra,* I, C, 7.

[e] The authorities are in irreconciliable conflict. See Long *v.* Chandler, 10 Del. Ch. 339, 92 Atl. 256, reviewing the authorities. And see annotated notes, in 14 Ann. Cas. 671, and 38 L. R. A. N. S. 1195.

[f] **This rule does not apply to a claim** to make good a representation about the subject-matter made, not in the contract but collaterally to it. Rutherford *v.* Acton-Adams, (1915) A. C. (Eng.) 866, Ann. Cas. 1915D, 1106.

[g] **In Scotland,** this procedure is unknown. Stewart *v.* Kennedy, 15 App. Cas. (Eng.) 75, 102.

86. **Minn.**—Chicago M. & St. P. R. Co. *v.* Durant, 44 Minn. 361, 365, 46 N. W. 676. **N. J.**—Planer *v.* Equitable L. Assur. Soc. (N. J. Eq.), 37 Atl. 668. **Eng.**—See Caballero *v.* Henty, L. R. 9 Ch. 447, 43 L. J. Ch. 635, 30 L. T. N. S. 314, 22 Wkly. Rep. 446.

87. Durham *v.* Legard, 34 Beav. 611, 11 Jur. N. S. 706, 34 L. J. Ch. 589, 13 W. R. 959, 55 Eng. Reprint 771. See *supra,* I, C.

88. Neptune Fisheries Co. *v.* Cape May Real Estate Co. (N. J. Eq.), 105 Atl. 212; Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292.

89. Neptune Fisheries Co. *v.* Cape May Real Estate Co. (N. J. Eq.), 105 Atl. 212, denying partial specific performance with compensation where the prayer is limited to a prayer for general relief and there is nothing to indicate that complainant desires it.

90. Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051.

91. See *infra,* this note.

[a] **A provision that no compensation** shall be allowed for errors applies only to small and unintentional errors and does not prevent the award of compensation if the error is gross. Whittemore *v.* Whittemore, L. R. 8 Eq. (Eng.) 603.

92. **Md.**—Foley *v.* Crow, 37 Md. 51. **N. C.**—Tillery *v.* Land, 136 N. C. 537,

deficiency, if the difference is material. If, however, the vendor is able to convey substantially what he agreed to convey, specific performance with compensation for the small and immaterial deficiency may be decreed,[93] unless the defendant by misrepresentation or otherwise disentitles himself to the remedy,[94] or unless the assessment of compensation is too difficult.[95]

(III.) For Delay. — Damages for delay in making a conveyance may be awarded in addition to specific performance.[96]

k. *Injunctive Relief.* — An injunction may be granted by way of ancillary relief in a proper case.[97]

l. *Relief Granted to the Defendant.* — **(I.) Generally.**[98] — The court on decreeing specific performance may allow the defendant vendor for improvements made in good faith.[99] The court cannot quiet the vendor's title when he has not asked for general or equitable relief.[1] Nor can the court by decree authorize him to elect whether to return the purchase money paid, or to accept the balance due, where time is not of the essence of the contract.[2] But it has been held that a decree giv-

542, 48 S. E. 824. **N. Y.**—Sternberger *v.* McGovern, 56 N. Y. 12, 15 Abb. Pr. (N. S.) 257; Peters *v.* Delaplaine, 49 N. Y. 362. **N. D.**—Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051. **Tex.** Gober *v.* Hart, 36 Tex. 139. **Eng.** Cato *v.* Thompson, 9 Q. B. D. 616, 47 L. T. N. S. 491; Smith *v.* Tolcher, 4 Russ. 302, 28 Rev. Rep. 103, 38 Eng. Reprint 819.

See also *supra,* I, C, 7.

[a] **But the court may refuse specific relief unless** the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. Rutherford *v.* Acton-Adams, (1915) A. C. (Eng.) 866, Ann. Cas. 1915D, 1106.

93. **Ga.**—Phinizy *v.* Guernsey, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680. **Ill.**—Towner *v.* Tickner, 112 Ill. 217. **Md.**—Foley *v.* Crow, 37 Md. 51. **Mass.** Mansfield *v.* Wiles, 221 Mass. 75, 108 N. E. 901. **Mo.**—See Lanyon *v.* Chesney, 186 Mo. 540, 556, 85 S. W. 568. **N. M.**—Mundy *v.* Irwin, 20 N. M. 43, 145 Pac. 1080, Ann. Cas. 1918D, 713. **N. D.**—Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051. **W. Va.**—Tavenner *v.* Barrett, 21 W. Va. 656. **Eng.** Smith *v.* Tolcher, 4 Russ. 302, 28 Rev. Rep. 103, 38 Eng. Reprint 819; Shepherd *v.* Croft (1911) 1 Ch. 521, 80 L. J. Ch. 170, 103 L. T. N. S. 874; Rutherford *v.* Acton-Adams, (1915) A. C. 866, Ann. Cas. 1915D, 1106.

[a] **If there are incumbrances** for which the plaintiff is responsible, purchase-money deductions can be made in the decree. Mackey Wall Plaster Co. *v.* United States Gypsum Co., 244 Fed. 275.

94. Foley *v.* Crow, 37 Md. 51; Rutherford *v.* Acton-Adams, (1915) A. C. (Eng.) 866, Ann. Cas. 1915D, 1106.

95. Rudd *v.* Lascelles (1900) 1 Ch. Div. (Eng.) 815; Cato *v.* Thompson, 9 Q. B. D. 616, 47 L. T. N. S. 491.

96. **Ala.**—Lauderdale Power Co. *v.* Perry, 80 So. 476. **N. Y.**—Worrall *v.* Munn, 38 N. Y. 137, 141; Post *v.* West Shore R. Co., 50 Hun 301, 3 N. Y. Supp. 172; Bennett *v.* Abrams, 41 Barb. 619, 626. **N. D.**—Orfield *v.* Harney, 33 N. D. 568, 157 N. W. 124; Pillsbury *v.* Streeter, 15 N. D. 174, 107 N. W. 40.

97. **Ala.**—Hays *v.* Hall, 4 Port. 374, 388, 30 Am. Dec. 530. **Md.**—Spencer *v.* State, 69 Md. 28, 13 Atl. 809. **N. J.** Farrington *v.* Forman (N. J. Eq.), 26 Atl. 532.

98. **Enforcing contract on both sides,** see *supra,* I, Q, 2, d.

99. Eastman *v.* Simpson, 139 Mass. 348, 1 N. E. 346; Leeds *v.* Penrose, 44 N. J. Eq. 464, 15 Atl. 261.

1. Mancuso *v.* Rosso, 81 Neb. 786, 116 N. W. 679, where he filed a general denial only.

2. Rea *v.* Ferguson, 126 Iowa 704, 102 N. W. 788.

[a] **Especially** when such relief is not prayed for. Rea *v.* Ferguson, 126 Iowa 704, 102 N. W. 788.

ing the defendant purchaser the option of settling in accordance with his contract or paying the full purchase price with interest is not erroneous.[3]

(II.) Imposing Terms. — The court in granting relief may impose terms upon the plaintiff.[4]

3. When Specific Performance Is Denied. — a. *Generally.* — If specific performance of a contract to convey cannot be decreed, the court, when there is no remedy at law, may direct a return of the purchase money paid,[5] and make an allowance for improvements,[6] if such relief is prayed for,[7] and the court may declare the amount thereof to be a lien on the land.[8] The court may rescind the contract in a proper case.[9]

b. *Monetary Relief as an Alternative.*[10] — **When Specific Performance Is Awarded.** — On a finding for the plaintiff in an action for specific performance, he cannot have damages in lieu of specific performance.[11]

Where Specific Performance Fails. — The jurisdiction in equity is not necessarily at an end if relief by specific performance fails.[12] In a proper case[13] the court may grant specific performance or give adequate

3. Pricbard *v.* Mulhall, 140 Iowa 1, 118 N. W. 43.

4. **Ill.**—Wolf *v.* Lawrence, 276 Ill. 11, 114 N. E. 567. **Ia.**—King *v.* Raab, 123 Iowa 632, 99 N. W. 306. **N. J.** Harrigan *v.* Smith, 57 N. J. Eq. 635, 42 Atl. 579. **Okla.**—Skidmore *v.* Leavitt, 175 Pac. 503.

[a] **A condition which will cause the plaintiff considerable expense** without any resultant benefit to either of the parties will not be imposed. Kerwin Machine Co. *v.* Baker (Mich.), 165 N. W. 625.

5. **Ala.**—Williams *v.* Kirkpatrick, 195 Ala. 563, 70 So. 742; Powell *v.* Higley, 90 Ala. 103, 7 So. 440. **Ind.** Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699. **Md.**—Girault *v.* Adams, 61 Md. 1; Powell *v.* Young, 45 Md. 494. **Va.**—Stearns *v.* Beckham, 31 Gratt. (72 Va.) 379.

[a] **Where the contract is uncertain, or where the statute of frauds** is relied on as a defense. Powell *v.* Young, 45 Md. 494.

6. **Ala.**—Lauderdale Power Co. *v.* Perry, 80 So. 476; Powell *v.* Higley, 90 Ala. 103, 7 So. 440; Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225. **Md.**—Powell *v.* Young, 45 Md. 494. **Mich.**—Hawley *v.* Sheldon, Har. 420. **N. J.**—See Clow *v.* Taylor, 27 N. J. Eq. 418, ordering an account where the defendant consents.

7. McDole *v.* Kingsley, 163 Ill. 433, 45 N. E. 281; Webster *v.* Brown, 67 Mich. 328, 34 N. W. 676.

8. Powell *v.* Higley, 90 Ala. 103, 7 So. 440.

9. **Fla.**—Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283. **Minn.** Thwing *v.* Hall & Ducey Lumber Co., 40 Minn. 184, 41 N. W. 815. **W. Va.** Cleavenger *v.* Sturm, 59 W. Va. 658, 53 S. E. 593. **Eng.**—Willan *v.* Willan, 16 Ves. Jr. 72, 83, 33 Eng. Reprint 911, *quoted* in Seymour *v.* Delancey, 6 Johns. Ch. (N. Y.) 222.

[a] "In general, when a specific performance is denied, a rescission will be decreed." Hendry *v.* Benlisa, 37 Fla. 609, 624, 20 So. 800, 34 L. R. A. 283.

[b] **When both parties are in default,** equity will place them in statu quo as nearly as possible. Francis *v.* Brown, 22 Wyo. 528, 145 Pac. 750.

[c] **The negligence of the defendant** presents a reason why the court in its discretion may refuse to relieve him of the contract. Woldenberg *v.* Riphan, 166 Wis. 433, 166 N. W. 21.

10. Manner of computing, see *supra*, I, P, 3, 6 and 7.

11. People's Pure Ice Co. *v.* Trumbull, 70 Fed. 166, 173, 17 C. C. A. 43.

12. Copper *v.* Wells, 1 N. J. Eq. 10; Moubray *v.* Dieckman, 9 App. Div. 120, 41 N. Y. Supp. 82, 75 N. Y. St. 543.

13. **Conn.**—Thresher *v.* Stonington Sav. Bank, 68 Conn. 201, 36 Atl. 38.

damages as an alternative. The rule is that when the plaintiff is entitled to specific performance,[14] and specific relief fails through no fault of the plaintiff,[15] the court having obtained jurisdiction over the subject-matter of the suit may grant, as an alternative, monetary relief,[16] provided that the plaintiff was not, at the time of the institution of the action, aware that specific performance could not be decreed,[17]

Ky.—Chicago M. & G. R. Co. *v.* Dodds, 167 Ky. 624, 181 S. W. 666. **Md.**—Linthicum *v.* Washington B. & A. Elec. R. Co., 124 Md. 263, 92 Atl. 917. **N. J.** Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197. **N. Y.**—Moubray *v.* Dieckman, 9 App. Div. 120, 41 N. Y. Supp. 82. **Okla.**—Ball *v.* White, 50 Okla. 429, 150 Pac. 901. **Pa.**—Masson's Appeal, 70 Pa. 26. **S. C.**—Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 330.

14. Ala.—Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. **Cal.**—Morrison *v.* Land, 169 Cal. 580, 147 Pac. 259, 263. **Mass.** Milkman *v.* Ordway, 106 Mass. 232, 253.

[a] "**The rule assumes,** of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite on his part to the cognizance of his case in chancery; and that the special relief sought is defeated, not by any defense or counter-equities, but simply because an order therefor would be fruitless, from the inability of the defendant to comply." Milkman *v.* Ordway, 106 Mass. 232, 254, *quoted* in Eastman *v.* Reid, 101 Ala. 320, 13 So. 46.

15. Ala.—A. D. Smith & Sons *v.* Securities Co., 73 So. 892 (granting an accounting); Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. **Cal.**—Morrison *v.* Land, 169 Cal. 580, 147 Pac. 259; Messer *v.* Hibernia Sav. & L. Soc., 149 Cal. 122, 84 Pac. 835. **Colo.**—Riverside Land & Irr. Co. *v.* Sawyer, 24 Colo. App. 442, 134 Pac. 1011. **Ga.**—Gordon *v.* Spellman, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918A, 852. **Mass.**—Milkman *v.* Ordway, 106 Mass. 232, 253; Andrews *v* Brown, 3 Cush. 130. **Minn.**—Hopkins *v.* Baremore, 99 Minn. 413, 109 N. W. 831. **Miss.**—See Keystone Lumber Yard *v.* Yazoo & M. V. R. Co., 96 Miss. 116, 50 So. 445, Ann. Cas. 1912A, 801, 806 note. **N. Y.**—Barlow *v.* Scott, 24 N. Y. 40; Albany Heights Realty Co. *v.* Vogt, 182 App. Div. 736, 169 N. Y. Supp. 1049. **N. D.**—Mitchell *v.* Knudtson Land Co., 19 N. D. 736, 124 N. W. 946. **Wis.**—Hopkins *v.* Gilman, 22 Wis. 476; Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57. **Eng.**—Todd *v.* Gee, 17 Ves. Jr. 273, 34 Eng. Reprint 106; Denton *v.* Stewart, 1 Cox 258, 29 Eng. Reprint 1156.

[a] **As Affected by Manner in Which Incapacity Is Shown.**—There is equal ground for applying the rule to cases where the defect of title right or capacity in the defendant is developed in his answer, in the course of the hearing, or upon reference of his title or capacity after an order of fulfillment. Milkman *v.* Ordway, 106 Mass. 232, 253.

[b] **In an action to enforce a covenant to reimburse for improvements** made under a lease, equity may decree compensation although it cannot specifically enforce the contract because it requires the appointment of arbitrators. Copper *v.* Wells, 1 N. J. Eq. 10, 15.

16. See cases in the next preceding note. *Contra,* Lewis *v.* Yale, 4 Fla. 418, 437, holding the American cases are based on English cases which have been overruled. But see Park *v.* Minneapolis, St. P. & S. S. M. R. Co., 114 Wis. 347, 89 N. W. 532, holding such damages cannot be awarded if no reason is shown why they cannot be recovered at law.

17. Ala.—Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. **Ark.**—Bonner *v.* Little, 38 Ark. 397. **Ill.**—Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019; Bosley *v.* Peck, 192 Ill. App. 366. **Ia.** Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724. **Mo.**—McQueen *v.* Chouteau's Heirs, 20 Mo. 222, 64 Am. Dec. 178. **N. J.**—Logan *v.* Flattau, 73 N. J. Eq. 222, 67 Atl. 1007. **N. Y.**—Morss *v.* Elmendorf, 11 Paige 277, 288; Wiswall *v.* McGowan, 1 Hoff. Ch. 125. **N. D.** Knudtson *v.* Robinson, 18 N. D. 12, 118 N. W. 1051. **Pa.**—Kerlin *v.* Knipp, 207 Pa. 649, 57 Atl. 34. **Va.**—Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841. **Wash.** Peters *v.* Van Horn, 37 Wash. 550, 79 Pac. 1110.

See Sternberger *v.* McGovern, 56 N. Y. 12, 15 Abb. Pr. (N. S.) 257.

and provided such relief is asked for.[18] Under the reformed procedure where law and equity are administered by one tribunal, damages may be awarded notwithstanding the plaintiff's knowledge that specific performance could not be decreed.[19]

In accordance with these rules damages or compensation in lieu of specific performance may be decreed when specific relief would work a hardship on the defendant,[20] or when the subject-matter is abstracted or destroyed pending the suit.[21] The authorities agree that compensation may be decreed where the defendant disables himself from performing his contract, pending the suit.[22] Some extend the rule to cases where the disability arises after the making of the contract and before the institution of the suit,[23] but others do not.[24] And some apply the rule to cases where the defendant never had the power to perform, if the plaintiff brought suit in good faith.[25] If the disability is only as to a part, specific performance may be decreed for the part that can be performed and damages for the residue.[26]

R. DECREE. — **1. Generally.** — The court must make a decree in accordance with the general rules.[27] The form of the decree depends

18. Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871; Albany Heights Realty Co. *v.* Vogt, 182 App. Div. 736, 169 N. Y. Supp. 1049. See *supra*, I, J, 4.

19. **Cal.**—Messer *v.* Hibernia Sav. & L. Soc., 149 Cal. 122, 84 Pac. 835. **Kan.**—Stramel *v.* Hawes, 97 Kan. 120, 154 Pac. 232. **N. Y.**—Sternberger *v.* McGovern, 56 N. Y. 12, 15 Abb. Pr. (N. S.) 257; Snow *v.* Monk, 81 App. Div. 206, 80 N. Y. Supp. 719.

20. Buckley *v.* Patterson, 39 Minn. 250, 39 N. W. 490; Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 298, 26 N. E. 261.

21. Chapman *v.* Mad River & L. E. R. Co., 6 Ohio St. 119, 139.

22. **U. S.**—Altoona E. E. & S. Co. *v.* Kittanning & F. C. St. R. Co., 126 Fed. 559. **Ala.**—Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. **Ill.**—Greer *v.* Sellers, 64 Ill. App. 505. **Mass.**—Milkman *v.* Ordway, 106 Mass. 232, 253. **N. Y.**—Morss *v.* Elmendorf, 11 Paige. 277, 288; Wiswall *v.* McGown, 2 Barb. 270; Wiswall *v.* McGowan, 1 Hoff. Ch. 125, 133. **Ore.** Livesley *v.* Johnston, 18 Ore. 40, 84 Pac. 1044. **Pa.**—Head *v.* Meloney, 111 Pa. 99, 2 Atl. 195. **Wis.**—Fleming *v.* Ellison, 124 Wis. 36, 102 N. W. 398. **Eng.**—Todd *v.* Gee, 17 Ves. Jr. 273, 34 Eng. Reprint 106; Denton *v.* Stewart, 1 Cox 258, 29 Eng. Reprint 1156.

23. **Ala.**—Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. **Mass.**—Milkman *v.* Ordway, 106 Mass. 232, 253. **Va.**—Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841.

24. Lewis *v.* Yale, 4 Fla. 418, 437; Todd *v.* Gee, 17 Ves. Jr. 273, 34 Eng. Reprint 106, *overruling* Denton *v.* Stewart, 1 Cox 258, 29 Eng. Reprint 1156.

25. Eastman *v.* Reid, 101 Ala. 320, 13 So. 46; Morss *v.* Elmendorf, 11 Paige (N. Y.) 277, 288; Wiswall *v.* McGowan, 1 Hoff. Ch. (N. Y.) 125; Snow *v.* Monk, 81 App. Div. 206, 80 N. Y. Supp. 719.

[a] **Where at the date when the contract is made,** a defect in the vendor's title exists, the court may award damages in lieu of specific performance. Snow *v.* Monk, 81 App. Div. 206, 80 N. Y. Supp. 719.

26. Wiswall *v.* McGowan, 1 Hoff. Ch. (N. Y.) 125, 133.

27. See the title, "**Decrees.**"

Forms of decrees, see 9 STANDARD PROC. 1165.

[a] **A joint decree** in favor of the several complainants should be rendered. Eastman *v.* Reid, 101 Ala. 320, 13 So. 46.

[b] The decree should (1) describe the property (Brandt *v.* Clark, 81 Cal. 634, 22 Pac. 863; Edwards *v.* Fry, 9 Kan. 417 [holding description sufficient]), in (2) conformity with the description in the complaint. Holman *v.* Vallejo, 19 Cal. 498.

[c] **A description by reference to a map instead of by metes and bounds is**

upon whether the action is brought by the vendor or by the purchaser and upon the particular circumstances of the case.[28]

2. Decree in Favor of Purchaser. — In general, in an action by a purchaser for specific performance of a contract to convey, the decree should declare the equities of the parties,[29] find the amount due,[30] direct payment within a specified time,[31] and a conveyance by the vendor on the payment of the amount due.[32] The decree should then direct that if payment is not made by the expiration of the time prescribed, the suit shall be dismissed with costs,[33] or the plaintiff's right to specific performance shall be barred.[34] A judgment vesting title is sometimes rendered,[35] and some statutes specifically provide for such a decree.[36] If damages in lieu of specific performance are decreed, the decree should be in the alternative awarding damages unless the defendant should secure the specific performance sought.[37] It has been held

sufficient. Brandt *v.* Clark, 81 Cal. 634, 22 Pac. 863.

28. North *v.* Percival, L. R. 2 Ch. Div., 1898, (Eng.) 128, 134.

29. See *infra*, this section.

30. Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540, 547.

31. **Ark.**—Holman *v.* Lowrance, 102 Ark. 252, 144 S. W. 190. **Ill.**—Fitzhugh *v.* Smith, 62 Ill. 486, 493. **Ia.** Vennum *v.* Babcock, 13 Iowa 194. **Ky.** Brewer *v.* Peed, 7 J. J. Marsh. 230. **N. C.**—Bateman *v.* Hopkins, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642. **Tex.**—Fordtran *v.* Dunovant, 54 Tex. Civ. App. 564, 118 S. W. 768. **Eng.** Lowther *v.* Andover, 1 Bro. C. C. 396, 28 Eng. Reprint 1200.

[a] **The court cannot give the plaintiff an option** of rejecting a deed tendered in compliance with the decree. Pope *v.* Hoopes, 84 Fed. 927; Richards *v.* Green, 23 N. J. Eq. 536.

32. **Cal.**—Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536. **Ill.** Fitzhugh *v.* Smith, 62 Ill. 486, 492, where the form of the decree was "the money to be paid by the master to Smith upon his executing a proper deed." **Minn.**—Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207. **Tex.**—Morris *v.* Hand, 70 Tex. 481, 8 S. W. 210.

[a] **A decree giving the defendant the option** of performing or of paying damages is improper, but the defendant cannot complain thereof. Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207.

33. **Mo.**—Whelan *v.* Reilly, 61 Mo. 565. **N. C.**—Bateman *v.* Hopkins, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642. **Tex.**—Fordtran *v.* Dunovant, 54 Tex. Civ. App. 564, 118 S. W. 768. **Eng.** Lowther *v.* Andover, 1 Bro. C. C. 396, 28 Eng. Reprint 1200.

34. **Cal.**—Seventy-Six L. & W. Co. *v.* Superior Court, 93 Cal. 139, 142, 28 Pac. 813. **Ill.**—Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540, 553. **N. Y.** Clark *v.* Hall, 7 Paige 382.

[a] **But if such a direction is omitted** the plaintiff may offer to perform at any time. Seventy-Six L. & W. Co. *v.* Superior Court, 93 Cal. 139, 28 Pac. 813.

35. **Mich.**—See Simmons *v.* Conklin, 129 Mich. 190, 88 N. W. 625. **Minn.** Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207. **Wis.**—Matteson *v.* Scofield, 27 Wis. 671.

[a] **A judgment declaring the defendants to be the owners** in fee of the land accomplishes the same result as one which directs a conveyance and is not erroneous. Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536.

36. See the statutes, and the following: **Mass.**—Dooley *v.* Merrill, 216 Mass. 500, 104 N. E. 345. **Mo.**—Otto *v.* Young, 227 Mo. 193, 217, 127 S. W. 9. **Ore.**—Columbia River Co. *v.* Smith, 83 Ore. 137, 162 Pac. 831, 163 Pac. 309.

[a] **Construction of Decree.**—Under statute, a decree requiring the party to make conveyance or like act within a specified period, is deemed to be equivalent thereto if the party does not comply therewith. Dooley *v.* Merrill, 216 Mass. 500, 104 N. E. 345; Columbia River Co. *v.* Smith, 83 Ore. 137, 162 Pac. 831, 163 Pac. 309.

37. Milkman *v.* Ordway, 106 Mass. 232, 253, as the defendant may be able to procure specific performance.

that a sale of the property for the purpose of paying the unpaid purchase money may be directed.[38] If a lis pendens has been filed, the decree should direct its vacation.[39]

3. Decree in Favor of Vendor. — In an action for specific performance brought by a vendor against the vendee,[40] the court should find in its decree the amount due on the contract,[41] and direct its payment to the plaintiff vendor within a specified time after notice,[42] and a delivery of a conveyance on payment of the amount due.[43] The decree may direct specific performance in case good title can be made and direct inquiries as to title.[44] It may declare the vendor entitled to a lien upon the land for the unpaid purchase money,[45] with liberty to apply.[46] Or it may contain a provision directing the sale[47] of the property if the vendee fails to pay the unpaid purchase money within a

38. Brewer *v.* Peed, 7 J. J. Marsh. (Ky.) 230; Burnap *v.* Sidberry, 108 N. C. 307, 12 S. E. 1002. *Contra,* Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Fitzhugh *v.* Smith, 62 Ill. 486.

39. Baxter *v.* Middleton, L. R. 1 Ch. Div. (1898) 313.

40. **Form of decree,** see Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301.

41. London & N. W. Am. Mortg. Co. *v.* McMillan, 78 Minn. 53, 80 N. W. 841.

[a] **The decree should be definite and certain** as to the amount to be paid by the purchaser. Giles *v.* Union Land Co. (Tex. Civ. App.), 196 S. W. 312.

42. **Cal.**—Keller *v.* Lewis, 53 Cal. 113. **Ill.**—Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761. **Minn.**—London & N. W. Am. Mortg. Co. *v.* McMillan, 78 Minn. 53, 80 N. W. 841. **Wash.** Lawrence *v.* Halversen, 41 Wash. 534, 83 Pac. 889.

[a] **A Reasonable Time.**—London & N. W. Am. Mortg. Co. *v.* McMillan, 78 Minn. 53, 80 N. W. 841.

[b] **In New York,** as a rule not less than the time which an execution runs on a money judgment at law is allowed the vendee to make the payment. Adams *v.* Ash, 46 Hun (N. Y.) 105, 111, 11 N. Y. St. 618.

43. Gilpin *v.* Watts, 1 Colo. 479, 482; Cooper *v.* Morgan, L. R. 1 Ch. Div. [1909] 261. See, however, Goddin *v.* Vaughn's Exx., 14 Gratt. (55 Va.) 102.

[a] **The clerk may be made custodian of the deed** with power to deliver it on payment of the purchase money. Wolff *v.* Cloyne, 156 Cal. 746, 106 Pac 104; Corbus *v.* Teed, 69 Ill. 205.

[b] **Form.**—The supreme court directed that the judgment in Wolff *v.* Cloyne, 156 Cal. 746, 751, 106 Pac. 104, be modified by adding the following clauses: "Payment of the sums herein adjudged to the plaintiff may be made to the clerk of this court for the plaintiff, and the said clerk shall thereupon deliver to the defendant, his heirs, assigns or legal representatives, the deed for the land in controversy deposited by plaintiff with the clerk at the beginning of this action. If such payment is made to the sheriff said deed shall be delivered to the sheriff by the clerk and by the sheriff delivered to defendant upon payment. If paid to the plaintiff he shall concurrently deliver the deed."

44. See 9 STANDARD PROC. 1165, form B. See also 2 Dan. Ch. Pr. (8 ed.) 1203.

45. Bee *v.* Stafford & Uttoxeter Ry. Co., 23 Wkly. Rep. (Eng.) 863.

46. See Munns *v.* Isle of Wight Ry. Co., L. R. 5 Eq. 414, 39 L. J. Ch. 522, 23 L. T. N. S. 96, 18 Wkly. Rep. 781. See form 9 STANDARD PROC. 1166, D.

47. **Ill.**—Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761. **Mich.**—Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132. **Minn.**—Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. St. Rep. 438. **N. Y.**—Adams *v.* Ash, 46 Hun 105, 11 N. Y. St. 618; Clark *v.* Hall, 7 Paige 382, if the vendee will not accept the conveyance. **S. C.**—Singleton *v.* Cuttino, 107 S. C. 465, 92 S. E. 1046, this is the usual practice. **W. Va.**—See Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9, as to necessity of bond by the commissioner.

[a] **But the purchaser must be al-**

specified time, and giving a decree for any deficiency,[48] and awarding execution for any unsatisfied balance of the purchase money after the sale of the property.[49] Or the decree may declare that in case of the vendee's default, his rights and interests in the land shall be terminated.[50] Some courts hold that a sale as in the case of a mortgage should not be ordered,[51] but that the decree should direct enforcement of the amount adjudged to be due by execution only.[52]

4. Dismissal. — If the bill is insufficient,[53] or if the averments of the bill are not supported by the proof,[54] a decree of dismissal will be entered, and the plaintiff will be left to his remedy at law.[55]

5. Where the Defendant Pleads a Different Contract. — If the defendant sets up a contract different from that alleged in the bill, he is, according to some authorities, entitled to specific performance of that contract if it is sustained by the evidence.[56] According to other authorities, the court may or must dismiss the bill,[57] unless the plaintiff amends his bill,[58] or the court may put the plaintiff to his election, either to have the contract as proved executed,[59] or rescinded and the parties put in statu quo.[60]

6. Amendment and Vacation. — The court may modify[61] or va-

lowed a reasonable time in which to pay the amount due to prevent sale. Tillinghast *v.* Henderson, 59 S. C. 388, 38 S. E. 5.

[b] **It is not a matter of course** to direct a sale, unless the vendor asks for it. Adams *v.* Ash, 46 Hun 105, 11 N. Y. St. 618; Clark *v.* Hall, 7 Paige (N. Y.) 382. See also Kimbrough *v.* Curtis, 50 Miss. 117.

48. Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132; Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. St. Rep. 438.

49. Corbus *v.* Teed, 69 Ill. 205. See Anderson *v.* Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247.

50. London & N. W. Am. Mortg. Co. *v.* McMillan, 78 Minn. 53, 80 N. W. 841; Adams *v.* Ash, 46 Hun (N. Y.) 105, 11 N. Y. St. 618; Connecticut *v.* Sheridan, 1 Clarke Ch. (N. Y.) 533. See also Keller *v.* Lewis, 53 Cal. 113.

51. Odd Fellows' Sav. Bank *v.* Brander, 124 Cal. 255, 56 Pac. 1109; Johnston *v.* Mulcahy, 4 Cal. App. 547, 88 Pac. 491.

52. Heins *v.* Thompson & Flieth Lumb. Co., 165 Wis. 563, 163 N. W. 173, 177 "but without prejudice to plaintiff proceeding by action to enforce such contract by strict foreclosure, in lieu of so collecting such amount due, or in case of failure to so collect."

53. Atherton *v.* Hull, 12 W. Va. 170.

54. Levandowski *v.* Althouse, 136 Mich. 631, 99 N. W. 786; Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

55. See the title, "**Dismissal, Discontinuance and Nonsuit.**"

[a] **Effect of Decree.**—When the question of damages is not raised in the equity suit and the decree is not based upon any ground showing there is no right of action under the contract, it is no bar to an action for damages. Paris *v.* Magoon, 14 Hawaii 612.

56. **Ore.**—Thompson *v.* Hawley, 14 Ore. 199, 12 Pac. 276. **Vt.**—Redfield *v.* Gleason, 61 Vt. 220, 227, 17 Atl. 1075, 15 Am. St. Rep. 889 **W. Va.**—Norfolk & W. R. Co. *v.* McGarry, 52 W. Va. 547, 44 S. E. 236.

[a] **A Cross-bill Is Not Required.** Redfield *v.* Gleason, 61 Vt. 220, 227, 17 Atl. 1075, 15 Am. St. Rep. 889.

57. **Mich.**—Levandowski *v.* Althouse, 136 Mich. 631, 99 N. W. 786. **N. Y.**—Byrne *v.* Romaine, 2 Edw. Ch. 445. **Va.**—McComas *v.* Easley, 21 Gratt. (62 Va.) 23. **W Va.**—Baldenberg *v.* Warden, 14 W. Va. 397.

58. See *supra*, I, J, 5.

59. McComas *v.* Easley, 21 Gratt. (62 Va.) 23; Baldenberg *v.* Warden, 14 W. Va. 397, 406.

60. McComas *v.* Easley, 21 Gratt. (62 Va.) 23; Baldenberg *v.* Warden, 14 W. Va. 397, 406.

61. See 15 STANDARD PROC. 98.

[a] **In respect to the time** in which

cate[62] its decree in accordance with the general rules elsewhere discussed.

7. Enforcement of. — In the case of disobedience, a decree for specific performance of a contract to convey be enforced by attachment as for contempt.[63] A judgment for the purchase money is not so enforceable under the codes,[64] and statutes of the several states.[65] Such a judgment may be enforced by writ of execution or sequestration,[66] or the vendor may apply for an order that the contract be rescinded,[67] or for an order of sale in enforcement of the lien.[68] In a proper case an injunction may be issued,[69] or a receiver may be appointed.[70] The cause may be reinstated to carry the decree into effect in a proper case.[71]

the party has been ordered to do an act with a view to carrying the judgment into effect, the judgment may be amended. Adams *v.* Ash, 46 Hun 105, 11 N. Y. St. 618.

[b] **The court cannot, on the ground that specific performance fails,** appoint a referee to ascertain the damages and give judgment therefor, after entry of a decree for specific performance. H. Koehler & Co. *v.* Brady, 87 App. Div. 326, 84 N. Y. Supp. 457.

62. See 15 STANDARD PROC. 151.

[a] **Where a purchaser abandons the contract after decree** by withdrawing the deposit of the purchase money, the court may vacate the decree if he fails to pay the money due. Cheney *v.* Wagner, 33 Neb. 310, 50 N. W. 13.

63. **Cal.**—Seventy-Six L. & W. Co. *v.* Superior Court, 93 Cal. 139, 28 Pac. 813. **N. Y.**—Beck *v.* Allison, 56 N. Y. 366, 370, 15 Am. Rep. 430. **Va.**—Dunsmore *v* Lyle, 87 Va. 391, 12 S. E. 610.

64. Kittel *v.* Stueve, 11 Misc. 279, 32 N. Y. Supp. 272, 24 Civ. Proc. 223, 1 N. Y. Ann. Cas. 99, 65 N. Y. St. 447.

[a] **Otherwise under original English** practice. See Smith *v.* Smith, 84 N. J. Eq. 299, 93 Atl. 890.

65. Smith *v.* Smith, 84 N. J. Eq. 299, 93 Atl. 890.

66. **N. J.**—Smith *v.* Smith, 84 N. J. Eq. 299, 93 Atl. 890; Aspinwall *v.* Aspinwall, 53 N. J. Eq. 684, 33 Atl. 470. **N. Y.**—Kittel *v.* Stueve, 11 Misc. 279, 32 N. Y. Supp. 272, 24 Civ. Proc. 223, 1 N. Y. Ann. Cas. 99, 65 N. Y. St. 447. **Wash.**—Anderson *v.* Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247.

[a] **Until the title is vested in the purchaser,** the vendor cannot collect the purchase money by execution. Smith *v.* Smith, 84 N. J. Eq. 299, 93 Atl. 890.

[b] **But execution cannot be issued on a judgment enforcing a contract to execute a mortgage** and providing that the land shall be bound by the lien of the judgment. Roberge *v.* Winne, 75 Hun 597, 27 N. Y. Supp. 601, 59 N. Y. St. 616.

67. Foligno *v.* Martin, 16 Beav. 586, 22 L. J. Ch. 502, 51 Eng. Reprint 906. See Munns *v.* Isle of Wight Ry. Co., L. R. 5 Eq. 414, 39 L. J. Ch. 522, 23 L. T. N. S. 96, 18 Wkly. Rep. 781.

Decree with leave to apply, see *supra,* I, R, 3.

68. Smith *v.* Smith, 84 N. J. Eq. 299, 93 Atl. 890; Bee *v.* Stafford and Uttoxeter Ry. Co., 23 Wkly. Rep. (Eng.) 863.

69. See Munns *v.* Isle of Wight Ry. Co., L. R. 5 Eq. 414, 39 L. J. Ch. 522, 23 L. T. N. S. 96, 18 Wkly. Rep. 781, discharging an injunction which rendered the land useless to both parties.

[a] **If the defendant remain without the jurisdiction** of the court, the contract may be established as if it had been executed, and an injunction granted restraining the defendant from denying its execution and delivery. Wharton *v.* Stoutenburgh, 39 N. J. Eq. 299.

70. Munns *v.* Isle of Wight Ry. Co., L. R. 5 Eq. 414, 39 L. J. Ch. 522, 23 L. T. N. S. 96, 18 Wkly. Rep. 781, appointing a receiver to take possession of the premises for an insolvent railroad company who purchased land for a right of way and against whom specific performance was decreed.

71. Ward *v.* Funsten, 86 Va. 359, 10 S. E. 415, where the purchase money was invested in a trust for the vendor's widow and children.

If the defendant is a corporation, the decree may be enforced by a sequestration, distringas or other process as may be necessary.[72]

S. REVIEW. — A decree for specific performance may be reviewed in accordance with general rules elsewhere discussed.[73]

T. COSTS. — Following the general rule in equity,[74] costs are in the discretion of the court or chancellor.[75]

II. SPECIFIC PERFORMANCE BY INJUNCTION. — Relief in the nature of specific performance of contracts is sometimes had indirectly by injunction against its breach,[76] where, as a general rule, the contract is such that it can be enforced by specific performance,[77] and

72. Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358.

73. See generally the title, "**Appeals**" and 8 STANDARD PROC. 499. See the following cases: **Mo.**—Harrison *v.* Town, 17 Mo. 237. **Pa.**—Gray *v.* Citizens' Gas Co., 206 Pa. 303, 55 Atl. 988, as to record. **Va.**—Brockenbrough *v.* Blythe's Exrs., 3 Leigh (30 Va.) 619, **objection on appeal.**

74. See 8 STANDARD PROC. 498.

75. **U. S.**—Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360. **Mich.**—Murphy *v.* Stever, 47 Mich. 522, 11 N. W. 368. **N. Y.**—Bruce *v.* Tilson, 25 N. Y. 194, 198.

[a] **Thus where the defendant fails to raise the objection of the adequacy of the legal remedy** until after part of the evidence has been introduced, a part of the costs may be taxed to him. Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

[b] **Where there are mistakes common to both parties** as to the litigation, costs may be denied either party against the other. Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Voorhees *v.* De Myer, 3 Sandf. Ch. (N. Y.) 614, 624.

[c] **On a failure to make a proper tender,** the plaintiff will not be awarded costs. Minneapolis St. P. & S. S. M. Ry. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63.

[d] **On a strict foreclosure,** there is no positive decree against the defendant for costs. Connecticut *v.* Sheridan, 1 Clarke Ch. (N. Y.) 533.

76. **Ark.**—See Pitcock *v.* State, 91 Ark. 527, 538, 121 S. W. 742, 134 Am. St. Rep. 88. **Conn.**—Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432. **Ill.**—Welty *v.* Jacobs, 171 Ill. 624, 631, 49 N. E. 723, 40 L. R. A. 98; Chicago Mun. Gas Light & F. Co. *v* Lake, 130 Ill. 42, 60, 22 N. E. 616. **N. M.**—Locke *v.* Murdock, 20 N. M. 522, 151 Pac. 298, L. R. A. 1917B, 267. **N. Y.**—Standard Fashion Co. *v.* Siegel Cooper Co., 30 App. Div. 564, 52 N. Y. Supp. 433; Daly *v.* Smith, 49 How. Pr. 150. **Ohio.**—Chapman *v.* Mad River & L. E. R. Co., 6 Ohio St. 119, 139. **R. I.**—American Electrical Wks. *v.* Varley Duplex Co., 26 R. I. 295, 58 Atl. 977. **Eng.**—Lumley *v.* Wagner, 1 De G. M. & G. 604, 5 De G. & Sm. 485, 21 L. J. Ch. 898, 16 Jur. 871, 42 Eng. Reprint 687.

[a] "An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practicable mode of enforcement which its terms permit." Pomeroy's Eq. Juris. §1341 *quoted* in South Chicago City Ry. Co. *v.* Calumet etc. Ry. Co., 171 Ill. 391, 49 N. E. 576; Chicago Mun. Gas Light & F. Co. *v.* Lake, 130 Ill. 42, 60, 22 N. E. 616.

[b] **The case of Lumley *v.* Wagner is an anomaly** which it would be dangerous to extend. Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 429, 60 L. J. Ch. 428, 64 L. T. N. S. 716, 39 Wkly. Rep. 433.

77. **Ill.**—Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; South Chicago Ry. Co. *v.* Calumet Elec. St. Ry. Co., 171 Ill. 391, 49 N. E. 576. **Ind.**—Fowler Utilities Co. *v.* Gray, 168 Ind. 1, 79 N. E. 897, 120 Am. St. Rep. 344, 7 L. R. A. (N. S.) 726. **Mass.** Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180.

where the contract contains negative covenants or stipulations not to perform the acts contracted for elsewhere,[78] or according to some authorities,[79] but not all,[80] where the contract has affirmative stipulations which imply a negative.

[a] **Some Statutes So Provide.**—See the statutes and Farnum *v.* Clarke, 148 Cal. 610, 84 Pac. 166; Anderson *v.* Neal Institutes Co. (Cal. App.), 173 Pac. 779; Peterson *v.* McDonald, 13 Cal. App. 644, 110 Pac. 465.

[b] **If, because there is an adequate remedy in damages,** the court cannot grant specific relief, it cannot grant an injunction to restrain a breach of the contract. Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, note 20 L. R. A. 432; Donnell *v.* Bennett, 22 Ch. Div. 835, 52 L. J. Ch. 414, 48 L. T. N. S. 68, 31 Wkly. Rep. 316; Fothergill *v.* Rowland, L. R. 17 Eq. 132, 43 L. J. Ch. 252, 29 L. T. N. S. 414, 22 Wkly. Rep. 42.

[c] **If the remedy is not mutual,** relief by way of injunction will not be granted. Fowler Utilities Co. *v.* Gray, 168 Ind. 1, 79 N. E. 897, 120 Am. St. Rep. 344, 7 L. R. A. (N. S.) 726. See also Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98. But see Duke of Bedford *v.* British Museum, 1 Coop. t. Cott. 90, 47 Eng. Reprint 761.

[d] **If the granting of relief would require the protracted supervision** of the court, relief will be denied. Berliner Gramophone Co. *v.* Seaman, 110 Fed. 30, 49 C. C. A. 99.

[e] **The rights of third persons will be considered** and relief will be withheld where it would operate unjustly upon them. Roosen *v.* Carlson, 46 App. Div. 233, 47 App. Div. 638, 62 N. Y. Supp. 157.

Exceptions to rule, see *infra,* this section.

[f] **Where Interest of the Public Is Involved.**—Although an agreement in violation of public policy will not be specifically enforced, when the interests of the parties alone is involved, yet when public interests are involved, equity will enjoin its breach so long as the public interest requires it. Seattle Electric Co. *v.* Snoqualmie Falls P. Co., 40 Wash. 380, 82 Pac. 713, 1 L. R. A. N. S. 1032, an agreement to furnish electricity which creates a monopoly.

78. **U. S.**—M'Caull *v.* Braham, 21 Blatchf. 278, 16 Fed. 37. **Ky.**—Cain *v.* Garner, 169 Ky. 633, 185 S. W. 122, Ann. Cas. 1918B, 824, L. R. A. 1916E, 682. **N. Y.**—Daly *v.* Smith, 49 How. Pr. 150, 6 Jones & S. 158; Aborn *v.* Janis, 62 Misc. 95, 113 N. Y. Supp. 309. **Eng.**—Lumley *v.* Wagner, 1 De Gex, M. & G. 604, 5 De G. & Sm. 485, 21 L. J. Ch. 898, 16 Jur. 871, 42 Eng. Reprint 687.

See the titles, "**Restraint of Trade**" and "**Theaters and Shows.**"

79. **U. S.**—Kennerley *v.* Simonds, 247 Fed. 822. **N. Y.**—Hoyt *v.* Fuller, 19 N. Y. Supp. 962, 47 N. Y. St. 504; Duff *v.* Russell, 14 N. Y. Supp. 134. **Ore.**—Cort *v.* Lassard, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653. **Pa.**—New Idea Pattern Co. *v.* Whitner, 215 Pa. 193, 64 Atl. 518. **Eng.**—Donnell *v.* Bennett, 22 Ch. Div. 835; Wolverhampton & W. Ry. Co. *v.* London & N. W. R. Co., L. R. 16 Eq. 433, 43 L. J. Ch. 131; De Mattos *v.* Gibson, 4 De G. & J. 276, 28 L. J. Ch. 165, 498, 45 Eng. Reprint 108. See Montague *v.* Flockton, L. R. 16 Eq. 189, 42 L. J. Ch. 677, 28 L. T. N. S. 580, *overruled* in Whitwood Chemical Co. *v.* Hardman, (1891) 2 Ch. 416, 427, 60 L. J. Ch. 428, 64 L. T. N. S. 716, 39 Wkly. Rep. 433.

[a] **Such covenant must be clearly implied** and understood by all the parties. It should not be employed, unless it is indispensable to carry the intention of the parties into effect. Kennerley *v.* Simonds, 247 Fed. 822. See also Bentley *v.* Bentley, 12 Man. (Can.) 436.

[b] **A contract to act at a particular theater for a specified time necessarily implies** a negative against acting at any other theater during that time and an injunction to restrain a breach by acting at another theater may be granted. Cort *v.* Lassard, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653.

80. Whitwood Chemical Co. *v.* Hardman, (1891) 2 Ch. 416, 427, 60 L. J. Ch. 428, 64 L. T. N. S. 716, 39 Wkly. Rep. 433; Lumley *v.* Wagner, 1 De Gex M. & G. 604, 5 De G. & Sm. 485, 21 L. J. Ch. 898, 16 Jur. 871, 42 Eng. Reprint 687.

When Specific Performance Cannot Be Granted. — The cases are very conflicting as to when an injunction may be granted if the contract is not specifically enforceable and it is almost impossible to reconcile them.[81] It is now firmly established that an injunction will often be granted when the court will not decree performance,[82] as where the contract is one that the court would specifically enforce except for the fact that it cannot do so by the ordinary machinery of the court.[83] But if the

81. See remarks of Lowell, District Judge in Singer Sewing Machine Co. *v.* Union Button-Hole & Emb. Co., 1 Holmes 253, 22 Fed. Cas. No. 12,904.

[a] **There is no distinct line** dividing the two classes of cases; those in which a court without power to grant specific relief grants an injunction and those in which it refuses to interfere. Fothergill *v.* Rowland, L. R. 17 Eq. (Eng.) 132, 43 L. J. Ch. 252, 29 L. T. N. S. 414, 22 Wkly. Rep. 42.

[b] **"I think the fair result of the later cases may be thus expressed:** If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it." Singer Sewing-Mach. Co. *v.* Union Button-Hole & Emb. Co., Holmes 253, 22 Fed. Cas. No. 12,904.

[c] **Sir Fry,** after reviewing the authorities says, "It may, it is conceived, be concluded that the principle of this case [Lumley *v.* Wagner, 1 De G. M. & G. 604, 42 Eng. Reprint 687], will not be extended: that negative stipulations will not be implied except in the cases where the courts have already done so; and that even the presence of an express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted. In other words, it is probable that the court will hereafter, except so far as it may be bound by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind fit for specific performance: that, if it be, the Court will tend to restrain acts inconsistent with it, whether there be negative words or not: that if it be not of a kind fit for specific performance, no injunction will be granted, even though negative words may be present." Fry's Specific Performance, 5th Ed., §862. See also Donnell *v.* Bennett, 22 Ch. Div. 835, 52 L. J. Ch. 414, 48 L. T. N. S. 68, 31 Wkly. Rep. 316, per Fry, J.

82. Singer Sewing-Machine Co. *v.* Union Button-Hole & Emb. Co., 1 Holmes 253, 22 Fed. Cas. No. 12,904.

[a] **If relief by way of specific performance and injunction** is asked in the bill, injunctive relief may be granted although specific performance cannot. Singer Sewing-Mach. Co. *v.* Union Buttonhole & Embroidery Co., 1 Holmes 253, 22 Fed. Cas. No. 12,904; Standard Fashion Co. *v.* Siegel Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854.

83. U. S.—Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 7 L. R. A. 381. See also Brush-Swan Electric L. Co. *v.* Brush Electric Co., 41 Fed. 163; Chicago & A. R. Co. *v.* New York L. E. & W. R. Co., 24 Fed. 516, 521. **Mass.** Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180. **Pa.**—New Idea Pattern Co. *v.* Whitner, 215 Pa. 193, 64 Atl. 518.

[a] **Thus although it is impracticable to execute or supervise the execution** of the decree, an injunction may be granted. **U. S.**—Singer Sewing Mach. Co. *v.* Union Button Hole & Em. Co., 1 Holmes 253, 22 Fed. Cas. No. 12,904; Chicago & A. R. Co. *v.* New York, L. E. & W. R. Co., 24 Fed. 516, 521. **Pa.** New Idea Pattern Co. *v.* Whitner, 215 Pa. 193, 64 Atl. 518, an agreement to sell or keep on sale plaintiff's patterns. **R. I.**—American Electrical Wks. *v.* Varley Duplex Co., 26 R. I. 295, 58 Atl. 977.

[b] **Reason.**—It is one thing to stop a party from doing that which he cannot rightly do, and another to undertake to compel him to do an act involving the exercise of faculties and judgment peculiar and personal to him-

contract is one that cannot be specifically enforced, and the granting of the injunction is tantamount to a specific performance, relief cannot be granted.[84]

Where the contract contains both affirmative and negative covenants, some courts hold that a breach of the latter may be enjoined, although the former cannot be specifically enforced,[85] while some hold otherwise.[86] Accordingly, a violation of contracts for the services of artists and the like of unusual character, which contain negative covenants not to perform elsewhere will be enforced by an injunction against a breach,[87] although specific performance of the affirmative covenant to

self. Chicago & A. Ry. Co. *v.* New York L. E. & W. R. Co., 24 Fed. 516.

84. Roosen *v.* Carlson, 16 App. Div. 233, 47 App. Div. 638, 62 N. Y. Supp. 157; Hills *v.* Croll, 1 Coop. & Cott. 83, 2 Ph. 60, 47 Eng. Reprint 758.

[a] **If an affirmative covenant would not be enforced if the court had the power,** a negative covenant will not be enforced. Rice *v.* D'Arville, 162 Mass 559, 39 N. E. 180.

[b] **Thus** on breach of a lease containing a covenant to keep open premises as a public house, and to prevent any acts which might cause a forfeiture of the lease, an injunction will be granted to prevent a breach of the negative covenant, but cannot be granted to prevent a breach of the affirmative covenant as this is tantamount to ordering a specific performance of the covenant. Hopner *v.* Brodripp, 1 Coop. t. Cott, 89, 47 Eng. Reprint 761.

85. N. J.—Myers *v.* Steel Machine Co., 67 N. J. Eq. 300, 57 Atl. 1080. **Ore.** Cort *v.* Lassard, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653. **Eng.**—Hopner *v.* Brodripp, 1 Coop. t. Cott, 89, 47 Eng. Reprint 761; Rolfe *v.* Rolfe, 1 Coop. t. Cott, 87, 47 Eng. Reprint 760; Lumley *v.* Wagner, 1 De Gex M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 5 De G. & Sm. 485, 42 Eng. Reprint 687; Donnell *v.* Bennett, 22 Ch. Div. 835, 52 L. J. Ch. 414, 48 L. T. N. S. 68, 31 Wkly. Rep. 316, per Fry, J.

[a] **When the negative covenant is distinct** from the affirmative covenant it may be enforced although the affirmative covenant cannot. Rolfe *v.* Rolfe, 15 Sim. 88, 10 Jur. 61, 60 Eng. Reprint 550.

[b] **Even though the negative contract is co-extensive** with the positive contract, the negative contract may be enforced. Donnell *v.* Bennett, 22 Ch. Div. (Eng.) 835, 52 L. J. Ch. 414, 48 L. T. N. S. 68, 31 Wkly. Rep. 316, per Fry J. See also Catt *v.* Tourle, L. R. 4 Ch. (Eng.) 654.

[c] **But the injunction should not extend to the affirmative** covenant. Hopner *v.* Brodripp, 1 Coop. t. Cott. 89, 47 Eng. Reprint 761.

86. Anderson *v.* Neal Institutes Co. (Cal. App.), 173 Pac. 779; Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98.

87. U. S.—Kennerley *v.* Simonds, 247 Fed. 822; Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 7 L. R. A. 381, baseball player. See Weeghman *v.* Killifer, 215 Fed. 289, 131 C. C. A. 558, L. R. A. 1915A, 820. **Ky.**—Cain *v.* Garner, 169 Ky. 633, 185 S. W. 122, Ann. Cas. 1918B, 824, L. R. A. 1916E, 682, contract of a jockey. **N. J.**—Myers *v.* Steel Machine Co., 67 N. J. Eq. 300, 57 Atl. 1080. **N. Y.**—Aborn *v.* Janis, 62 Misc. 95, 113 N. Y. Supp. 309. **Pa.**—Philadelphia Ball Club *v.* Lajoie, 202 Pa. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227, contract of ballplayer. **Eng.**—Lumley *v.* Wagner, 1 De Gex M. & G. 604, 5 De G. & Sm. 485, 21 L. J. Ch. 898, 16 Jur. 871, 42 Eng. Reprint 687; Morris *v.* Colman, 18 Ves. Jr. 437, 34 Eng. Reprint 382 (contract of author); Whitwood Chemical Co. *v.* Hardman, (1891) 2 Ch. Div. 416, 60 L. J. Ch. 428, 64 L. T. N. S. 716, 39 Wkly. Rep. 433.

[a] **Contracts of Theatrical Performers.—N. Y.**—Daly *v.* Smith, 49 How. Pr. 150; Roosen *v.* Carlson, 46 App. Div. 233, 47 App. Div. 638, 62 N. Y. Supp. 157; Hoyt *v.* Fuller, 19 N. Y. Supp. 962. **Ore.**—Cort *v.* Lassard, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653. **Eng.**—Lumley *v.* Wagner, 1 De Gex M. & G. 604, 5 De G. & Sm. 485, 21 L. J. Ch. 898, 16 Jur. 871, 42 Eng. Reprint 687.

perform the services cannot be granted.[88]

A mandatory injunction may be awarded in a proper case.[89]

III. SPECIFIC PERFORMANCE BY MANDAMUS. — Mandamus is not an appropriate remedy for the enforcement of contract rights of a private nature not involving questions of public trust or official duty.[90]

IV. SPECIFIC PERFORMANCE IN PROBATE COURTS. — A. GENERALLY. — Some statutes confer upon probate courts jurisdiction to decree specific performance of contracts of decedents.[91] The power of the court is special and is limited to cases falling within the terms of the statute,[92] and from this it follows that in pursuing this remedy, the statute must be strictly followed.[93]

See the title, "**Theaters and Shows.**"

88. See the following: Hammond *v.* Georgian Co., 133 Ga. 1, 65 S. E. 124; McCall Co. *v.* Wright, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249.

And see the cases in the next preceding note.

89. Lane *v.* Newdigate, 10 Ves. Jr. 192, 32 Eng. Reprint 818.

[a] **But a mandatory injunction to enforce a contract cannot be granted where** specific performance cannot be awarded. Myers *v.* Steel Machine Co., 67 N. J. Eq. 300, 57 Atl. 1080; Franklin Fire Proofing Co. *v.* Dallas, 29 Tex. Civ. App. 448, 68 S. W. 820. See also Anderson *v.* Neal Institutes Co. (Cal. App.), 173 Pac. 779.

90. See 20 STANDARD PROC. 139.

Enforcement against municipalities, see 20 STANDARD PROC. 139.

91. Ala.—Samuels *v.* Findley, 7 Ala. 635; Hays *v.* Hall, 4 Port. 374, 386, 30 Am. Dec. 530. **Cal.**—In re Garner's Estate, 147 Cal. 457, 82 Pac. 68; Estate of Corwin, 61 Cal. 160; Cory *v.* Hyde, 49 Cal. 469; Treat *v.* De Celis, 41 Cal. 202, query. **Me.**—May *v.* Boyd, 97 Me. 398, 54 Atl. 938, 94 Am. St. Rep. 509; Bates *v.* Sargent, 51 Me. 423, only legal contracts in force at the death of the obligor, the performance of which was prevented by death may be enforced in the probate court. **Minn.**—Laird *v.* Vila, 93 Minn. 45. 100 N. W. 656, 106 Am. St. Rep. 420; Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427, the probate court has no jurisdiction to enforce parol contracts for the conveyance of land. **Mont.**—Bullerdick *v.* Hermsmeyer, 32 Mont. 541, 551, 81 Pac. 334, query as to the constitutionality of the statute. **Pa.**—White *v.* Patterson, 139 Pa. 429, 436, 21 Atl. 360 (the orphan's court has jurisdiction only in cases in which the vendor died seised or possessed of real estate without having made any sufficient provision for the performance of his contract of sale); In re Ake's Appeal, 74 Pa. 116; Cobb's Exr. *v.* Burns, 61 Pa. 278; Myers *v.* Black, 17 Pa. 193. **Tex.**—Houston *v.* Killough, 80 Tex. 296, 307, 16 S. W. 56; Todd *v.* Caldwell, 10 Tex. 236; Buchanan *v.* Park (Tex. Civ. App.), 36 S. W. 807, the proceeding in Texas is adversary in character.

[a] **The proceeding is in the nature of a special probate proceeding.** Sander-Boman Real Estate Co. *v.* Yesler's Estate, 2 Wash. 429, 27 Pac. 269.

[b] **This statutory remedy is more summary** and less expensive than that in equity. Hays *v.* Hall, 4 Port. (Ala.) 374, 386, 30 Am. Dec. 530; Lacy *v.* Simpson, Minor (Ala.) 33; Estate of Garnier, 147 Cal. 457, 82 Pac. 68.

[c] **When the conveyance by a prospective heir is made before the death** of the ancestor, the probate court has no jurisdiction to enforce specific performance. Dunn *v.* Wallingford, 47 Utah 491, 155 Pac. 347.

92. Ala.—Driver *v.* Hudspeth, 16 Ala. 348. **Cal.**—Estate of Corwin, 61 Cal. 160. **Me.**—Bates *v.* Sargent, 51 Me. 423.

[a] **The Probate Court Is Not Given More Extensive Power Than Is Administered by a Court of Equity.** Estate of Corwin, 61 Cal. 160.

As to cases not provided for, the parties must resort to equity. See cases cited *supra*, this note.

93. Buchanan *v.* Park (Tex. Civ. App.), 36 S. W. 807; Sander-Boman

B. PROCEEDINGS. — Although the statutes differ considerably,[94] it may be stated that, in general, the proceeding is instituted by a verified[95] petition, setting forth the facts,[96] filed in the probate court having jurisdiction of the probate proceedings of the estate of the decedent,[97] by the executor or administrator,[98] or by any person claiming to be entitled to a conveyance from the administrator.[99] The executor or administrator is a necessary party.[1] And where the proceeding is adversary in character, the purchaser is a necessary party to a petition by the executor.[2] The heirs are necessary parties to the executor's petition, under some statutes.[3] But a person to whom the executor has conveyed the property cannot be made a party.[4]

The statutory notice must be given.[5]

Real Estate Co. *v.* Yesler's Estate, 2 Wash. 429, 27 Pac. 269.

94. See the statutes.

95. Balwin *v.* Whitcomb, 71 Mo. 651.

[a] **The Verification Is Jurisdictional.**—Baldwin *v.* Whitcomb, 71 Mo. 651.

96. **Ala.**—Crimm's Admr. *v.* Townsend, 9 Ala. 403; Samuels *v.* Findley, 7 Ala. 635. **Me.**—Bates *v.* Sargent, 51 Me. 423. **Pa.**—Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668. **Tex.**—Buchanan *v.* Park (Tex. Civ. App.), 36 S. W. 807.

[a] **That the contract is in writing** must be shown. Bullerdick *v.* Hermsmeyer, 32 Mont. 541, 552, 81 Pac. 334. But compare, *supra*, I, J, 2, c.

[b] **That the deceased vendor owned** the lands must be stated under some statutes. Driver *v.* Hudspeth, 16 Ala. 348.

[c] **The minute details of the contract** need not be set out. The substance only need be stated. Carter *v.* Jackson, 56 N. H. 364.

[d] **That the petitioner is willing and offers to perform the agreement** on his part must be alleged. Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668.

[e] **A prayer for general relief** is sufficient. Brinker *v.* Brinker, 7 Pa. 53.

[f] **Petition need not be subscribed,** it being sufficient if the petitioner's name is inserted elsewhere in the petition in his own handwriting. Carter *v.* Jackson, 56 N. H. 364.

[g] **An amendment** to supply defects of form may be made. Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668.

97. Crimm's Admr. *v.* Townsend, 9 Ala. 403; McFarson's Appeal, 11 Pa. 503.

[a] **The court in whose jurisdiction the land lies is not the proper court,** unless, of course it has jurisdiction of the accounts of the executor. McFarson's Appeal, 11 Pa. 503.

98. **Cal.**—Estate of Garnier, 147 Cal. 457, 82 Pac. 68, he may petition for a transfer of real or personal property. **Ill.**—Eaton *v.* Bryan, 18 Ill. 525. **Neb.** Solt *v.* Anderson, 67 Neb. 103, 93 N. W. 205.

[a] **For specific performance of a contract to convey to the executor himself,** he may without resigning file a petition. In the Matter of the estate of Garnier, 147 Cal. 457, 82 Pac. 68.

99. Cal. Code Civ. Proc., §1598; Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668.

1. In re **Healy's Estate (Cal.),** 66 Pac. 175.

2. Buchanan *v.* **Park (Tex. Civ.** App.), 36 S. W. 807.

3. Eaton *v.* Bryan, 18 Ill. 525.

4. Estate of Corwin, 61 Cal. 160.

[a] **The proceeding must be dismissed** as a consequence of the inability to make the grantee a party. Ex parte Corwin, 61 Cal. 160.

5. **Cal.**—See Code Civ. Proc., §1598. **Mass.**—Nazro *v.* Long, 179 Mass. 451, 61 N. E. 43. **Wash.**—Sander-Boman Real Estate Co. *v.* Yesler's Estate, 2 Wash. 429, 27 Pac. 269.

[a] **Notice must be published** in some newspaper. Samuels *v.* Findley, 7 Ala. 635; Sander-Boman Real Estate Co. *v.* Yesler's Est., 2 Wash. 429, 27 Pac. 269.

[b] **Notice to the widow and heirs** is not necessary where the administrator is the petitioner. Simmon's Estate, 140 Pa. 567, 21 Atl. 402; West Hickory Min. Assn. *v.* Reed, 80 Pa. 38. See also Butman *v.* Butman, 213 Ill. 104, 72 N. E. 821.

At the hearing all persons interested may appear and contest the petition by filing objections in writing.[6] The judge or court is required to investigate the facts,[7] but it seems that a jury may be impaneled in a proper case in some states.[8] It has been held that the judge may appoint an attorney to represent the estate.[9]

C. ORDER AND DECREE. — If the petition is sustained, the court must make a decree authorizing and directing the executor to execute a conveyance.[10] If the petitioner's right is found to be doubtful, the court must dismiss the petition without prejudice.[11]

D. APPEAL AND REVIEW. — An order sustaining the petition,[12] or dismissing it,[13] is appealable, but is not collaterally impeachable when the court has jurisdiction.[14]

V. SPECIFIC PERFORMANCE IN COMMON LAW ACTIONS. In Pennsylvania, before equity jurisdiction was conferred upon its courts, specific performance was had by way of the common law actions,[15] the action on the case,[16] the action of covenant,[17] and the

6. Cal. Code Civ. Proc., §1599; Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668.

7. Driver *v.* Hudspeth, 16 Ala. 348; Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668.

8. Driver *v.* Hudspeth, 16 Ala. 348, holding that, conceding that the court has power to impanel a jury, it cannot do so unless a real doubt exists as to the existence of the fact.

9. Estate of Garnier, 147 Cal. 457, 82 Pac. 68. By analogy to proceedings on a claim against the estate under §1510 Code Civ. Proc. But he need not do so when the heirs resist the petition.

10. **Cal.**—See Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082. **Me.**—Bates *v.* Sargent, 51 Me. 423. **Minn.**—Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977. **Wash.**—Sander-Boman Real Estate Co. *v.* Yesler's Estate, 2 Wash. 429, 27 Pac. 269, the conveyance should not be directed until after the time for an appeal has elapsed.

[a] **Enforcement.**—The decree directing a conveyance may be enforced by attachment proceedings. Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668.

11. **Cal.**—Code Civ. Proc., §1602; Estate of Corwin, 61 Cal. 160. **Minn.** Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977. **S. D.**—Hartshorn *v.* Smith, 19 S. D. 653, 104 N. W. 467.

[a] **The court cannot deny the petition** but must dismiss it. Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977.

12. Estate of Corwin, 61 Cal. 160; Bates *v.* Sargent, 51 Me. 423. See Sander-Boman Real Estate Co. *v.* Yesler's Estate, 2 Wash. 429, 27 Pac. 269.

[a] **The heirs at law** may appeal. Bates *v.* Sargent, 51 Me. 423.

13. Mousseau *v.* Mousseau, 40 Minn. 236, 242, 41 N. W. 977, per Mitchell J. concurring.

14. Samuels *v.* Findley, 7 Ala. 635.

15. Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496; Irvine *v.* Bull, 7 Watts (Pa.) 323.

[a] **Equitable principles have thus become** and are regarded in Pennsylvania as part of the common law of the state. Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496.

16. Irvine *v.* Bull, 7 Watts (Pa.) 323.

[a] **An action on the case** may be brought, to compel a specific performance stating the agreement and such facts as would be sufficient to induce a chancellor to decree specific performance. This is usually coupled with other counts for damages for breach of the contract, and the jury may give damages for a sum so large that the vendor will make a deed rather than pay such sum, and the verdict is conditional for so much to be released on making a deed within a specified time, and paying the costs. Irvine *v.* Bull, 7 Watts (Pa.) 323.

17. Nicol *v.* Carr, 35 Pa. 381; Jordan *v.* Cooper, 3 Serg. & R. (Pa.) 564.

[a] **The court will frame a declaration** suited to the circumstances of

action of ejectment.[18] Subsequent statutes investing the courts with equity powers have not divested them of the jurisdiction previously exercised.[19]

the case. Jordan *v.* Cooper, 3 Serg. & R. (Pa.) 564.

18. German-American Title & Trust Co. *v.* Shallcross, 147 Pa. 485, 494, 23 Atl. 770, 30 Am. St. Rep. 751; Reno *v.* Moss, 120 Pa. 49, 66, 13 Atl. 716; Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496.

[a] **Ejectment is a substitute** for a bill in equity. Roddy *v.* Harah, 62 Pa. 129; Carmalt *v.* Platt, 7 Watts (Pa.) 318. See also Seitzinger *v.* Ridgway, 9 Watts. (Pa.) 496.

[b] **Equitable Ejectment Is Governed by the General Principles of Equity.**—Accordingly, (1) a decree of ejectment will depend on the justice and equity of the case presented. Reno *v.* Moss. 120 Pa. 49, 66, 13 Atl. 716; Piersol *v.* Neill, 63 Pa. 420. See also Shaw *v.* Bayard, 4 Pa. 257. (2) Every element that would induce a chancellor to withhold his hand in a court of chancery will control a judge in an equitable ejectment. Piersol *v.* Neill, 63 Pa. 420. (3) A result of this use of ejectment is that one verdict and judgment in an equitable suit are conclusive as to the title. German-American Title & Trust Co. *v.* Shall Cross, 147 Pa. 485, 494, 23 Atl. 770, 30 Am. St. Rep. 751; Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496.

[c] **Proceedings.**—On proving the contract and a compliance with it, and on bringing the money into court, if it has been tendered and refused, the jury may find a verdict for the plaintiff and he is put into possession. The vendor takes the money and generally makes a deed. But if he is obstinate, the record is evidence of title in the plaintiff. Irvine *v.* Bull, 7 Watts. (Pa.) 323, 325.

[d] **Parties.**—The action may be brought (1) by the purchaser against the vendor (Seitzinger *v.* Ridgway, 9 Watts [Pa.] 496; Irvine *v.* Bull, 7 Watts [Pa.] 323), or (2) by the vendor against a purchaser in possession. Berwind *v.* Williams, 172 Pa. 1, 33 Atl. 353; Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496.

[e] If the purchaser is dead, his heirs are necessary parties. Thompson *v.* Adams, 55 Pa. 479.

[f] **A conditional verdict** is rendered. Roddy *v.* Harah, 62 Pa. 129; Crow *v.* Crow, 29 Pa. 216; Shaw *v.* Bayard, 4 Pa. 257; De Camp *v.* Feay, 5 Serg. & R. (Pa.) 323. "Ejectment, as a remedy to enforce specific performance, is by rescission of contract through means of a verdict for the land itself upon the legal title, if the contract be not set up as a defense in equity; or if set up, by a verdict for the land on such condition as will secure performance of the contract, or its rescission upon a failure to perform the condition." Thompson *v.* Adams, 55 Pa. 479.

[g] **The jury should prescribe** (1) the terms on which the damages should be released (Decamp *v.* Feay, 5 Serg. & R. [Pa.] 323, 9 Am. Dec. 372. See also Carmalt *v.* Platt, 7 Watts [Pa.] 318), and (2) should ascertain the amount due. Devling *v.* Williamson, 9 Watts (Pa.) 311.

[h] **The equity rule that the verdict is not binding** on the court applies to equitable ejectment. Reno *v.* Moss, 120 Pa. 49, 67, 13 Atl. 716; Church *v.* Ruland, 64 Pa. 432.

[i] **Enforcement.**—(1) A condition of the judgment in equitable ejectment requiring the execution of a deed may be enforced by a bill in equity. Rill *v.* Gannon, 161 Pa. 289, 29 Atl. 55; Trefiz *v.* King, 74 Pa. 350. (2) The law court cannot compel the performance by the vendor of the condition. Riel *v.* Gannon, 161 Pa. 289, 29 Atl. 55.

19. Reno *v.* Moss, 120 Pa. 49, 68, 13 Atl. 716; Church *v.* Ruland, 64 Pa. 432, 441; Galloway *v.* Horne, 2 Del. Co. R. (Pa.) 515.

SPEEDING. — See **Indictment and Information; Motor Vehicles.**

SPELLING. — See **Certainty in Pleading; Indictment and Information; Names.**

SPENDTHRIFTS. — See **Incompetents; Trusts and Trustees.**

SPLITTING ACTION. — See **Separate Trials; Severance; Successive Suits.**

STALE DEMAND. — See **Laches; Limitation of Actions.**

STATED ACCOUNT. — See **Account and Accounting.**